

D R A F T  
FOR DISCUSSION ONLY

## UNIFORM COLLABORATIVE LAW ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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October 1, 2009  
Includes Changes Recommended by Committee on Style  
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*With Prefatory Note and Comments*

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By  
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ON UNIFORM STATE LAWS

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*October 1, 2009.*

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## UNIFORM COLLABORATIVE LAW ACT

### Prefatory Note

#### Overview

This prefatory note is designed to facilitate understanding of the Uniform Collaborative Law 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 Act;
- discussing the major policy issues addressed during the act's development and drafting- e.g. appropriate scope of regulation, informed consent, domestic violence, and
- identifying the reasons why the Uniform Collaborative Law Act should be a uniform act.

The text of the act, with comments on specific sections, follows this prefatory note. The comments address the purpose of a specific section and issues in the drafting and interpretation of that 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 Law: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004). Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process.

#### 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 they mutually have the 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, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991) [hereinafter *GETTING TO YES*]. 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. 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. If they do not find a meeting point of agreement between their positions, negotiations break down and litigation ensues. JULIE MCFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 81-84 (2007) [hereinafter *MCFARLANE, NEW LAWYER*].

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

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. “Each side knows *at the start* that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement.” Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 *J. DISP. RESOL.* 131, 133 (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.* 290, 327 (2008) [hereinafter *Schneyer, Organized Bar and Collaborative Law*]. 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 “where 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. 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. Many models of collaborative law require parties to engage jointly retained mental health and financial professionals in advisory and neutral roles- e.g. 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 (2003). 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. 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* FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT* 105– 26 (2009); N.Y. ASS’N OF COLLABORATIVE PROF’LS: *COLLABORATIVE LAW PARTICIPATION AGREEMENT*, *available at* [http://collaborativelawny.com/participation\\_agreement.php](http://collaborativelawny.com/participation_agreement.php); TEX. COLLABORATIVE LAW COUNCIL: *PARTICIPATION AGREEMENT* (2005).

### **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 (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. 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. Collaborative lawyers, in contrast, are licensed and regulated members of the legal profession and bound by its rules of professional responsibility. Mediators, as neutrals, cannot give candid legal advice to a party while collaborative lawyers can. Mediators, as neutrals, are also constrained in redressing imbalances in the knowledge and sophistication of parties. *See, e.g.,* MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard IIB (2005) (“A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality”); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard IV (2000) (“A family mediator shall conduct the mediation process in an impartial manner”); RULES OF THE CHIEF ADMINISTRATIVE JUDGE § 146. 2008 – 31 NY Reg. 93 (July 31, 2008) (detailing the neutrality requirement for mediators in New York). Despite their limited purpose 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 Stuart Webb approximately eighteen years ago in the context of representation in divorce proceedings, the leading subject area for collaborative law practice today. Stuart Webb, *Collaborative Law: An Alternative for Attorneys Suffering ‘Family Law Burnout,’* 18 MATRIM. STRATEGIST 7 (2000). Since then, collaborative law has matured and emerged as a viable option on the continuum of choices of dispute resolution processes available to parties to 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 Director, International Academy of Collaborative Professionals (Feb. 17, 2009); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 83 n.65 (2005) (citing Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11).
- Collaborative law has been used to resolve thousands of cases in the United States, Canada, and elsewhere. David A. Hoffman, *Collaborative Law: A Practitioner’s Perspective*, 12 DISP. RESOL. MAG. 25 (Fall 2005).
- The International Association of Collaborative Professionals (IACP), the umbrella organization for collaborative lawyers, has more than 2,600 lawyer members. Telephone Interview by Ashley Lorance with Talia Katz, Executive Director, International Academy of Collaborative Professionals (Feb. 17, 2009).

- Collaborative law practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions. See Int'l Acad. Collaborative Prof'ls., <http://www.collaborativepractice.com> (follow "Find a Collaborative Professional" hyperlink) (last visited Aug. 1, 2007).
- A number of states have enacted statutes of varying length and complexity which recognize and authorize collaborative law. See, e.g., CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).
- A number of courts have taken similar action through enactment of court rules. See, e.g., MINN. R. GEN. PRAC. 111.05 & 304.05 (2008); SUPER. CT. CONTRA COSTA COUNTY, LOCAL RULES, RULE 12.8, (2007); L.A. COUNTY SUPERIOR COURT RULE 14.26 (2005); LRSF 11.17 (2009); SONOMA COUNTY LOCAL RULE 9.25 (2005); UTAH CODE OF JUDICIAL ADMINISTRATION, RULE 4-510 (2006); LA. CODE R. tit. IV, § 3 (2005).
- The first empirical research on collaborative law found generally high levels of client and lawyer satisfaction with the process and that negotiation under collaborative law participation agreements is more problem solving and interest based than those in the more traditional adversarial framework. It found no evidence that "weaker" parties fared worse in collaborative law than in adversarial based negotiations. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (June 2005) (Can.), available at [http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005\\_1/2005\\_1.pdf](http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf) (last visited Feb. 12, 2009). See also Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179 (2004); Mark Sefton, *Collaborative Family Law: A Report for Resolution* (Feb. 2009) (similar findings in first empirical evaluation of cases in collaborative law process in England and Wales) (hereinafter Sefton)
- Former Chief Judge Judith S. Kaye of New York established the first court based Collaborative Family Law Center in the nation in New York City. In announcing the Center, Chief Judge Kaye stated: "[w]e anticipate that spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved—surely a step in the right direction." JUDITH S. KAYE, 2007 THE STATE OF THE JUDICIARY 11 (New York State Office of Court Administration 2007). The Center began operations on September 1, 2009. Press Release, New York State Unified Family Court System, Collaborative Family Law Center to Reduce Stress, Expense and Time Involved in Matrimonial Cases (Sept. 1, 2009).
- The American Bar Association Dispute Resolution Section has organized a Committee on Collaborative Law. Section of Dispute Resolution: Collaborative Law Committee, available at <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited Aug. 1, 2009). The Collaborative Law Committee has an active Ethics Subcommittee engaged in the codification of the standards of practice for collaborative lawyers. American Bar Ass'n, Section on Dispute Resolution, Collaborative Law Committee, Ethics Subcommittee, Summary of Ethics Rules Governing Collaborative Law (Draft Aug. 2, 2008).
- Collaborative law is developing worldwide. Canada, Australia, the United Kingdom, New Zealand, France, Germany, Austria, Switzerland, the Czech Republic, Israel and Uganda all

