The Uniform Collaborative Law Act ("UCLA") will be presented to the ABA House of Delegates in February 2010 for approval. The UCLA was approved by a unanimous vote of the Uniform Law Commission ("ULC") (formerly known as the National Conference of Commissioners on Uniform State Laws) in July 2009. The ABA Section of Dispute Resolution has, by unanimous vote of its Council, decided to co-sponsor the resolution approving the UCLA. On behalf of the Section, we encourage you to support House of Delegates approval of this important and useful Act, and we urge the ABA Sections and Divisions and state delegations to consider joining the Dispute Resolution Section as co-sponsors.

The ABA has supported the growth of Collaborative Law in the United States in the following ways. First, Formal Opinion #07-447 of the ABA Standing Committee on Ethics and Professional Responsibility ("Ethical Considerations in Collaborative Law Practice") approved the use of Collaborative Law in August 2007, stating:

*Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence (emphasis added).*


The purpose of this memo is to (1) describe Collaborative Law, (2) discuss the status of Collaborative Law with regard to state laws and ethics opinions; (3) summarize the UCLA; (4) discuss the reasons why the ABA House of Delegates should approve the UCLA; and (5) address concerns expressed by the ABA Section of Litigation, which opposes the UCLA.
1. **Description of Collaborative Law**

Collaborative Law is a *voluntary* process that was first developed by Minnesota lawyer Stuart Webb. In a 1989 letter to a Justice of the Minnesota Supreme Court, Webb proposed a process in which the lawyers and clients in a case agree that the lawyers would represent the clients solely for purposes of negotiation, and the Justice encouraged him to try this method. Now, 20 years later, the Collaborative Law process is widely used throughout the United States, in every Canadian province, and in several countries overseas. (The website for the International Academy of Collaborative Professionals lists Collaborative Law practitioners and groups in England, France, Germany and 12 other countries.)

The key defining element of Collaborative Law is a written agreement that no party will seek a resolution of any disputed issues in court during the collaborative process, and that if any party does so, the Collaborative Law attorneys for the parties will withdraw from any adversarial proceeding regarding the subject matter of the dispute. This Collaborative Law Participation Agreement usually also contains provisions calling for good faith negotiation, the sharing of relevant information, the use of joint experts, client participation in the negotiations, respectful communications, and the confidentiality of the negotiation process.

Collaborative Law has been widely used in family law cases, and is also beginning to be used in other types of cases. It is not ideal for every case (for example, some cases need judicial determination), but practitioners have found that in a large number of cases, the Collaborative Law process results in faster, less expensive, and less acrimonious resolution of conflict as compared to litigation.

Twenty years of experience with Collaborative Law – and thousands of cases using this technique – have shown that the Collaborative Law process promotes interest-based, problem-solving negotiations, and that such negotiations are, in appropriate cases, advantageous for the clients as compared with more positional, adversarial negotiations.

2. **Status of Collaborative Law with Regard to State Laws and Ethics Opinions**

Three states (California, North Carolina, and Texas) have enacted statutes approving the use of Collaborative Law. (For copies of these statutes, please visit the Collaborative Law Committee page on the DR Section web site: [http://tinyurl.com/CLCommittee](http://tinyurl.com/CLCommittee).)

In addition, courts in California, Florida, Louisiana, Minnesota, and Utah have promulgated rules providing for the use of Collaborative Law. In New York City, former Chief Judge Judith S. Kaye of New York established the first court-based Collaborative Family Law Center in 2007.

Legal ethics opinions in nine states have addressed Collaborative Law (Colorado, Kentucky, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Pennsylvania, and Washington) and all of them except the Colorado opinion approved the use of Collaborative Law with appropriate precautions, such as the importance of informed consent. The Colorado opinion, issued in February 2007, permits clients, but not lawyers, to sign Collaborative Law agreements, and cites the issue of informed consent as the primary concern. In August 2007, the ABA issued an ethics opinion (Formal Opinion #07-447), as noted above, disagreeing with the Colorado opinion and stating that clients can, in fact, give informed consent, and therefore lawyers can participate in the Collaborative Law process. (For copies of these ethics opinions and a memo discussing them, please visit the Collaborative Law Committee page on the DR...
3. **Summary of the UCLA**

An executive summary of the UCLA is attached to this memo. Some of the main points addressed in the Act are the following:

- Any party may withdraw from the Collaborative Law process at any time.
- Participants in a Collaborative Law process must make timely, full, and candid disclosure of all information relevant to the case, and update that information throughout the case.
- Even while the Collaborative Law process is in effect, courts have the authority to issue emergency orders, if needed, to protect the health, safety, welfare or interests of a party or family or household member.
- The attorney withdrawal/disqualification provision is modified in a manner that enables governmental entities and low-income clients to continue to use firms or legal services organizations even if the case requires litigation.
- Collaborative Law attorneys must advise clients about alternatives, such as litigation, arbitration, and mediation, must screen for instances of domestic violence or other coercive behavior, and must assess with the prospective client whether a collaborative law process is appropriate for the client's case.
- Participants in Collaborative Law negotiations are entitled to a privilege that is similar to the privilege accorded to mediation under the Uniform Mediation Act (which has been enacted in 11 states and introduced in 5 more).
- The UCLA acknowledges that standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the Collaborative Law process.

4. **Reasons for Approval of the UCLA**

Like mediation and other forms of alternative dispute resolution, Collaborative Law provides an important – and now well-established – tool in the lawyer’s toolbox. Tens of thousands of lawyers in the U.S. and in other countries have already added this tool, and many thousands of clients have benefited from that choice. Some lawyers may decide that Collaborative Law is not for them. However, as stated in the Prefatory Note of the UCLA, “experience to date indicates that Collaborative Law is a valuable dispute resolution [option] for those parties who choose to participate in it with informed consent.”

