

The Uniform Collaborative Law Act Frequently Asked Questions

In July 2009, the Uniform Law Commission approved the Uniform Collaborative Law Act (UCLA). The UCLA is the result of a 3 year drafting process that called upon the expertise and experiences of a wide variety of individuals. The final act incorporates the distinctive features of collaborative practice into a stand-alone Act and a stand-alone Rule that are both ethical and practical for states to enact. The final version is also referred to as “UCLR/A”, from which each state may select the format to suit its own definitions of which provisions are appropriate in each format.

It is important to point out that the UCLA creates a nationally uniform Act, or statutory framework, and a Rule of Court framework, in which collaborative law can be ethically practiced, but does not mandate the use of the collaborative law process in any specific situation or dispute. The UCLA specifically prohibits any person from being ordered into collaborative law over that person’s objections. It also contains detailed provisions to insure that a party enters into collaborative law with informed consent, including a comparison of collaborative law with other dispute resolution options. Parties and their attorneys remain free to choose other dispute resolution mechanisms (including traditional litigation). The endorsement of the UCLR/A by the Academy would be approval of the statutory framework contained therein for states wishing to adopt such a policy – it would not mean the approval by the Academy of collaborative law as a preferred practice or a recommendation that collaborative law principles be used in any particular situation.

WHAT IS COLLABORATIVE LAW?

Collaborative law is a form of alternative dispute resolution that developed over 20 years ago in Minnesota. Since its initial use in Minnesota, the practice has spread to all 50 states, as well as Canada, England, Ireland and Australia. Roughly 22,000 lawyers have been trained for collaborative practice, a number that continues to grow as more clients seek out alternatives to the traditional adversarial approach.

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”). Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process. Studies indicate high levels of success in this form of alternative dispute resolution and high client satisfaction. Because the parties agree in advance to seek settlement and avoid litigation, both the atmosphere and the incentives of the collaborative process are aligned to that end. Disqualification of the collaborative process attorneys from pursuing subsequent litigation in the event a collaborative process does not result in a complete agreement of all issues is an important factor in achieving that result.

WHY DRAFT A UNIFORM COLLABORATIVE LAW ACT?

The Joint Editorial Board on Uniform Family Laws (JEB-UFL) recommended that the Uniform Law Commission draft a statute to address this developing area of law. The JEBUFL members include representatives of the Uniform Law Commission, the ABA Section on Family Law, and the American Academy of Matrimonial Lawyers. The JEB-UFL noted that despite textbooks published by the ABA, court rules allowing for collaborative practice, and canons provided by local collaborative associations, the statutes and rules governing its practice vary in length and complexity, or did not exist at all. The lack of national standards created variance in the practice, leaving some lawyers to practice collaborative law in a manner that could contravene the traditional duties and responsibilities of lawyers. Without clear standards, the chance that a lawyer unknowingly commits malpractice during a collaborative agreement increases significantly.

The UCLA is the most comprehensive statutory framework developed to date for collaborative law. By enacting the UCLA, states will guarantee that when collaborative law is being practiced, it is done so under a framework that protects the interests of both the client and the lawyer.

IS COLLABORATIVE LAW ETHICAL?

The ABA Standing Committee on Ethics and Professional Responsibility explicitly deemed collaborative law as an ethical practice of law in Formal Opinion 07-447, issued in August 2007. The Committee issued its formal opinion in response to a Colorado Ethics Opinion that found it was “unethical” for the collaborative lawyers to sign the participation agreement as “parties”. The Colorado Opinion left open, however, the option of the clients agreeing to collaborative law without the lawyers signing the agreement.. It is of note that in addition to the ABA, eight states have issued ethics opinions deeming collaborative law ethical.

According to the ABA Standing Committee on Ethics and Professional Responsibility, collaborative law is ethical as long as: “[b]efore representing a client in a collaborative law process, a lawyer [advises] 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 collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.”

Throughout the drafting process, ABA advisors from the Section of Family Law, Section of Litigation, and Section of Alternative Dispute Resolution reviewed the language with special attention to the ABA Ethics Opinion. Moreover, the ABA Standing Committee on Ethics and Professional Responsibility commented on several sections, resulting in language more compliant with the Ethics Opinion. As a result of these comments, the Act comports with the ABA Ethics Opinion and mandates essential elements of disclosure and discussion between prospective parties in order to guarantee that all

parties enter into the collaborative agreement with informed consent. Additionally, the Act mandates that the collaborative agreement contains the disqualification and voluntary disclosure of information that are essential to the collaborative process. At the time of approval by the Uniform Law Commission, all ABA advisors were unanimous in their belief that the Act is true to the 2007 Ethics Opinion.

