



## STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

### Draft Revised Tentative Report

Relating to

## New Jersey Family Collaborative Law Act

**February 11, 2013**

This revised tentative report is distributed to advise interested persons of the Commission's revised tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. If you approve of the report, please inform the Commission so that your approval can be considered along with other comments.

Please send comments concerning this revised tentative report or direct any related inquiries, to:

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## INTRODUCTION

The Uniform Collaborative Law Act (“UCLA”) was recommended for enactment by the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission (“ULC”)) in 2009. In 2010, it was revised, amended, and re-titled the Uniform Collaborative Law Rules/Act (“UCLR/A”).

Collaborative law is a voluntary, non-adversarial settlement process in which the parties, with the assistance of their lawyers (and, as appropriate, other collaborative professionals such as financial practitioners, including certified financial planners and certified public accountants, and mental health professionals, including licensed clinical social workers, psychologists, licensed professional counselors, licensed marriage and family therapists and psychiatrists trained in collaborative law) attempt to negotiate in good faith a mutually acceptable resolution of the parties’ dispute without court involvement. The collaborative lawyers, along with their clients and one or more other collaborative professionals, as necessary, work together as a team in order to resolve the dispute.

The hallmark of collaborative law is the lawyer disqualification clause whereby both parties agree that each of their attorneys may not represent a party before a court or other tribunal in a proceeding related to the collaborative matter either during the collaborative law process (with certain limited exceptions) or in the event the collaborative law process fails. This limitation of representation clause is intended to serve two purposes: to protect the parties from the pressure of settling within court-imposed timeframes and to free attorneys to focus on dispute resolution rather than litigation tactics.

Another fundamental principle of collaborative law is the mandatory disclosure and exchange of information by the parties. Full and fair disclosure is deemed by those who practice collaborative law to be a key to the success of the process. It enables the parties to develop trust and confidence in the process itself while giving the collaborative professionals the information necessary to guide the parties and help them reach a comprehensive resolution of the dispute.

It is important to emphasize that the collaborative lawyers do not act as mediators. They are not “neutrals”, nor do they have comparable duties to both spouses. They are expected to advocate for outcomes that serve their clients’ best interests and advise their clients of their legal rights and protect client confidences.<sup>1</sup>

According to the website of the International Academy of Collaborative Professionals (“IACP”)<sup>2</sup>, the collaborative process of dispute resolution is now practiced in 39 states and the

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<sup>1</sup> See *The Organized Bar and the Collaborative Law Movement: A study in Professional Change*, Ted Schneyer, 2008 Arizona Board of Regents, 50 Ariz. L. Rev. 289 (Spring 2008).

<sup>2</sup> The IACP is an approximately 4,000 member association of attorneys, financial professionals and psychologists from 24 countries who are trained in and practice collaborative law. The IACP has been in existence in some form since 1999.

District of Columbia<sup>3</sup> with more than 235 practice groups. The states with five or more practice groups that are IACP members are California, Colorado, Connecticut, Florida, Maryland, Michigan, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, and Wisconsin. At least one state, New York, has made collaborative law training an integral part of its dispute resolution programs. In 2009, the New York State courts sponsored a Collaborative Law Family Center which connects income-eligible couples with specially-trained lawyers and other professionals to assist with collaborative divorces. The New York Office of Alternative Dispute Resolution provides free collaborative divorce training to lawyers, mental health professionals and financial planning professionals who have agreed to provide limited free out-of-court services to income qualifying couples. The New York State Unified Court System's website lists approximately 15 separate associations of collaborative law professionals.

### **Key Provisions of the Uniform Law**

The UCLR/A creates a uniform framework for the use of collaborative law that is intended to provide important consumer protections and enforceable privilege provisions. Minimum requirements are established for the collaborative law participation agreement, which is the agreement of the parties to participate in the collaborative law process. (Rule/Section 4). The law sets forth explicit informed-consent requirements, including reasonable and clear disclosures about the pros and cons of collaborative law versus other dispute resolution methods and requires that the attorney discuss the appropriateness of the collaborative law process and the limitation of the attorney's representation with a prospective party. (Rule/Section 14). Full, fair and voluntary disclosure of all relevant information during the collaborative law process, without formal discovery, is required by the uniform law. (Rule/Section 12.)