report collaborative law activity. Robert Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, 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 2005, collaborative law has experienced rapid growth. COLLABORATIVE PRACTICE IN FAMILY LAW: A REPORT TO THE ATTORNEY-GENERAL BY THE FAMILY LAW COUNCIL, (Australia Family Law Council ed., 2006). The Family Law Council Report, released by Attorney-General Philip Ruddock in April 2007, said that collaborative law had the potential to deliver ongoing benefits to the public. Sue Purdon, *Divorcing With Dignity*, COURIER MAIL (Austl.), Apr. 13, 2007, at 26. About 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 Cost out of Divorce*, TIMES ONLINE, Oct. 4, 2007, <http://business.timesonline.co.uk/tol/business/law/article2584817.ece>. About 1200 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 Higher Human Needs*, IRISH TIMES, May 5, 2008, at 4. When Ireland hosted the second European Collaborative Law Conference in May 2008 the Republic of Ireland’s President, Mary McAleese, announced that collaborative law was the preferred method of dispute resolution in Ireland. Robert Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, Sept. 3, 2008, at 2D.
- Many professionals from other disciplines, especially financial planning and psychology, have been trained to participate in collaborative law. See Gary L. Voegelé, Linda K. Wray & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 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)).
- Numerous articles have been written about collaborative law in scholarly journals, See e.g. Schneyer, *Organized Bar and Collaborative Law supra*; Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131 (2008); Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Ethics*, 30 CAMPBELL L. REV. 237 (2008); Michaela Keet, et al., *Client Engagement Inside Collaborative Law*, 24 CAN. J. FAM. L. 145 (2008); Forrest S. Mosten, *Collaborative Law Practice: An Unbundled*

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

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

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

### **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 (2008) (discussing the different types of disputes, beyond family law cases, where collaborative law may be appropriate, 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. 2 (Fall 2007). See generally SHERRIE R. ABNEY, *AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW* (2006). 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. Homepage of the Global Collaborative Law Council, <http://www.collaborativelaw.us/about.html> (last visited Sept. 29, 2009).

### **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, *Interpersonal Conflict as A Risk Factor for Child Maladjustment: Implications for the Development of Prevention*

*Programs*, 43 FAM. CT. REV. 97, 97 (2005). *See generally* INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH AND APPLICATIONS (John H. Grynych & Frank D. Fincham eds., 2001); J. B. Kelly, *Children's Adjustment in Conflicted Marriages & Divorce: A Decade Review of Research*, J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, 39, 963-973 (2000). The lower the conflict level between parents, the more the child benefits from contact with both parents and the more regularly child support is paid. *See* 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. SCHEPARD, CHILDREN COURTS AND CUSTODY, *supra*, 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 risk that [collaborative law] poses for clients. Other things being equal, spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations. [Collaborative law] clients presumably bind themselves by a mutual commitment to good faith negotiations in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens’ call and have his ship founder.” Schneyer, *Organized Bar and Collaborative Law supra*, 50 ARIZ. L. REV. at 318 n.142. *See generally* SCHEPARD, CHILDREN, COURTS AND CUSTODY, *supra*, at 50; Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation Research and Reflections*, 43 FAM. CT. REV. 22, 34 (2005).

### **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 generally* Report of the Ad Hoc Panel on Disp. Resol. & Pub. Pol’y, Nat’l Inst. of Disp. Resol., *Paths to Justice: Major Public Policy Issues of Dispute Resolution* (1983), reprinted in LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 3-4 (2d ed. 1997); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998).

Parties who participate in consensual dispute resolution processes like collaborative law have a more positive view of the justice system. 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 206-217. 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 them and want to be able to incorporate that understanding into settlement of their disputes. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267-268 (1989).