Collaborative Law offers three important advantages in appropriate cases. First, empirical data suggest that it saves the parties time and money, by focusing their attentions on settlement. With high settlement rates in both federal and state civil cases (for example, statistics from the Administrative Office of the U.S. Courts for 2002 show that trials were conducted on only 1.8% of the federal civil cases filed), the parties in the vast majority of cases benefit from early and focused attention to the possibilities for settlement.
Second, in those cases where the parties will have some ongoing relationship, Collaborative Law reduces the animosity, antagonism, and aggravation of a public airing of the parties’ grievances. This is particularly helpful in those cases (such as divorces) where acrimony can boil over and scald children and other third parties. Even in those cases where there will be no ongoing relationship, the focus on settlement discussion instead of adversarial maneuvers can promote resolution.

Third, by promoting an interest-based approach to settlement, the Collaborative Law process can, like mediation, generate creative options that serve the parties’ interests better than a court judgment, and produce results that can only be obtained by agreement. The confidentiality of the Collaborative Law process, which is protected (with appropriate exceptions) in the UCLA, promotes candor in settlements discussions in precisely the same way as in mediation.

The rapidly proliferating adoption of court rules and statutes regarding the use of Collaborative Law makes this a particularly good time for the promulgation of the UCLA, before an extensive patchwork quilt of state laws develops. The value of uniformity, for example, with regard to the evidentiary privilege created by the UCLA for Collaborative Law negotiations seems particularly important. Uniform laws promote the public’s interest in predictability, and predictability, in turn, reduces costs in the resolution of conflict.

5. Concerns Expressed by the ABA Litigation Section

In its letter to the ULC, the Litigation Section expresses the following concerns: (a) the UCLA would have the effect of amending the Model Rules of Professional Conduct, and that courts, not legislatures, should therefore determine the suitability of Collaborative Law; (b) lawyers should not be forced to withdraw from a case; (c) clients cannot give truly informed consent to the lawyer’s potential disqualification because “even the most sophisticated and wealthy client is not clairvoyant”; (d) Collaborative Law leaves clients vulnerable if there is a power imbalance; (e) a Machiavellian use of Collaborative Law by one of the parties could create ethical dilemma for the lawyers involved in the case; (f) settlement must be voluntary and Collaborative Law could have the effect of coercing a settlement; (g) the affirmative obligations to disclose “information substantially related” to the case puts Collaborative Lawyers in “an impossible situation”; (h) it’s not clear why the UCLA creates special protection for individuals in the area of domestic violence without explaining why that one area was singled out for special treatment; (i) the confidentiality provisions of the UCLA do not mention fraud as an exception; and (j) the provisions regarding waiver of the evidentiary privilege are too complicated. The Litigation Section also expressed concern about the use of the term “substantially related,” and the ULC Drafting Committee changed that term in response. (A copy of the Litigation Section letter and the ULC’s response are attached.)

In our view, each of these concerns has a clear and logical response.

(a) The UCLA would have the effect of amending the Model Rules of Professional Conduct. Section 13 of the UCLA states that the Act “does not affect the professional responsibility obligations and standards applicable to a lawyer or other licensed professional” (emphasis added). The ABA Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion on Collaborative Law in August 2007 and found no inconsistency between the practice of Collaborative Law and the ABA Model Rules of Professional Conduct. ABA Ethics Counsel George Kuhlman recently stated that “the Ethics Committee finds nothing to object to in the Model Act” (i.e., the UCLA). Finally, no state ethics committee has declared
the practice of Collaborative Law unethical; even the Colorado opinion permits Collaborative practice if the parties, as opposed to the lawyers, sign the Participation Agreement. The Litigation Section has no authority in support of its position and is advocating an interpretation of the Model Rules that is inconsistent with the views of the ABA Ethics Committee.

(b) **Lawyers should not be forced to withdraw from a case.** The Collaborative Law process is voluntary. No one is forced to accept a “negotiation only” scope of representation — it is freely chosen by the parties and counsel if they all agree that it is appropriate for their case. The Model Rules of Professional Conduct permit lawyers and clients to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent. See Model Rule 1.2 and Comment [6], which provides that “[a] limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives.” The Collaborative Law process establishes voluntary ground rules, not unlike those that apply to solicitors and barristers in England, where only the latter take cases to trial.

(c) **Clients cannot give truly informed consent to the lawyer’s potential disqualification.** The ABA Ethics Committee’s Formal Opinion states that clients can give informed consent to a Collaborative Law representation. The crux of the Litigation Section’s objection is that clients (“even the most sophisticated and wealthy”) cannot anticipate what the impact of the withdrawal provision will be, particularly if it is the opposing party who decides to end the Collaborative process. However, the inability of client and counsel to know in advance how the case will proceed is as much a feature of litigation (if not more so) as compared with Collaborative Law. But our legal system permits disqualification agreements in a variety of other settings where the parties lack such knowledge but where such agreements serve important objectives. For example, in joint-representation agreements, clients acknowledge that the lawyer may be forced by unfolding circumstances to withdraw from representing one of more of the multiple parties if their interests diverge during the course of the representation. Similarly, a lawyer involved in the negotiation of a contract might enter an appearance in litigation involving that contract even though the lawyer and client acknowledge that the lawyer might have to withdraw if his/her testimony is needed in the case. Collaborative Law is, in one sense, part of a growing practice of attorneys offering “unbundled” legal services. The ABA has endorsed the use of “unbundled” services, in which the lawyer provides some but not all of the services that a client might need. In 2000, the ABA published the first book-length discussion of unbundling, by attorney Forrest Mosten (UNBUNDLE YOUR LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES A LA CARTE FOR IMPROVED SERVICE AND PROFITS), and the ABA Standing Committee on the Delivery of Legal Services has recently launched an Unbundling Resource Center.

(d) **Collaborative Law leaves clients vulnerable if there is a power imbalance.** A party with greater economic resources may have more power — regardless of whether the parties are engaged in litigation, mediation, or Collaborative Law — to hold out for a better result. One of the purposes of the Collaborative Law process is to level the playing field as much as possible by requiring voluntary sharing of information and good faith negotiation. The crux of the Litigation Section’s concern seems to be that a wealthier party would be in a better position to afford new counsel, and that gives the wealthier party a bargaining advantage. However, this advantage may be even greater in litigation, where the costs of continuing in the process are generally higher. In any event, if only one party can afford to hire successor counsel, the case may not be suitable for Collaborative Law. This point was noted by New Jersey’s Professional Ethics Committee in its 2005 opinion approving the use of Collaborative Law, and this concern is precisely why the UCLA modifies the disqualification provision for low-income clients. Also,
the UCLA requires lawyers to assess with the prospective client, in advance, the factors (such as financial considerations) that “relate to whether a collaborative law process is appropriate for the prospective party’s matter.”