The uniform law also creates a privilege between parties and non-attorney collaborative professionals during the negotiation process, modeled after a similar privilege in the Uniform Mediation Act. (Rule/Section 17). The limits of the privilege and how the privilege is waived are set forth in separate sections of the uniform law. (Rules/Sections 18 and 19). The law clarifies that participation in a collaborative law process is voluntary and any party to the process may terminate the process unilaterally and with or without cause. (Rule/Section 5). Application for emergency court orders is permitted, if needed, without causing the parties' attorneys to be disqualified. (Rules/Sections 7 and 9).<sup>4</sup>

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<sup>3</sup> They are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

<sup>4</sup> As will be discussed later in the text of this report, there are several features of the uniform law which are not included in the proposed New Jersey version of the statute but are strongly recommended as the subject for court rule. For example, screening for domestic violence or other coercive behavior is *mandatory* under the uniform law, but is not made mandatory in the proposed New Jersey statute because regulation of attorney conduct in New Jersey is governed by court rule and not by legislation. The Commission does recommend that these and other issues pertaining to the conduct of attorneys be the subject of court rules that are promulgated in conjunction with a New Jersey statute.

The uniform law imposes many requirements on attorney conduct. The law sets forth the manner in which the attorney must first assess whether the collaborative law process is suitable for the prospective client's matter and provide information to the prospective client. The law prohibits an attorney from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter except as authorized under the act. (Rule/Section 14). The uniform law sets forth the requirements for disqualification of a collaborative lawyer (Rule/Section 9). The lawyer is also required to make reasonable inquiry whether the prospective client has a history of a coercive or violent relationship with another prospective party to the dispute and may not begin or continue a collaborative law process if the lawyer reasonably believes that the safety of the party or prospective party cannot be protected adequately. (Rule/Section 15).

The uniform law further restricts court procedure by providing that a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party (Rule/Section 7), find that the parties intended to enter into a collaborative law participation agreement under certain circumstances, and even enforce an agreement evidenced by a record resulting from the process, including the application of the attorney disqualification and privilege provisions,. (Rule/Section 20).

The amendments to the UCLA, approved in the summer of 2010, make several significant changes to the original law. First, the amendments provide for the regulation of collaborative law by statute, or by court rules that mirror the statute, thereby giving states the discretion to adopt the provisions by statute, court rule, or a combination of both. Second, the amendments give states the option to limit application of the act to family law matters. Third, the amendments provide that if the parties undertake the collaborative law process while a proceeding is pending before a court, the court retains discretion to grant a stay of that proceeding (and related calendar matters) rather than the stay being automatically granted as a matter of law. To reflect the new focus, the name of the revised act also was changed to the Uniform Collaborative Law Rules/Act.

Hawaii, Ohio, Nevada, Texas, Utah, and the District of Columbia, have adopted the uniform law.<sup>5</sup> Thus far, in 2013, the UCLR/A has been introduced in the legislatures of Illinois, Massachusetts, Oklahoma, New Mexico and Washington. Introduction is anticipated in the legislature of Alabama sometime this year and although California has had a family collaborative law statute since at least 2007, California has created a task force to outline protocol for adoption of the UCLR/A in 2013.

### **Limited Scope Representation and the Rules of Professional Conduct**

One controversial issue in collaborative law practice generally is the ethical implication of the attorney disqualification provision. The ABA and a consensus of those jurisdictions that have considered it, have determined that the process of collaborative law is not unethical per se. The ABA ethics committee characterized the collaborative lawyer's "disqualification agreement" as establishing a "limited scope representation" permitted by the Model Code of Professional

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<sup>5</sup> Texas had its own statute on collaborative law before adopting the uniform law and it opted to specifically limit adoption of the UCLA to family law disputes.

Responsibility so long as the limitation is reasonable under the circumstances and the client gives informed consent.

In 2005, even before promulgation of the uniform law, the New Jersey Supreme Court Advisory Committee on Professional Ethics issued Opinion 699, which recognized that a lawyer could participate in collaborative law without violating the Rules of Professional Conduct. The Advisory Committee had been asked to examine a perceived conflict between the traditional role of the lawyer and the requirements of the collaborative process, i.e., the lawyer's obligation to advocate for his or her client zealously and in an inherently adversarial manner versus the collaborative law requirement that each lawyer in the collaborative process contractually limit the scope of the representation of his or her client.<sup>6</sup>

In Opinion 699, the Advisory Committee said that “[i]t is deemed critical to the success of the collaborative law process that the lawyers contractually limit the scope of their representation to achieving resolution through non-adversarial processes . . . [T]he lawyers (and also their firms) enter into an agreement which provides that if there is ensuing adversarial litigation, both parties’ attorneys must withdraw from the representation. In this way, the lawyers have a practical incentive to resolve disputes without such litigation.”