Earlier settlements can reduce the disruption that a dispute can cause in the lives of parties and others affected by the dispute and reduce private and public resources spent on the resolution of disputes. *See* JEFFREY RUBIN, DEAN PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT 68-116 (2d ed. 1994) (discussing reasons for and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. Earlier settlement also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005) (“It is the policy of this state to encourage the peaceable resolution of disputes... and the early settlement of pending litigation through voluntary settlement procedures.”). *See also* Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 S. TEX. L. REV. 849, 850 (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 Fiss, *Against Settlement*, 93 YALE L. J. 1073 (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 “[a]s a litigant I should dread a lawsuit beyond almost

anything else short of sickness and death.” Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926). See Robert H. Heidt, *When Plaintiffs Are Premium Planners For Their Injuries: A Fresh Look At The Fireman’s Rule*, 82 IND. L.J. 745, 769 (2007) (referring to Judge Learned Hand’s quote while discussing the benefit of the fireman’s rule, how it avoids substantial litigation, refers to litigation as “toxic and protracted” in character, noting that “incessant wrangling will leave professional rescuers and defendants “dispirited” and may stretch on for years, leaving the parties and witnesses bitter, stressed, and frustrated); Andrew S. Boutros & Jeffrey O’Connell, *Treating Medical Malpractice Claim Under A Variant Of The Business Judgment Rule*, 77 NOTRE DAME L. REV. 373, 420 (2002) (referring to Judge Learned Hand’s quote while discussing the benefit of prompt settlement to personal injury tort claims, including those arising from medical malpractice).

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 “fitting the forum to the fuss,” the better. 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) [hereinafter Lande & Herman, *Forum and Fuss*].

### **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 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, LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Philip V. D. 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 1.4 provides that “[a] lawyer should exert best

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

### **The 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, the lawyer encourages problem solving in the client . . . . The client’s best interests include the well-being of children, family peace and economic stability.” AM. ACAD. OF MATRIMONIAL LAW, BOUNDS OF ADVOCACY (2000), available at [http://www.aaml.org/files/public/Bounds\\_of\\_Advocacy.htm](http://www.aaml.org/files/public/Bounds_of_Advocacy.htm). *Bounds of Advocacy* further states that “the emphasis on zealous representation [used] in criminal cases and some civil cases is not always appropriate in family law matters” and that “[p]ublic opinion [increasingly supports] other models of lawyering and goals of conflict resolution in appropriate cases.” *Id.* at § 2. Furthermore, *Bounds of Advocacy* states that a divorce lawyer should “consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.” *Id.* at § 6.1.

### **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 generally* MCFARLANE, THE NEW LAWYER, *supra*. 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. Then Chief Justice Warren Burger called for exploration of informal dispute resolution processes. The Pound Conference emphasized ADR processes – particularly mediation – as better for litigants who had continuing relationships after the trial was over because it emphasized their common interests rather than those that divided them. Professor

Frank Sander, Reporter for the Pound Conference's follow-up task force, projected a powerful vision of the court as not simply "a courthouse but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case." Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

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

In many states lawyers are required to present clients with alternative dispute resolution options – mediation, expert evaluation, arbitration – in addition to litigation. Professionalism creeds in Texas and Ohio, for example, require such discussion between lawyers and clients. See THE TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM § II (11) (1989) ("I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes."); OHIO SUPREME COURT. OHIO GOV. B. RULE XV, A LAWYER'S CREED (1997). In other states, similar obligations are imposed on by statute or court rule. See, e.g. ARK CODE ANN § 16-7-204 (2008) (All attorneys... are encouraged to advise their clients about the dispute resolution options available to them and assist them in the selection of the technique or procedure...."); N.J. CT. R. 1:40-1:40-12 (2000). See generally Marshall J. Berger, *Should An Attorney Be Required Be Required to Advise a Client of ADR Options*, 13 GEO. J. LEGAL ETHICS 427, apps. I-II (2000) (comprehensive listing of court rules, state statutes and ethics provisions); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002) (empirical studies analyzing the impact of rules requiring lawyers to discuss ADR with clients).

### **Collaborative Law 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. The organized bar has recognized unbundled services like collaborative law as a useful part of the lawyer's representational options. See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002); FOREST S. MOSTEN, UNBUNDLED LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE

(Am. Bar Ass'n 2000). *See generally* Symposium, *A National Conference on Unbundled Legal Services October 2000*, 40 FAM. CT. REV. 26 (2002); Franklin R. Garfield, *Unbundling Legal Services in Mediation*, 40 FAM. CT. REV. 76 (2002); Robert E. Hirshon, *Unbundled Legal Services and Unrepresented Family Litigants, Papers from the National Conference on Unbundling*, 40 FAM. CT. REV. 13 (2002); Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10 (2002); Andrew Schepard, *Editorial Notes*, 40 FAM. CT. REV. 5 (2002).

### **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* Advisory Comm. of the Supreme Court of Missouri, Formal Op. 124 (2008), *available at* [www.mobar.org/data/esq08/aug22/formal-opinion.htm](http://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](http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html); Kentucky Bar Ass'n, Op. E-425 (2005), *available at* [http://www.kybar.org/documents/ethics\\_opinions/kba\\_e-425.pdf](http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf); Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Inf. Op. 2004-24 (2004), *available at* [http://www.collaborativelaw.us/articles/Ethics\\_Opinion\\_Penn\\_CL\\_2004.pdf](http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf); North Carolina State Bar Ass'n, Formal Ethics Op. 1 (2002), *available at* <http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/2002&to=4/2002>. As one commentator has noted, "the mainstream response [of the organized bar] has for the most part accepted [collaborative law], at least as a worthwhile experiment." Schneyer, *The Organized Bar and Collaborative Law*, *supra*, 50 ARIZ. L. REV. at 292.