(e) A Machiavellian use of Collaborative Law by one of the parties could create ethical dilemma for the lawyers. Collaborative Law participation agreements address this issue by including provisions explicitly permitting the withdrawal of counsel if one of the parties participates in bad faith. Likewise, the UCLA explicitly permits any party to terminate the Collaborative Law process for any reason and at any time, including (for example) situations where the client believes that another party is participating in bad faith. In some cases, this principle is explicitly mentioned in the Collaborative Law Participation Agreement. For example, the Massachusetts Collaborative Law Council’s principles, used in participation agreements signed by the parties and counsel, state that “We understand that our Collaborative Law attorney will withdraw from a case as soon as possible upon learning that his or her client has withheld or misrepresented information or otherwise acted so as to undermine or take unfair advantage of the Collaborative Law process.”

(f) Settlement must be voluntary and Collaborative Law could have the effect of coercing a settlement. The crux of this concern seems to be that one party, by threatening to withdraw from the Collaborative Law process, could coerce the other party to agree to an unfair settlement. However, Collaborative Law negotiations – like all bargaining – takes place in the shadow of the law, and therefore each party retains the option of rejecting settlement proposals if s/he can do better in court. If the concern is that some parties will not be able to afford to go to court if they have already spent all their available resources on their Collaborative Law counsel, then (as noted above) this may not have been an appropriate case for Collaborative Law in the first place. The UCLA requires lawyers to properly screen cases for appropriateness. However, given the substantial cost of taking a case all the way to trial, a party seeking to use its greater economic resources as a lever to coerce a settlement could accomplish the same result in litigation, regardless of whether a Collaborative Law process is used initially in an attempt to settle the case.

(g) Affirmative disclosure obligations put Collaborative Lawyers in “an impossible situation.” The UCLA’s provisions relating to voluntary disclosure of relevant information are hardly novel. Mandatory disclosure is now a feature of the Federal Rules of Civil Procedure and many state rules. Those rules, like the disclosure requirements of the Collaborative Law process, require interpretation. For example, the Federal Rules require lawyers to decide whom they “may” call as witnesses and which documents “may” support their claims. Litigators have been complying with these rules for many years, and the fact that the term “may” is not self-defining has not put litigators in an “impossible situation.” Lawyers in Collaborative Law cases have, since long before the UCLA was drafted, interpreted and applied these same disclosure obligations (requiring, as stated in the UCLA, “timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery”) in thousands of Collaborative Law cases, because these disclosure requirements are a central feature of Collaborative Law participation agreements. We are not aware of complaints from such lawyers that their duties of disclosure presented an impossible situation.

(h) Why special protection for individuals regarding domestic violence? Section 15 of the UCLA broadly addresses “coercive or violent relationships,” and bars the use of Collaborative Law in such situations unless the lawyer and client have discussed the issue and “the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a collaborative law process.” This section is not limited to
domestic violence. Moreover, the extensive use of Collaborative Law in family cases makes it particularly appropriate to address this consideration in the UCLA because of the extensive use of face-to-face meetings in the Collaborative Law process. Finally, the UCLA does take into account other special circumstances, such as the modified disqualification provisions for low-income clients and the exception to the UCLA’s privilege provisions in situations where there are allegations of abuse, neglect, abandonment, or exploitation of a child.

(i) Confidentiality provisions of the UCLA do not mention fraud as an exception. Like the Uniform Mediation Act, which has been endorsed by the ABA House of Delegates, the UCLA does not explicitly mention an alleged fraud as a ground for overcoming the confidentiality of negotiations in a Collaborative Case. But the Act does create an exception to the privilege in situations where one party seeks to rescind an agreement reached in a Collaborative process. Section 19(c) of the UCLA creates an exception to the evidentiary privilege “if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in . . . a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process.” This protection, plus the exception to privilege for situations involving a plan to commit a crime or conceal a past crime, strike the right balance between protecting confidentiality and ferreting out misconduct.

(j) Provisions regarding waiver of the evidentiary privilege are too complicated. The evidentiary privilege sections of the UCLA closely mirror the provisions of the Uniform Mediation Act. These provisions are, in fact, complicated, as is the law of evidence generally. The Drafting Committees of the UMA and the UCLA, which included judges, lawyers, and legal educators, worked hard to streamline these sections and reduced their complexity to the extent possible while still covering the reasonable policy concerns (such as the prevention of fraud, abuse, neglect, and criminal activity) that are implicated by the creation of an evidentiary privilege and reasonable exceptions. The alternative to a uniform act is a patchwork of complicated but uncodified laws on this subject. The UCLA also provides clarity with its section-by-section Comments, including discussion of this inherently complicated subject, and thus enables the public and lawyers to predict more accurately whether their communications will be privileged.

6. Conclusion

The UCLA is a timely and useful statute that serves important needs of clients and the public generally. Collaborative Law can save the parties time and aggravation and give them more control over the costs of resolving their dispute. When parties successfully resolve cases through Collaborative Law, this preserves judicial resources to devote to the cases that truly need litigation. Collaborative Law has become a well-established method of dispute resolution in the United States, approved by the ABA Ethics Committee and the legal ethics committees of eight states. Three states have already adopted Collaborative Law statutes. The ABA’s support for the UCLA will not only promote uniformity of the laws concerning Collaborative Law but also reassure the public that lawyers share their interest in developing more amicable, timely, and inexpensive methods of dispute resolution for use in appropriate cases. We strongly urge the Sections and Divisions of the ABA, the state Delegates, and all other members of the ABA House of Delegates to support enactment of the UCLA as an appropriate Act for those states desiring to adopt the specific substantive provisions contained in the Act.
Attachments:
- Executive Summary of the UCLA
- Uniform Collaborative Law Act ("UCLA")
- Formal Opinion #07-447 ("Ethical Considerations in Collaborative Law Practice")
- Litigation Section Letter Concerning the UCLA
- Uniform Law Commission Response to the Litigation Section
Executive Summary of the
Uniform Collaborative Law Act

The Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable. The signature product of the Commission, the Uniform Commercial Code, is a prime example of how the work of the Uniform Law Commission has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

The collaborative dispute resolution process (commonly known as “Collaborative Law”) is a voluntary, non-adversarial dispute resolution process for parties represented by counsel. As is the case with mediation, collaborative law has its roots in the area of family law, and the process is rapidly expanding for resolving disputes in many areas of civil law. A number of states have enacted statutes of varying length and complexity that recognize collaborative law, and a number of courts have taken similar action through the enactment of court rules.