WILL THE UCLA CHANGE MY PRACTICE?

Collaborative law is a 100% voluntary practice, for both the parties and lawyers involved. Some lawyers may see collaborative practice as antithetical to the traditional adversarial role of a lawyer as litigator. However, many attorneys choose to focus their efforts on acting as a counselor to their clients, an approach which also has a long tradition in American practice. Just as one lawyer may choose to practice only in a mediation setting over more the traditional practices of transactional law or litigation, collaborative lawyers devote their time and their professional skills to the non-judicial resolution their client's disputes. The UCLA does not diminish the duties of loyalty and zealous representation that are common throughout all practices of law.

Again, nothing in the UCLA mandates a lawyer to enter into a collaborative agreement. Lawyers and firms that have concerns regarding the possibility of disqualification can refrain from entertaining the collaborative practice in its entirety. In addition, by having a nationally standard model to draw from, all attorneys will be better able to explain the benefits and limitations of a collaborative law approach when asked by clients.

WHY DOES THE ACT ALLOW FOR COLLABORATIVE PRACTICE IN NON-FAMILY LAW SITUATIONS?

Currently, it is estimated that 90 percent of collaborative cases arise out of family law disputes. However, collaborative law, like other forms of alternative dispute resolution, is

driven by the demands and preferences of the marketplace. The use of collaborative law has spread to other areas of practice, as parties seek to resolve their disputes privately and without the enmity that litigation can bring.

Collaborative law is particularly favorable for non-family law disputes where privacy and maintain ongoing relations is important, as is the case in many business and commercial disputes, or in the division of estates, disputes involving closely held family businesses, employment disputes, construction and real estate disputes, and sexual harassment claims.

In Rule/Section 2, the final UCLR/A provides states with the option of limiting application of the Rules/Act to matters arising under the family laws of a state, or imposing no limitation on matters that can be submitted to the collaborative process.

The Uniform Law Commission understands that collaborative law may not be suited for certain disputes. Therefore, its use is not mandated in any context. It exists as an option for those individuals, businesses and non-profit entities that believe, after close consultation with their lawyer, that it would be useful under the circumstances of their dispute. As the use of collaborative law expands beyond family disputes, prudence dictates that the statute be broad in nature, as the situations in which parties may choose collaborative law cannot be predicted. No other ADR process is limited to a particular subject matter, and it would be very difficult to define “family law” for purposes of a workable subject matter limitation.

WHY DOES THE UCLA REQUIRE A LAWYER TO INQUIRE INTO POTENTIAL VIOLENCE OR COERCIVENESS IN A REALTIONSHIP?

The issues related to abuse were added as Section 15 of the UCLA at the request of the ABA Commission on Domestic Violence. The Drafting Committee was mindful of the Commission’s comments and sought to assure the safety of victims of domestic violence who are prospective parties in collaborative law. Although the application of this Section will occur mainly in the family law context, coercive relationships in other

situations may limit the effectiveness of the collaborative approach. Coercion may arise in relationships between members of a closely held family business or in employment situations. Therefore, collaborative lawyers should inquire into all circumstances related to the dispute and participate in the collaborative process only if there is no longer a threat of coercion or violence.

WHY IS THE DISQUALIFICATION REQUIREMENT MODIFIED FOR LOW INCOME OR GOVERNMENTAL AGENCIES BUT NOT OTHER FIRMS?

Section 10 of the Act modifies the disqualification rules for lawyers in law firms that represent low-income clients without a fee. The goal of the modified rule is to provide low income individuals with access to collaborative practice without limiting their ability to receive any legal services in situations where the parties are unable to resolve their dispute in the collaborative process. In order for representation to continue, all parties to the collaborative agreement must consent to the departure from the disqualification rule, and in any adversarial proceeding the collaborative lawyer must be screened from further participation in any matters related to the initial collaborative matter.

The UCLA draws heavily from the ABA Model Rules of Professional Conduct, which make similar accommodations for the needs of low-income parties by exempting non-profit legal firms from imputed disqualification rules applicable to other law firms (See Rule 6.5). The exception for governmental entities in Section 11 of the UCLA follows the treatment of government agency attorneys under rule 1.11 of the Model Rules. Without such an exception, in the event that a collaborative process went on to litigation all lawyers in an government office would be disqualified from further representation. Subject to additional restrictions and disclosures (specifically 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 choice of the drafting committee was to encourage the use of collaborative law by governmental agencies for resolving disputes.

IS THE UCLA LEGISLATING LEGAL ETHICS?