Only one state bar ethics opinion concluded to the contrary, arguing that when collaborative lawyers sign a collaborative law participation agreement with parties, they assume contractual duties to other parties besides their client, creating an intolerable conflict of interest. Colorado Bar Ass'n, Eth. Op. 115 (2007), *available at* <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth>. Even that opinion, however, recognized that collaborative law was permissible if an agreement between clients only, without the agreement of the lawyers. Furthermore, Colorado's unique view has been specifically rejected by American Bar Association, Formal Op. 07-447, *Ethical Considerations in Collaborative Law Practice* (2007). The ABA Opinion concluded that collaborative law is a "permissible limited scope representation," the disqualification provision is "not an agreement that impairs [the lawyer's] ability to represent the client, but rather is consistent with the client's limited goals for the representation" and "[i]f the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process."

### **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 (particularly with mental health experts and financial planners) in service to parties. Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 337-38 (1999). Instead of using these professionals in an adversarial framework as expert witnesses or consultants to further their “case”, collaborative lawyers draw on their expertise to help shape creative negotiations and settlements. Elizabeth Tobin Tyler, *Allies, Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Inequality*, 11 J. HEALTH CARE L. & POL'Y 249, 272-73 (2008).

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

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

### **The Uniform Collaborative Law Act – An Overview**

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

The Uniform Collaborative Law Act aims to standardize the most important features of collaborative law participation agreements, both to protect consumers and to facilitate party entry into 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 act also makes collaborative law’s key features – especially the

disqualification provision and voluntary disclosure of information – mandated provisions of participation agreements that seek the benefits of the rights and obligations of the act. Finally, the act creates an evidentiary privilege for collaborative law communications to facilitate candid discussions during the collaborative law process.

Specifically, the Uniform Collaborative Law Act:

- applies only to collaborative law participation agreements that meet the requirements of the act, thus seeking to insure that parties do not inadvertently enter into a collaborative law process (section 3(a));
- 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 act, include a description of the matter submitted to a collaborative law process and designation of collaborative lawyers (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 (section 5 (b));
- specifies when and how a collaborative law process begins and is concluded (section 5);
- creates a stay of proceedings when parties sign a participation agreement to attempt to resolve a matter related to a proceeding pending before a tribunal while allowing the tribunal to ask for periodic status reports (section 6);
- 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 (section 7);
- authorizes tribunals to approve settlements arising out of a collaborative law process (section 8);
- codifies the disqualification requirement for collaborative lawyers when a collaborative law process concludes (section 9);
- defines the scope of the disqualification requirement to include both the collaborative matter and a matter “related to the collaborative matter”- those involving the “same parties, transaction or occurrence, nucleus of operative fact, claim, issue or dispute as a collaborative matter” (section 9 and 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”) (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 (section 10);

- creates a similar exception for collaborative lawyers for government agencies (section 11);
- 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 (section 12);
- acknowledges that standards of professional responsibility and child abuse reporting for lawyers and other professionals are not changed by their participation in a collaborative law process (section 13);
- requires that lawyers disclose and discuss the material risks and benefits of a collaborative law process as compared to other dispute resolution processes such as litigation, mediation and arbitration to help insure parties enter into collaborative law participation agreements with informed consent (section 14);
- creates an obligation on collaborative lawyers to screen clients for domestic violence (defined as a “coercive and violent relationship”) and, if present, to participate in a collaborative law process only if the victim consents and the lawyer reasonably believes that the victim will be safe (section 15);
- authorizes parties to reach an agreement on the scope of confidentiality of their collaborative law communications (section 16);
- creates an evidentiary privilege for collaborative law communications which are sought to be introduced into evidence before a tribunal (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 (sections 18, 19)\*;

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\*The Drafting Committee for the Uniform Collaborative Law Act gratefully acknowledges a major debt to the drafters of the Uniform Mediation Act. The drafting of the Uniform Mediation Act required the National Conference of Commissioners on Uniform State Laws (now the 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 Act, particularly those involving the scope of evidentiary privilege, are virtually identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions, the commentary and citations in this act are taken verbatim or with slight adaptation from the Uniform Mediation Act. To reduce confusion, those provisions are presented here without quotation marks or citations, and edited for brevity and with insertions to make them applicable to collaborative law.

- 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 (section 20).

### **Key Policy Issues Addressed in the Drafting of the UCLA**

#### **The Balance Between Regulation and Party Autonomy**

The Uniform Collaborative Law Act supports a trend that emphasizes client autonomy and “greater reliance on governance of lawyer-client relationship by contract.” Schneyer, *Organized Bar and Collaborative Law*, *supra*, 50 ARIZ. L. REV. at 318. The 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 act leaves the collaborative law process to agreement between parties and collaborative lawyers.