Collaborative Law agreements are crossing state lines as more individuals and businesses are utilizing the collaborative process. As the use of the process continues to grow, the Uniform Collaborative Law Act (the “Act”) will provide consistency from state to state regarding enforceability of collaborative law agreements, confidentiality of communications in the process, an automatic stay of court proceedings and the privilege against disclosure should the process not result in settlement.

Beginning in February, 2007 a Drafting Committee of the Uniform Law Commission has conducted a series of conferences for the purpose of drafting an act to codify collaborative law procedures into a uniform act. In July, 2009, meeting in its one-hundred and eighteenth year, the Commission unanimously approved a Uniform Collaborative Law Act. This paper provides a section-by-section summary of the Act, as approved by the Commission.

Section 1 sets forth the title: Uniform Collaborative Law Act.

Section 2 sets forth definitions of terms used in the Act.

Section 3 makes the Act applicable to a collaborative law participation agreement signed after the effective date of the Act and emphasizes that a tribunal cannot order a party to participate in the collaborative law process over that party’s objection.

Section 4 establishes minimum requirements for a collaborative law participation agreement, which is the agreement that parties sign to initiate the collaborative law process. The agreement must be in writing, state the parties intention to resolve the matter (issue for resolution) through collaborative law, contain a description of the matter and identify and confirm engagement of the collaborative lawyers. The Section further provides that the parties may include other provisions not inconsistent with the Act.
**Section 5** specifies when and how the collaborative law process begins, and how the process is concluded or terminated. The process begins when parties sign a participation agreement, and any party may unilaterally terminate the process at any time without specifying a reason. The process is concluded by a negotiated, signed agreement resolving all or a portion of the matter, or a portion of the matter and the parties’ agreement that the remaining portions of the matter will not be resolved in the process.

Several actions will terminate the process, such as a party giving notice that the process is terminated, beginning a proceeding, filing motions or pleadings, requesting a hearing in an adjudicatory proceeding without the agreement of all parties, or the discharge or withdrawal of a collaborative lawyer. The Section further provides that under certain conditions the collaborative process may continue with a successor collaborative lawyer in the event of the withdrawal or discharge of a collaborative lawyer. The party’s participation agreement may provide additional methods of terminating the process.

**Section 6** creates a stay of proceedings before a tribunal (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law with the tribunal. A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to insure confidentiality of the collaborative law process.

**Section 7** creates an exception to the stay of proceedings by authorizing a tribunal to issue emergency orders to protect the health, safety, welfare or interests of a party or family or household member; or, to protect financial or other interests of a party in any critical area in any civil dispute.

**Section 8** authorizes a tribunal to approve an agreement resulting from a collaborative law process.

**Section 9** sets forth a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process terminate without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated, are disqualified from representing a party in a proceeding before a tribunal in the collaborative matter, except to seek emergency orders (Section 7) or to approve an agreement resulting from the collaborative law process (Section 8). The disqualification requirement is further modified regarding collaborative lawyers representing low-income parties (Section 10) and governmental entities as parties (Section 11).

**Sections 10** creates an exception to the disqualification for lawyers representing low income parties in a legal aid office, law school clinic or a law firm providing free legal services to low income parties. If the process terminates without settlement, a lawyer in the organization or law firm with which the collaborative lawyer is associated may represent the low income party in an adjudicatory proceeding involving the matter in the collaborative law process, provided that the participation agreement so provides, and the representation is without fee, and the individual collaborative lawyer is appropriately isolated from any participation in the collaborative matter before a tribunal.
Section 11 creates a similar exception to the disqualification requirement for lawyers representing a party that is a government or governmental subdivision, agency or instrumentality.

Section 12 sets forth another core element of collaborative law. Parties in the process must, upon request of a party, make timely, full, candid, and informal disclosure of information substantially related to the collaborative matter without formal discovery, and promptly update information that has materially changed. Parties are free to define the scope of disclosure in the collaborative process, so long as they do not violate another other law, such as an Open Records Act.

Section 13 acknowledges that standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.

Section 14 deals with appropriateness of the collaborative law process. Prior to the parties signing a participation agreement, a collaborative lawyer is required to discuss with a prospective client factors that the collaborative lawyer reasonably believes relate to the appropriateness of the prospective client’s matter for the collaborative process, and provide sufficient information for the client to make an informed decision about the material benefits and risks of the process as compared to the benefit and risks of other reasonably available processes, such as litigation, arbitration, mediation or expert evaluation. Further, a prospective party must be informed of the events that will terminate the process and the effect of the disqualification requirement.

Section 15 obligates a collaborative lawyer to make a reasonable effort to determine if a prospective client has a history of a coercive or violent relationship with another prospective party, and if such circumstances exist, establishes criteria for beginning and continuing the process and providing safeguards.

Section 16 provides that oral and written communications developed in the collaborative process are confidential to the extent agreed by the parties or as provided by state law, other than the Act.

Section 17 creates a broad privilege prohibiting disclosure of communications developed in the process in legal proceedings. The provisions are similar to those in the Uniform Mediation Act and apply to party and non-party participants in the process.

Sections 18 and 19 provide for the possibility of waiver of privilege by all parties, and certain exceptions to the privilege based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records act, or to prove or disprove professional misconduct or malpractice. Parties may agree that all or part of the process is not privileged.

Section 20 deals with enforcement of an agreement made in a collaborative process that fails to meet the mandatory requirements for a participation agreement (Section 4), or a
collaborative lawyer who has not fully complied with the disclosure requirements (Section 14). When the interests of justice so require, a tribunal is given discretion to enforce an agreement resulting from a flawed participation agreement, if the tribunal finds that the parties intended to enter into a participation agreement, and reasonably believed that they were participating in the collaborative process.