The UCLA does not change the rules of professional responsibility. Section 13 of the Act acknowledges that the standards of professional responsibility of lawyers are not changed by their participation in the collaborative process. Rules of professional responsibility are canonized by court rule and not legislation. The UCLA does not set any special training requirements for lawyers who practice collaborative law, nor does it limit the practice of law to one group of lawyers or another. Many state ethics committees have supported the concept of collaborative law. Further, similar alternative dispute resolution acts, such as the Uniform Mediation Act and the Uniform Arbitration Act, have not been contested for 'legislating ethics' despite containing language similar to that found in the UCLA.

HOW DOES THE COLLABORATIVE LAW PROCESS AFFECT NORMAL CASE MANAGEMENT?

Collaborative law is designed to find solutions that maximize the outcome of the dispute for all parties. To this end, the UCLR/A gives courts the discretion to approve a stay of proceedings, such as pretrial conferences, trial conferences, and discovery hearings, once a notice of collaborative law is filed. If granted, there would be an emergency order exception to the stay. Approval of a stay would take cases off of the normal court docket, allowing a fuller exploration of possible solutions to a dispute while also allowing courts to attend to other disputes more expediently.

HOW DOES THE UCLA ENCOURAGE VOLUNTARY DISCLOSURE?

The act generally requires parties to "make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery" and to "update promptly previously disclosed information that has materially changed."

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. A collaborative law participation agreement typically requires timely, full, candid and informal disclosure of information related to the collaborative matter. Voluntary disclosure helps to build trust between the parties, a crucial prerequisite to a successful resolution of the collaborative matter. Similar requirements have been established for parties in mediation.

The obligation of voluntary disclosure imposed on parties to a collaborative law process reflects a trend in civil litigation to encourage voluntary disclosure without formal discovery 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.” 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). Many states impose similar obligations on parties.

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. 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. 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.

Moreover, nothing in the UCLA 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 the 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. Many states, for example, mandate compulsory financial disclosure in divorce cases even without a specific request from the other party. 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. 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.

HOW DOES THE UCLA HANDLE ISSUES OF INFORMED CONSENT

The Act places specific obligations on a collaborative lawyer which must be fulfilled prior to the signing of a participation agreement. The lawyer is required to discuss with a prospective client factors which the lawyer reasonably believes relate to the appropriateness of the matter for the process, and provide sufficient information for a prospective client to make an informed decision about the material benefits and risks of the process as compared to the material benefits and risks of other reasonably available processes, such as litigation, arbitration, mediation or expert evaluation. The UCLA sources its language on this subject directly from the 2007 ABA Formal Ethics 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.

The ABA Model Rules - Terminology - Rule 1.0 [e] defines informed consent: “(It) denotes 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 action.”

DOES THE UCLA CREATE A SPECIAL PRIVILEGE FOR COLLABORATIVE COMMUNICATIONS?

Protection for confidentiality of communications in the process is central to collaborative law. Parties may enter collaborative law without 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.

The UCLA creates privileges 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 language governing the issues of privilege for communications made in the collaborative law process is similar to the privilege provided to communications during mediation by the Uniform Mediation Act. This privilege is not absolute – it has exceptions for violence, to defend against malpractice, etc.

The UCLA also provides for a broad prohibition on later disclosure of communications made within the collaborative law process in the legal process, making those

communications inadmissible for any purpose other than those specified in the act. For example, communications by any other participant in the collaborative law process such as jointly retained experts.

Section 17 creates a broad evidentiary privilege for parties' communications in the process, drawing on the purpose, rationale and tradition of the attorney-client privilege. The Act also creates a privilege for a non-party participant for their communications in the process. Extending the privilege to non-parties, such as professional counselors, financial and other experts, seeks to facilitate the candid participation of experts and others who may have information and perspective that would facilitate resolution of the matter in the process. Section 18 provides that the party and non-party privilege may be waived, if agreed to in writing by all parties.

Section 19 sets forth specific and exclusive exceptions to the broad grant of privilege provided for communications in the process. The exceptions are based on limited but vitally important values such as crime prevention, protecting against bodily injury and abuse, information available under Open Records Act and the right of someone to respond to accusations of professional misconduct. Also, parties may present evidence in a subsequent proceeding to determine whether the terms of a settlement agreement made in the process have been breached.

As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a tribunal will hold an in camera hearing to determine if the claim for exemption from privilege can be confidentially asserted or defended.

For more information about the Uniform Collaborative Law Act, and to download the full Rules/Act (93 pages), please visit the Uniform Law Commission website at www.nccusl.org.