The 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 (section 4(b) - the disqualification requirement (section 9, 10 and 11), voluntary disclosure of information (section 12), informed consent (section 14), protection of safety from domestic violence (section 15) and a party’s right to terminate a collaborative law process without cause (section 5(d)). The 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 (*See* EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS tit. IV, § 3 (2005); in others, it does not (*See* CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007)). In some models of collaborative law, mental health professionals play roles such as “divorce coach” or “child specialist.” Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Ethics*, 30 CAMPBELL L. REV. 237, 270 (2008). Neutral experts can be engaged by the parties to do a specific task such as an appraisal or valuation or evaluation of parenting issues. *Id*; Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related*

*Conflicts*, 2008 J. DISP. RESOL. 83, 92 (2008) [hereinafter Tesler, *Deep Resolution*]. Some models of collaborative law encourage parties and collaborative lawyers to mediate disputes and call in a third party neutral for that purpose. Tesler, *Deep Resolution, supra*, 2008 J. DISP. RESOL. at 92.

In the interests of stimulating diversity and continuing experimentation in collaborative law, the act does not regulate in detail how collaborative law should be practiced. Each model of collaborative law has different benefits and costs, as do different models of mediation or arbitration. See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003); 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 (2002); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999). 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.

### **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. To avoid any possible confusion, section 13 of the UCLA 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. *State ex rel. Fiedler v. Wisconsin Senate*, 454 N.W.2d 770 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice); *Attorney General v. Waldron*, 426 A.2d 929, 932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation"). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c and Rptr. Note (2000).

It is also important to note that the favorable bar association opinions and the act do not validate every form of collaborative law agreement or collaborative law practice. They still leaves collaborative lawyers and collaborative law participation agreements subject to regulation by bar ethics committees and other agencies charged with regulating lawyers and to malpractice claims by clients. Particular collaborative law participation agreements, for example, may have provisions which raise professional responsibility concerns. The 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. 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 DISPUTE. RES. MAG. 23 (Winter 2008). The 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* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16(c) (2007) (governing the lawyer-client relationship in matrimonial matters, including requirement of written retainer agreement).

### **The Need for Legal Representation in Collaborative Law**

Under the 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 counsel.” (emphasis added)). Several federal and state courts allow self represented litigants in arbitration. *E.g.*, United States District Court for the District of Idaho Home Page, <http://www.id.uscourts.gov/pro-se.htm#Arbitration> (last visited Nov. 12, 2008); United States District Court for the Eastern District of Tennessee Home Page, [http://www.tned.uscourts.gov/arbitration\\_handbook.php](http://www.tned.uscourts.gov/arbitration_handbook.php) (last visited Nov. 12, 2008); Delaware Superior Court Home Page, [http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr\\_compulsory\\_arbitration.htm#b2](http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_compulsory_arbitration.htm#b2) (last visited Nov. 12, 2008). However, some states and arbitration programs have taken the opposite view. *E.g.*, United States District Court for the Eastern District of New York Home Page, [http://www.nyed.uscourts.gov/adr/Arbitration/Arbitration\\_FAQ/arbitration\\_faq.html](http://www.nyed.uscourts.gov/adr/Arbitration/Arbitration_FAQ/arbitration_faq.html) (last visited Nov. 12, 2008). Similarly, self represented litigants are generally allowed to participate in mediation. The drafting committee of the Uniform Mediation Act elected to let the parties decide whether to bring counsel into mediation. UNIF. MEDIATION ACT § 10, comments (2001). State statutes differ on whether a mediator is empowered to exclude lawyers from mediation. *See, e.g.*, N.D. CENT. CODE § 14-09.1-05 (1987) (mediator may not exclude counsel); OR. REV. STAT. ANN. § 107.785 (West 1983) (counsel shall not be excluded); CAL. FAM. CODE § 3182 (1993) (mediator has authority to exclude counsel); S.D. CODIFIED LAWS § 25-4-59 (1996) (mediator may exclude counsel).

An individual's statutory right to self-representation in court was initially recognized by the Judiciary Act of 1789 and later codified in 28 U.S.C. § 1654 (1994) (“In all courts of the United States, parties may plead and conduct their own cases personally”). *See, e.g.*, TASK FORCE ON PRO SE LITIGATION, GUIDELINES FOR BEST PRACTICES IN PRO SE ASSISTANCE (2004) (setting forth the best national and local practices that may be used by district court judges to

provide assistance to pro se litigants), *available at* [http://www.lasc.org/la\\_judicial\\_entities/Judicial\\_Council/Pro\\_Se\\_Guidelines.pdf](http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf). Additionally, the constitution or statutes of many states either expressly or by interpretation provide for the right to self-representation in court. *See* Wikipedia, List of U.S. State Constitutional Provisions Allowing Self-Representation in State Courts, [http://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_State\\_constitutional\\_provisions\\_allowing\\_self-representation\\_in\\_state\\_courts](http://en.wikipedia.org/wiki/List_of_U.S._State_constitutional_provisions_allowing_self-representation_in_state_courts) (last visited Aug. 1, 2009).

Collaborative law is, however, a private, contractual agreement between parties to attempt to resolve disputes and it is out of court. Parties may be required to agree to waive their right to self representation as a condition for participating in and getting its benefits if they do so with informed consent, aware of the risks and benefits of their decision. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 954 (2000).