**Section 21** emphasizes the need to promote uniformity in applying and construing the Act among states that adopt it.

**Section 22** provides that the Act may modify, limit or supersede certain provisions of the Federal Electronic Signatures in Global and National Commerce Act.

**Section 23** is a severability clause; and **Section 24** establishes an effective date for the Act.

The ABA Section of Dispute Resolution has endorsed the Uniform Collaborative Law Act, and other Sections and entities of the ABA are encouraged to do so. The Act will be presented to the ABA House of Delegates in February 2010, and should be available for consideration by state legislatures in mid-2010. ABA members and all collaborative practitioners are encouraged to contact their state delegates to the House of Delegates and encourage their support of the Uniform Collaborative Law Act.

Collaborative Law is a rapidly developing process for managing conflicts and resolving disputes outside of the courthouse. Voluntary early settlement increases party satisfaction, reduces unnecessary expenditure of personal and business resources for dispute resolution, and promotes a more civil society. The future growth and development of Collaborative Law has significant benefits for clients and the legal profession.

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*Revised: September 27, 2009*
SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Collaborative Law Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Collaborative law communication” means a statement, whether oral or in a record, verbal or nonverbal, that:
   (A) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded; and
   (B) is made for the purpose of conducting, participating in, continuing, or reconvening a collaborative law process.

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

(3) “Collaborative law process” means a procedure intended to resolve a matter without intervention by a tribunal in which parties:
   (A) sign a collaborative law participation agreement; and
   (B) are represented by collaborative lawyers.

(4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law process.

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

(6) “Law firm” means lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or other association, or lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

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

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

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

(10) “Proceeding” means:
    (A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related pre-hearing and post-hearing motions, conferences, and discovery; or
    (B) a legislative hearing or similar process.

(11) “Prospective party” means a person that discusses the possibility with a prospective collaborative lawyer of signing a collaborative law participation agreement.
(12) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

(14) “Sign” means, with present intent to authenticate or adopt a record:
   (A) to execute or adopt a tangible symbol; or
   (B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) “Tribunal” means
   (A) a court, arbitrator, administrative agency or other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter; or
   (B) a legislative body conducting a hearing or similar process.

SECTION 3. APPLICABILITY; SCOPE.

(a) This [act] applies to a collaborative law participation agreement that meets the requirements of section 4 signed [on or] after [the effective date of this [act]].

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

SECTION 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative law participation agreement must:
   (1) be in a record;
   (2) be signed by the parties;
   (3) state the parties’ intention to resolve a matter through a collaborative law process under this [act];
   (4) describe the nature and scope of the matter;
   (5) identify the collaborative lawyer who represents each party in the collaborative law process; and
   (6) contain a statement by each collaborative lawyer confirming the lawyer’s representation of a party in the collaborative law process.

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

SECTION 5. BEGINNING AND CONCLUDING A COLLABORATIVE LAW PROCESS.

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

(b) A collaborative law process is concluded by a:
   (1) negotiated resolution of the matter as evidenced by a signed record;
   (2) negotiated resolution of a portion of the matter as evidenced by a signed record where the parties agree that the remaining portions of the matter will not be resolved in the collaborative law process; or
   (3) termination of the process.

(c) A collaborative law process terminates:
   (1) when a party gives notice to other parties in a record that the collaborative law process is ended; or
   (2) when a party:
       (A) begins a proceeding related to the collaborative matter without the agreement of all parties; or
       (B) in a pending proceeding related to the collaborative matter:
           (i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;
           (ii) requests that the proceeding be put on the [tribunal’s active calendar]; or
(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (e), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party. The party’s collaborative lawyer shall give prompt notice in a record of such discharge or withdrawal to all other parties.

(d) A party may terminate a collaborative law process with or without cause. A notice of termination need not specify a reason for terminating the process.

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

1. the unrepresented party engages a successor collaborative lawyer; and

2. in a signed record:

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

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

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

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

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

SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

(a) Parties to a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a matter related to the proceeding. Parties shall file promptly a notice of the agreement with the tribunal after the collaborative law participation agreement is signed. Subject to subsection (c) and Section 7 and 8, the filing operates as a stay of the proceeding.

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

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

1. A status report may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process.

2. A tribunal may require parties and lawyers to disclose in a status report whether the process is ongoing or concluded.

3. A communication made in violation of subsection (1) may not be considered by a tribunal.

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

SECTION 7. EMERGENCY ORDER. During the collaborative law process a tribunal may issue emergency orders to protect the health, safety, welfare, or interests of a party or [insert term for family or household member as defined in [state civil protection order statute]]. The collaborative lawyer is authorized to seek or defend an emergency order under section 9(c)(2).

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

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

(a) Except as otherwise provided in subsection (c), a collaborative lawyer may not appear before a tribunal
to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:
   (1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or
   (2) to seek or defend an emergency order to protect the health, safety, welfare, or interests of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person. In that event, subsections (a) and (b) apply when the party, or [insert term for family or household member] is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interests of that person.

SECTION 10. LOW INCOME PARTIES.

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

(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent the party without fee in the collaborative matter or a matter related to the collaborative matter if:
   (1) the party has an annual income which qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;
   (2) the collaborative law participation agreement so provides; and
   (3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

SECTION 11. GOVERNMENTAL ENTITIES AS PARTIES.

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

(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent the government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:
   (1) the collaborative law participation agreement so provides; and
   (2) the collaborative lawyer is isolated from any participation in the collaborative matter or matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

SECTION 12. DISCLOSURE OF INFORMATION. During the collaborative law process on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party shall also update promptly previously disclosed information that has materially changed. Parties may define the scope of disclosure during the collaborative law process, except as provided by law other than this [act].

SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING. This [act] does not affect:
   (a) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or
   (b) the obligation of a person to report abuse or neglect of a child or adult under the law of this state.

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

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

(c) advise the prospective party that:

(1) after signing an agreement:

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

(B) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not thereafter represent a party before a tribunal in such a proceeding except as authorized by Section 9(c), 10(b), or 11(b);

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

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

SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.