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* COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, OP. 2009-2, ETHICAL DUTIES CONCERNING SELF-REPRESENTED PERSONS (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), *available at* <http://www.abcny.org/Ethics/eth2009-2.htm>. 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 qualification and training standards for membership, which can be quite extensive. *See, e.g.*, Collaborative Family Law Group of San Diego, Bylaws § 2.02 (requires that attorneys be licensed in California and have at least 5 years experience in the field of family law, in addition to the following requirements to maintain membership in the association: complete two-day training program, attend at least half of the CLE programs offered by the association every year as well as the association's general meetings, maintain membership in the International Association of Collaborative Professionals), *available at* <http://www.collaborativefamilylawsandiego.com/training.htm>; Massachusetts Collaborative Law Council, Membership Standards for Collaborative Practitioners (requires that attorney be licensed and in good standing, have professional liability insurance, and be current in payment of council membership dues, in addition to 12 hours of basic collaborative law training that meets IACP minimum standards), *available at*

<http://www.massclc.org/pdf/2006STANDARDSFORPROFESSIONALS.pdf>; New York Association of Collaborative Professionals, 2008 NYACP Membership Requirements (requires that attorney be a member in good standing of the New York State Bar with professional liability insurance, with 5 years of matrimonial experience, as well as requiring participation in two-day collaborative law training, 36-40 hour mediation training, and attendance at 7 meetings during the year; association also requires continuing training after the first year of membership, ranging between 8 - 12 hours depending upon whether the attorney completed collaborative cases in the previous year), available at <http://www.collaborativelawny.com/join.php#Lawyer>.

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

Neither the Uniform Arbitration Act nor the Uniform Mediation Act forecloses parties in particular types of matters from invoking those dispute resolution processes. 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 in Pending Cases**

The purpose of the 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 even after a case is commenced in court. Every pending case that is settled without a trial conserves party and public resources for other matters. Section 6 thus authorizes 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 further proceedings, except for status reports. The stay is lifted when the collaborative law process concludes. Section 7 also explicitly creates an exception to the stay of proceedings for “emergency orders to protect the health, safety, welfare or interests of a party or family or household member.” In addition, Section 8 authorizes tribunals to approve settlements entered into as a result of a collaborative law process. These provisions are based on court rules and statutes recognizing collaborative law in a number of jurisdictions. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June 25, 2007) MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

### **The Scope of the Disqualification Requirement**

The disqualification requirement for collaborative lawyers when collaborative law concludes is a defining characteristic of collaborative law. Section 9 mandates it be included in all collaborative law participation agreements which seek to benefit from the act.

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, section 9 extends the requirement to not only the collaborative matter but also to “matters related to a collaborative matter.” In addition, the 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 the disqualification requirement beyond the matter described in the participation agreement to matters that are “related” to the “collaborative matter.” “Related to the collaborative matter,” in turn, is defined in section 2(13) as “involving the same parties, transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as a matter.” The policy behind these definitions is to prevent the collaborative lawyer from representing a party in 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). The 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 (2008) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966)).

Application of “related to a collaborative matter” will ultimately turn on a case by case analysis of 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. *See, e.g., Grayson v. Wofsey*, 646 A.2d 195 (Conn. 1994); *Callahan v. Clark*, 901 S.W.2d 842 (Ark. 1995).

### **Imputed Disqualification of Associated Lawyers**

Section 9(b) adapts the rule of “imputed disqualification” by extending the disqualification requirement to lawyers in a law firm with which the collaborative lawyer is associated in addition to the lawyer him or herself. 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 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) (2002). The comment to this Rule states: “[t]he rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.” MODEL RULES OF PROF’L CONDUCT R. cmt. 1.10[2] (2002).

### Exception to Imputed Disqualification for Low-Income Parties

Section 10 modifies 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 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. Section 10 only applies to parties with “an annual income which qualifies the party for free legal representation under the criteria established by the law firm for free legal representation.” Section 10(b) (1). Many legal aid offices, for example, use 125% of federal poverty guidelines as a general eligibility criterion. *See* Atlanta Legal Aid Society, Frequently Asked Questions, <http://www.atlantalegalaid.org/faqs.htm> (last visited Aug. 2, 2009); The Legal Aid Society in New York City, Frequently Asked Questions about the Legal Aid Society, <http://www.legal-aid.org/en/aboutus/legalaidsocietyfaq.aspx> (last visited Aug. 2, 2009); Legal Aid of Nebraska, FAQ, [http://www.nebls.com/FAQ\\_LAN.htm](http://www.nebls.com/FAQ_LAN.htm) (last visited Aug. 2, 2009).

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

The exception to the imputed disqualification rule in section 10 is based on the recognition that 80% of low-income Americans who need civil legal assistance do not receive it. Legal aid programs reject approximately one million cases per year for lack of resources to handle them, a figure which does not include those who did not attempt to get legal help for whatever reason. Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASHINGTON POST, Oct. 15, 2005, at A09. The Legal Services Corporation recently did a study about the lack of civil legal services for low-income Americans. The results show that only one-fifth or less of the legal problems experienced by low-income people are helped by either *pro bono* or paid legal aid attorneys and only half of those who seek help will actually get legal help. Roughly one million people a year are turned away because of lack of resources. In 2002, there was one private attorney to every 525 people from the general population. In that same year, there was only one legal aid attorney to every 6,861 people in poverty. LEGAL SERVICE CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2d ed.2007).