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

(b) A collaborative lawyer shall throughout the collaborative law process continue to reasonably assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

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

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

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

SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION.

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

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

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

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

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

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

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

SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.

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

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

SECTION 19. LIMITS OF PRIVILEGE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 20. COLLABORATIVE LAW PARTICIPATION AGREEMENT NOT MEETING REQUIREMENTS.

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

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

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

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

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

(2) apply the disqualification provisions of Section 6, 9, 10, and 11; or
(3) apply the evidentiary privilege of Section 17.

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

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

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

SECTION 24. EFFECTIVE DATE. This act takes effect………...
Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.¹

In this opinion, we analyze the implications of the Model Rules on collaborative law practice.² Collaborative law is a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement. It had its roots in, and shares many attributes of, the mediation process. Participants focus on the interests of both clients, gather sufficient information to insure that decisions are made with full knowledge, develop a full range of options, and then choose options that best meet the needs of the parties. The parties structure a mutually acceptable written resolution of all issues without court involvement. The product of the process is then submitted to the court as a final decree. The structure creates a problem-solving atmosphere with a focus on interest-based negotiation and client empowerment.³

Since its creation in Minnesota in 1990,⁴ collaborative practice⁵ has spread

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. We do not discuss the ethical considerations that arise in connection with a lawyer’s participation in a collaborative law group or organization. See Maryland Bar Ass’n Eth. Op. 2004-23 (2004) (discussing ethical propriety of “collaborative dispute resolution non-profit organization.”)


5. The terms “collaborative law,” “collaborative process,” and “collaborative resolution process” are used interchangeably with “collaborative practice.” Although col-
rapidly throughout the United States and into Canada, Australia, and Western Europe. Numerous established collaborative law organizations develop local practice protocols, train practitioners, reach out to the public, and build referral networks. On its website, the International Academy of Collaborative Professionals describes its mission as fostering professional excellence in conflict resolution by protecting the essentials of collaborative practice, expanding collaborative practice worldwide, and providing a central resource for education, networking, and standards of practice.\(^6\)

Although there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a “four-way” agreement). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the four-way agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.

Several state bar opinions have analyzed collaborative practice and, with one exception, have concluded that it is not inherently inconsistent with the Model Rules.\(^7\) Most authorities treat collaborative law practice as a species of limited scope representation and discuss the duties of lawyers in those situa-

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tions, including communication, competence, diligence, and confidentiality. However, even those opinions are guarded, and caution that collaborative practice carries with it a potential for significant ethical difficulties.\(^8\)

As explained herein, we agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication. We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).

Rule 1.2(c) permits a lawyer to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent. Nothing in the Rule or its Comment suggest that limiting a representation to a collaborative effort to reach a settlement is per se unreasonable. On the contrary, Comment [6] provides that “[a] limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives.”

Obtaining the client’s informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation.\(^9\) The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.\(^10\)

The one opinion that expressed the view\(^11\) that collaborative practice is impermissible did so on the theory that the “four-way agreement” creates a non-waivable conflict of interest under Rule 1.7(a)(2). We disagree with that result because we conclude that it turns on a faulty premise. As we stated earlier, the four-way agreement that is at the heart of collaborative practice includes the promise that both lawyers will withdraw from representing their respective clients if the collaboration fails and that they will not assist their clients in ensuing litigation. We do not disagree with the proposition that this contractual obligation to withdraw creates on the part of each lawyer a “responsibility to a third party” within the meaning of Rule 1.7(a)(2). We do disagree with the view that such a responsibility creates a conflict of interest under that Rule.

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8. Supra note 6.
9. Rule 1.0(e).
10. See also Rule 1.4(b), which requires that a lawyer “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
A conflict exists between a lawyer and her own client under Rule 1.7(a)(2) “if there is a significant risk that the representation [of the client] will be materially limited by the lawyer’s responsibilities to ... a third person or by a personal interest of the lawyer.” A self-interest conflict can be resolved if the client gives informed consent, confirmed in writing, but a lawyer may not seek the client’s informed consent unless the lawyer “reasonably believes that [she] will be able to provide competent and diligent representation” to the client. According to Comment [1] to Rule 1.7, “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” As explained more fully in Comment [8] to that Rule, “a conflict exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer’s other responsibilities or interests.... The conflict in effect forecloses alternatives that would otherwise be available to the client.”

On the issue of consentability, Rule 1.7 Comment [15] is instructive. It provides that “[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.”

Responsibilities to third parties constitute conflicts with one’s own client only if there is a significant risk that those responsibilities will materially limit the lawyer’s representation of the client. It has been suggested that a lawyer’s agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client. We disagree, because we view participation in the collaborative process as a limited scope representation.

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer’s agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client’s limited goals for the representation. A client’s agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer’s representation of the client will be materially limited by the lawyer’s obligation to withdraw if settlement cannot

12. Rule 1.7(b)(4).
13. Rule 1.7(b)(1).
14. Colorado Bar Ass’n Eth. Op.115, supra note 7 (practice of collaborative law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful).
be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer’s representation to the collaborative negotiation of a settlement.¹⁶


¹⁶. See Lerner v. Laufer, 819 A.2d 471, 482 (N.J. Super. Ct. App. Div.), cert. denied, 827 A.2d 290 (N.J. 2003) (stating that “the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them,” court rejected malpractice claim against lawyer who used carefully drafted limited scope retainer agreement); Alaska Bar Ass’n Eth. Op. No. 93-1 (May 25, 1993) (lawyer may ethically limit scope of representation but must notify client clearly of limitations on representation and potential risks client is taking by not having full representation); Arizona State Bar Ass’n Eth. Op. 91-03 (Jan. 15, 1991) (lawyer may agree to represent client on limited basis as long as client consents after consultation and representation is not so limited in scope as to violate ethics rules); Colo. Bar Ass’n Ethics Comm. Formal Op. 101 (Jan. 17, 1998) (noting examples of “commonplace and traditional” arrangements under which clients ask their lawyers “to provide discrete legal services, rather than handle all aspects of the total project”).
April 15, 2009

Peter K. Munson
Chair, Drafting Committee on Uniform Collaborative Law Act
123 S. Travis St.
Sherman, Texas  75090

Dear Mr. Munson:

The Section of Litigation appreciates the opportunity to comment upon the draft Uniform Collaborative Law Act (“UCLA” or “Act”). You recognize, of course, that the Section of Litigation does not speak for the American Bar Association, which can adopt policy only through its House of Delegates. But the Section of Litigation Council has considered your proposal in depth and wanted your organization to have the benefit of our comments as you proceed.