The need for civil legal representation for low-income people is particularly acute in family law disputes. Recent studies have found that 70% of family law litigants do not have a lawyer on either side of a proceeding when the proceeding is filed in court, and the percentage increases to 80% by the time the matter is final. TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS, *available at* [http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full\\_Report.pdf](http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf). 49% of petitioners and 81% of respondents were self represented in Utah divorce cases in 2006. COMMITTEE ON RESOURCES FOR SELF REPRESENTED PARTIES, STRATEGIC PLANNING INITIATIVE, REPORT TO THE UTAH JUDICIAL COUNCIL (July 25, 2006), *available at* <http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Plan%202006.pdf>.

Low-income clients thus already face great difficulty in securing representation. They would face especially harsh consequences if collaborative law terminates without agreement and virtually all lawyers who might continue their representation are disqualified from doing so 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 (2002).

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

### **Exception to Imputed Disqualification for Government Parties**

Section 11 of the act creates an exception to imputed disqualification similar to that in section 10 for lawyers in a law firm with which a collaborative lawyer is associated which represents government parties. The act's definition of "law firm" includes "the legal department of a government or government subdivision, agency or instrumentality." Section 2(6).

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

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

not assigned to present matter).

### **Voluntary Disclosure of Information in Collaborative Law**

“Except as provided by law other than this act,” section 12 requires 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.” Finally, section 12 authorizes 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. Elizabeth Strickland, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N. C. L. REV. 979, 984 (2006). 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*, 45 BOSTON B. J. 5, Nov./Dec. 2001, at 1. Similar requirements have been established for parties in mediation. *See* GA. SUP. CT. A.D.R. R. app. C (7) (2008) (referring to the expectation of parties who participate in mediation “to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached”).

The obligation of voluntary disclosure imposed by Section 12 on parties to 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. Federal Rule of Civil Procedure 26(a), for example, requires that a party to litigation disclose names of witnesses, documents, and computation of damages “without awaiting a discovery request.” This early automatic disclosures was based on a consensus by 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 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* *Argusea LDC v. United States*, No. 06-22722-CIV COOKE/BROWN, 2008 U.S. Dist. LEXIS 20084 (S.D.F.L. 2008) (party is not bound by original answer to interrogatories if properly supplemented under 26(e)(1)(A)); *Inline Connection Corp. v AOL*, 472 F. Supp. 2d. 604 (D. Del. 2007) (Evidence

not properly amended under Fed. R. Civ. P. 26(e) may be inadmissible in court). Many states impose similar obligations on parties. R.I. SUP. CT. R. CIV. P. Form 9 (2007).

The act does not specify sanctions for a party who does not comply with the requirements of section 12. The drafters felt that any attempt to do so would require the act to define “bad faith” failure to disclose. The result would be the opposite of what the act seeks to encourage—more resolution of disputes without resort to the courts. Court 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 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 (2002) [hereinafter Lande, *Good Faith Participation*].

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. Section 5(b), 5(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, 179 (2007).

Moreover, nothing in 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 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 act. Courts can order settlement agreements voided or rescinded because of failure of disclosure in appropriate circumstances. *See, e.g.*, *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962); *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002), as modified, (Feb. 11, 2002); *Shafmaster v. Shafmaster*, 138 N.H. 460, 642 A.2d 1361 (1994); *Billington v. Billington*, 27 Conn. App. 466, 606 A.2d 737 (1992); *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 833, 866 (1994); *Rocca v. Rocca* 760 N.E.2d 677, 679 (Ind. Ct. App. 2002).

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(4) (2008) (mandating compulsory disclosure of specific financial information without a request from the other party); ALASKA R. CIV. P. 26.1 (listing information that must be disclosed to the other party in a divorce proceeding even in the absence of a request). 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.*, *Grayson v.*

Wofsey, 646 A.2d 195 (Conn. 1994); Callahan v. Clark, 901 S.W.2d 842 (Ark. 1995). 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 Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. L.J. REF. 1015 (1985); UNIF. MARRIAGE AND DIVORCE ACT § 306 (d) (2008) (Parties agreement may be incorporated into the divorce decree if the court finds that it is not "unconscionable" regarding the property and maintenance and not "unsatisfactory" regarding support); FED. R. CIV. P. 23(e)(1)(C) (standard for judicial evaluation of settlement of a class action, which is that the settlement must not be a result of fraud or collusion and that the settlement must be fair, adequate, and reasonable).

Section 13 also allows 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*, 63 DISP. RESOL. J. 36, 39 (Aug-Oct 2008) (in arbitration, the contract normally specifies how much discovery will be allowed).

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 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., MICH CT. RULES OF 1985 R. 6.201 (mandated pre trial disclosures); N.Y. CPLR 3101 (McKinney 1993) (qualifications of expert witness); PA. CONS. STAT. ANN. § 1340 (West 2007) (mandated disclosures by agency in child dependency proceeding). 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 opinions that find that collaborative law is 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, *Organized Bar and Collaborative Law*, *supra*, 50 ARIZ. L. REV. at 320.