At the outset, we want to congratulate you for addressing the issue of settlements and how they can be facilitated. We, as litigators, recognize one of our higher obligations is to fully explore that possibility with our clients as an alternative to litigation, and we consider this ethical obligation to be one that arises throughout the representation of a client in a litigated matter. However, the means selected in the proposed Uniform Collaborative Law Act are deeply troubling, and our Council voted unanimously to oppose their endorsement by the American Bar Association not only on public policy grounds, but because, in our view, they conflict with the Model Rules of Professional Conduct.

Professional Rules of Conduct Must be Established by Courts, not Legislation

Our most fundamental concern is not any individual provision in the UCLA but, rather, the prospect that the American Bar Association would be recommending legislation in this area. We view the proposal as presenting material amendments to explicit terms in the Rules of Professional Conduct, and considering such amendments is the function of the courts, not of a state legislature. The American Bar Association has fought long and hard to prevent any entity, other than the courts from regulating the profession of law. We view this Act as both problematic on the merits and an invitation for state legislatures to enter what we believe should be the courts’ exclusive domain.

Forced Disqualification is Unacceptable

Turning to our substantive comments, the most untenable provision of the Act is § 8, under which a collaborative lawyer would be disqualified from representing the client in a “substantially related” matter should the collaborative process terminate. Under § 4(b), “[a] party may terminate a collaborative law process with or without cause.” This termination can occur at any time, for any reason, or no reason at all. The result is an artificial inducement to stay at the bargaining table, and that dynamic in turn creates multiple problems. We note the following specific problems with forced disqualification.

Violation of Rule 1.2

First, the forced disqualification unreasonably limits the scope of representation, which conflicts with Model Rule 1.2. Just when the client is most in need of and has invested so much
time in the representation by the chosen lawyer, the other side can brandish a sledge hammer to disable the lawyer, against the will of the only two people (lawyer and client) who should have anything to say in the matter. The lawyer and client may wish to continue the representation for substantive, psychological or fiscal reasons that far outweigh the benefits of encouraging them to remain involved in the collaborative process. To be sure, the parties both have sledge hammers, and perhaps the intent was to create a Cold War environment of threatened mutual destruction that encourages both sides to stay at the bargaining table. But the potential for misuse is simply too great, and represents an unacceptable trade-off in the interest of settlement.

Consent Cannot be Informed

Second, the Act attempts (in § 12(a)(2)) to temper the automatic-disqualification provision by requiring lawyers to disclose to their clients the risk of disqualification if the collaborative process ends. But there is no way a client at the beginning of the collaborative process can provide informed consent to the loss of the lawyer at an unknown time in the future under circumstances that no one can predict. Even the most sophisticated and wealthy client is not clairvoyant. The UCLA’s lengthy attempts to provide the client with such broad Miranda-type warnings demonstrate the point.

The Act’s Attempts to Address the Power Imbalance Issue Fall Short

Third, the loss of the lawyer is disproportionately unfair in the context of a power imbalance. If a party with greater power lures the other into a collaborative process, the other party is far more likely to suffer at the mere whim of the other side. The Act attempts to address this problem by exempting low-income clients from some aspects of the automatic-disqualification provision (see § 9). But the exemption (for firms, not lawyers, and only if the collaborative lawyer “is isolated from any participation in the matter”) is insufficient. This is because the exemption addresses only financial issues, but power imbalances are often driven by non-financial concerns. And even focusing on finances, a power imbalance is generally relative, not absolute. Exempting low-income clients from some of the disqualification requirements is useless to a middle-class client embroiled in a dispute with a wealthy adversary.

The Lawyer Faces an Unnecessary Ethical Dilemma

Fourth, the potential for power imbalance unfairly saddles lawyers with untenable responsibilities. Consider, for example, a spouse going through a painful divorce, torn between the desire to end an abusive relationship and the old, unhealthy pattern of doing anything to please the other spouse. What does a lawyer do if she suspects that the more powerful spouse is forcing the weaker into a collaborative process only to terminate it at the worst possible time, thus exploiting the power dynamic by forcing the weaker spouse to change counsel midstream? A lawyer in such circumstances is faced with the Hobson’s choice of disobeying her conscience or disobeying her client’s instructions. We cannot support legislation that would create such ethical dilemmas for lawyers.

Settlement Processes Must be Voluntary

In short, the collaborative process purports to be “voluntary” but contains draconian provisions that would be unfair to enforce against many clients and would be improper to require collaborative lawyers to honor in a significant percentage of situations. The Section of Litigation believes that the settlement process must be totally voluntary at all stages, and the endorsement
of a too-clever-by-half weapon to force parties to stay at the bargaining table or strip parties of their chosen counsel is the very antithesis of the voluntary process that settlement procedures must be designed to achieve.

Turning to the proposal itself, the Section of Litigation has the following concerns about the substance of its terms:

**The Discovery “Rules” are Flawed**

1. The creation of affirmative discovery obligations creates serious professional responsibility and lawyer-client relationship problems. “During a collaborative law process a party shall make timely, full, candid, and informal disclosure of information substantially related to the matter upon request of a party, but without formal discovery, and shall promptly update information which has materially changed.” So the adverse party sends a letter asking for full, candid, informal disclosure of all information substantially related to the matter. Now what?

   It is one thing for the lawyer to be required to respond on behalf of the client to specific requests for information. But for the producing lawyer to be required to engage in affirmative production of damaging information based on a truly unprecedented set of confusing standards (if they can be called that) puts the lawyer in an impossible situation. Moreover, there are no definitions for non-discovery related terminology such as “full” or “candid.” The use of a requirement to produce “information substantially related to the matter,” a term snatched from Model Rule 1.9, is found nowhere in discovery practice. Finally, there is no indication how such standards might get enforced or what happens if the lawyer or client fails to meet the standards.

**Some Concerns are Identified; Others Ignored**

2. The Act requires disclosures about domestic violence. While perhaps an admirable goal, why was this one topic selected for special treatment if the Act applies not just to family law cases but to any dispute?

3. When the Act addresses exceptions to the privilege, it does not mention fraud. Fraud, however, can be as compelling a basis for an exception to the privilege as crime and, typically, is included under the crime-fraud exception to the testimonial privilege that the Act otherwise seems to be mirroring.

**Other Substantive and Technical Concerns**

4. The Act’s provisions regarding the waiver of the privilege are almost impossible to understand, contrary to the existing jurisprudence in the area, and create waiver in situations that cry out for the preservation of the privilege.

5. The use of “substantially related” is confusing in places and plain wrong in others. “Substantially related” is a term of art in Model Rule 1.9, and this Act uses it in at least two different senses without distinction. The first is the Model Rule 1.9 sense in §§ 8(a) and (b), 9(b)(2), 10(b), and 12(a)(2)(C). The second seems to be referring to the same matter in §§ 4(c)(1)(B) & (C), 5(a), 11, and 12(a)(2)(A)(i). The construct, where used in a Model Rule sense, should be “the same or substantially related matter.”
6. The order of the sections is not logical. Should they not proceed as the matter would proceed?

In conclusion, we concur with the laudable goal of promoting settlement and cooperation in that process. But we believe that arming one’s adversary with the unfettered ability to fire one’s own lawyer is an unacceptable means for achieving that result. We also cannot support a proposal that places rule-making in this professional responsibility area in the hands of the state legislatures, particularly when the proposed legislation itself violates the existing Model Rules.

Very truly yours,

[Signature]

Robert Rothman
Chair
ABA Section of Litigation

Cc: John A. Sebert, Executive Director, Uniform Laws Commission
Carlton D. Stansbury, ABA Advisor, Uniform Laws Commission
Robin Roy, ABA Staff Liaison to the Uniform Laws Commission
June 10, 2009

Mr. Robert Rothman
Chairman
ABA Section on Litigation
321 North Clark Street
Chicago, IL 60654

Dear Mr. Rothman,

Thank you for sharing the Section of Litigation's comments on the draft Uniform Collaborative Law Act (UCLA).

The NCCUSL Drafting Committee on the UCLA has benefited from the consideration and comments of various ABA sections and others in its two-year drafting process. The Final Reading Draft, which I enclose, incorporates your suggested deletion of the phrase "substantially related", substituting "related to a collaborative matter" (Section 9). The Drafting Committee believes they have produced an Act that brings uniformity to the standards governing collaborative law practiced in every state with twenty years of exponential growth.

The Drafting Committee has considered your comments and endeavored to produce an Act that offers uniformity and clarity to parties and their attorneys who may elect to consider or opt for collaborative resolution of a civil dispute. Substantial numbers of clients are exercising, with the benefit of legal counsel, collaborative resolution of their disputes. Clients and their attorneys have established collaborative law as a useful addition to dispute resolution and several States have enacted legislation or Court Rules recognizing collaborative law.

Collaborative law is clearly not for all cases or clients but, for some, it may be an appropriate elective method of dispute resolution. We believe the UCLA flags important considerations that attorneys should reconcile in service of their client's preference and agenda.

Your letter asserts the UCLA violates provisions of the Model Rules of professional responsibility. We have considered your concerns and respectfully disagree. Our decision is
supported by the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 07-447 issued on August 9, 2007 which has approved the collaborative law process with its established fundamental characteristic, the disqualification provision, now found in Section 9. Model Rule 1.2 permits a lawyer to limit the scope of representation as long as the limitation is reasonable and the client provides informed consent. Model Rule 1.2 further states, "Limited representation may be appropriate because the client has limited objectives for the representation" and "Terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives". ABA Ethics Counsel George Kuhlman recently stated in an e-mail that “the Ethics Committee finds nothing to object to in the Model Act” [referring to the UCLA].

The UCLA requires a lawyer discuss all aspects of collaborative law with a client before participating in a collaborative agreement (Section 14(a)). Collaborative practice relieves no professional duty of an attorney to his client (Section 13).

Before executing a participation agreement, the lawyer is directed to inquire into the circumstances of the dispute and help determine the suitability of the collaborative process for attempting to resolve the particular dispute between the specific parties. As part of this process, the lawyer must provide adequate information to the client about the terms and procedures of the collaborative law process. The UCLA sources its language on this subject directly from the 2007 Formal Opinion. The Act stresses the need for attorneys to provide clear and impartial descriptions of the options available to the party prior to deciding upon a course of action. The UCLA ensures that clients will be properly informed before entering into a participation agreement. The UCLA fully comports with any and all requirements concerning ensuring informed consent.

You present concerns about policy choices which the UCLA reflects and about which reasonable differences may exist but I assure you that all the points raised have received exhaustive consideration by the Drafting Committee which has received the benefit of ongoing participation and support of ABA advisors including the Litigation Section advisor as well as other knowledgeable attorneys. Ultimately, appropriate consideration of the collaborative process and its election rests with the participating client and their chosen conscientious legal counsel.

The attached Final Reading Draft will be presented for consideration at the Uniform Laws Annual Meeting in July where the draft may see further revision before submission to the ABA House of Delegates in February 2010. Be assured the drafting efforts of NCCUSL in this product are representative of its legacy of thoughtful and well crafted drafting providing states substantial advances in the law. We believe the UCLA will merit broad endorsement by the ABA House of Delegates and the Practice Sections.

Thank you for your comments. We look forward to the continued discussion with all interested ABA sections in anticipation of the UCLA’s presentation for February 2010 House of Delegates approval.
Sincerely,

Peter Munson
Chairman
Drafting Committee on the Uniform Collaborative Law Act

Cc: Drafting Committee, Advisors and Observers
Martha Walters, NCCUSL President
Robert Stein, Chair of the NCCUSL Executive Committee
John Sebert, NCCUSL Executive Director
Michael Kerr, NCCUSL Legislative Director
Eric Fish, NCCUSL Legislative Counsel