Section 14 thus places 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. Hannoeh Weisman, 678 A.2d 1060, 1069

(N.J. 1996) (“An attorney in a counseling situation must advise a client of the risks of a transaction in terms sufficiently clear to enable the client to assess the client’s risks. The care must be commensurate with the risks of the undertaking and tailored to the needs and sophistication of the client”).

The 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.*” 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. Section 14(2). The 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 which could include litigation, cooperative law, mediation, expert evaluation, or arbitration or some combination of these processes. Lande & Herman *Forum and Fuss, supra*, 42 FAM. CT. REV. at 280. The 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. Section 14(3).

The 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 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* Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163.

The 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.... Lawyers may understandably worry about losing possible [collaborative law] cases if they provide more thorough and balanced information. [T]his risk of losing business is outweighed by the professional and practice benefits (and obligations) of full disclosure and informed consent. By providing appropriate information before parties decide whether to use C[ollaborative] L[aw] lawyers can have greater confidence that parties will have realistic expectations, participate in the process more constructively and will be less likely to terminate a CL case.” 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 62-64).

### **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 most significant provision of the act's approach to domestic violence is the obligation it places on collaborative lawyers to make "reasonable inquiry" whether a 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 and be "protected adequately during the collaborative law process." Sections 15(a)-(c).

The 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 (2009), ME. REV. STAT. ANN. tit. 19-A, § 4002 (2008), N.M. STAT. ANN. § 40-13-2 (West 2008). Colorado and Idaho, in contrast, limit domestic violence to physical assault. COLO. REV. STAT. ANN. § 13-14-101 (West 2008), IDAHO CODE ANN. § 39-6303 (2008).

To avoid definitional difficulties, the act instead uses the term "coercive or violent relationship" instead of domestic violence. Section 15. This term encapsulates the core characteristics of 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." COMMISSION ON DOMESTIC VIOLENCE, AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES Standard II A (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.*, *R.H. v. State*, 709 So. 2d 129 (Fla. Dist. Ct. App. 1998); *People v. Irvine*, 882 N.E.2d 1124 (Ill. App. Ct. 2008); *Farrell v. Farrell*, 819 P.2d 896 (Alaska 1991); *In re Custody of Williams*, 432 NE2d 375 (Ill. App. Ct. 1982); *Hicks v. Hicks*, 733 So. 2d 1261 (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 (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 (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 (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).

Section 15 thus requires 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* COMMISSION ON DOMESTIC VIOLENCE, AMERICAN BAR ASSOCIATION, *TOOLS FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE* (2007). *See also* Office of Dispute Resolution, State Court Administrative Office, Michigan Supreme Court, *Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation* (Jan. 2006). These obligations

placed on collaborative lawyers by the act to incorporate screening and sensitivity to domestic violence in their representation of parties parallel obligations placed on mediators. MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION Standard X (2001) (“A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly”); *Id.* X 23 6. (“If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants ... including ... suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants”).

Section 15(c) requires 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.*, FLA. STAT. § 44.102(2)(c) (2005); UTAH CODE ANN. § 30-3-22(1) (Supp. 1994). *See generally* COMMISSION ON DOMESTIC VIOLENCE, AMERICAN BAR ASSOCIATION, MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT (Jan. 2008) (comprehensive listing of state legislation and rules on subject as of the date of the compilation, which includes the notation “[t]law is constantly changing...”). Section 15(c) (1) extends a similar option to collaborative law by requiring the victim’s consent to begin or continue the process.

The 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 act requires only that the lawyer do what a reasonable lawyer faced with a similar history of violence and coercion would do. *See* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7 (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 act addresses concerns about coercion and violence in several other sections. Section 7 creates an exception to the stay of proceedings created by filing a notice of collaborative law with a tribunal for “emergency orders to protect the health, safety, welfare or interest of a party or family or household member.” Section 9(c)(2) also creates an exception to the disqualification requirement for a collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated to represent a victim or an alleged abuser in proceedings seeking such emergency orders if other lawyers are not immediately available. These sections 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: “upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests...” MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) & (d) (2002) (emphasis added).

Finally, the act, like the Uniform Mediation Act, creates an exception to the evidentiary privilege otherwise extended to a collaborative law communication which is: “a threat or statement of a plan to inflict bodily injury or commit a crime of violence,” section 19 (a)(2); or is “intentionally used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity” section 19(a)(3); or is “sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child” 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 act does not, however, prescribe special qualifications and training in domestic violence for collaborative lawyers and other professionals who participate in the collaborative law process for fear of inflexibly regulating a still-developing dispute resolution process. The act also takes this position to minimize the previously mentioned risk of raising separation of powers concerns in some states between the judicial branch and the legislature in prescribing the conditions under which attorneys may practice law (See *supra*). The drafters recognize 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 Act is to create a privilege for collaborative law communications in legal proceedings, where it would otherwise either not be available or not be available in a uniform way across the states. The Uniform Collaborative Law Act's privilege for communications made in the collaborative law process is similar to the privilege provided to communications during mediation by the Uniform Mediation Act.

Protection for confidentiality of communications is central to collaborative law. Parties may enter collaborative law with fear that what they say during collaborative law sessions may be used against them in later 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*, 50 UCLA L. REV. at 102.