The Advisory Committee determined that collaborative law could be practiced by attorneys in a manner not inconsistent with the Rules of Professional Conduct. Of particular concern is the potential hardship for a client should the attorney be required to withdraw and the client thus forced to retain “new counsel to take up the case from scratch”. The Advisory Committee concluded that, rather than a withdrawal under RPC 1.16, an imposed limitation on the scope of the lawyer’s services that is known at the outset of the representation is more accurately analyzed as a “limitation on the scope of representation” which lawyers are permitted to impose under RPC 1.2(c).

RPC 1.2 (c ) permits the limitation if it is “reasonable under the circumstances and the client gives informed consent.” The Advisory Committee concluded that whether this limitation is reasonable within the meaning of RPC 1.2(c) is a determination that must be made in the first instance by the lawyer, exercising sound professional judgment in assessing the needs of the client. Such limited representation is not “reasonable” if, after being fully informed about the existing relationship between the parties, the lawyer determines that there is a significant possibility that either an impasse will result or the collaborative process otherwise will fail.

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<sup>6</sup> The specific inquiry facing the Advisory Committee was whether the Rules of Professional Conduct permitted the formation of a nonprofit unincorporated association -- funded by membership dues and devoted to public education about the benefits of collaborative law -- whose members consist of both lawyers and non-lawyer professionals, such as accountants or therapists, all of whom are committed to the collaborative law process. The association would not provide legal services to clients and the lawyer members would provide services within the context of their already existing firms. The Opinion concludes that a lawyer may become a member of an association that includes non-lawyers whose purpose is to engage in public education about collaborative law, so long as the activities of the association do not themselves amount to the practice of law. In this context, the Advisory Committee further examined the propriety of collaborative law itself and whether the “general contours of collaborative practice are consistent with the Rules of Professional Conduct.”

The Advisory Committee also found that the limitation on the scope of the lawyer's representation requires very direct disclosures to the client about the risks of a failed process -- including, specifically, the risk that all fees paid to that point will have been wasted -- and the client's subsequent, knowing consent to the risks. At the same time, an attorney's actions in pursuing the collaborative law approach are fully subject to all the requirements of the Rules of Professional Conduct, including the strictures of RPC 1.6 pertaining to confidentiality.

It is noteworthy that since Opinion 699, permissible limitation on the scope of a lawyer's representation, as contemplated by RPC 1.2 (c), has not been confined to the practice of collaborative law. Legal representation that is limited to a particular activity or group of activities, known as the "unbundling" of legal assistance, is now well-recognized in New Jersey having been determined to be expressly contemplated and authorized by RPC 1.2 (c) so long as the limited representation is "reasonable under the circumstances and the client gives informed consent." See New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion 713; see also *The Ethics of Unbundling*, Stephanie L. Kimbro, ABA Family Law Advocate, Vol. 33, No. 2, pp. 27-30 (2010).

At least eight state bar ethics committees, other than New Jersey, have expressly approved the use of collaborative law as a form of limited-scope representation<sup>7</sup> and the UCLR/A has broad support.<sup>8</sup> The ABA Standing Committee on Ethics and Professional Responsibility approved the use of collaborative law in 2007. In addition, at least three ABA Sections --the Section of Dispute Resolution, the Section of Individual Rights & Responsibilities, and the Family Law Section -- have approved the UCLR/A. Notwithstanding, the ABA House of Delegates at its 2011 annual meeting in Toronto considered and rejected for endorsement the UCLR/A. Collaborative law practitioners consulted by Staff advise that even with this setback to full ABA recognition, the demand (and need) for collaborative law is growing, at least in the family law sphere.

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<sup>7</sup> The eight state bar ethics committees are Kentucky, Maryland, Minnesota, Missouri, North Carolina, Pennsylvania, South Carolina and Washington. The Orange County California Bar Association also issued a formal ethics opinion concluding that collaborative family law under a typical participation agreement does not violate California's Rules of Professional Conduct or other ethics laws. Thus far, only Colorado has found the practice of collaborative law to violate its ethical rules. See Ethics Opinion 115 (2007) in which the Ethics Committee of the Colorado Bar Association determined that collaborative law, by definition, involves an agreement between the lawyer and a third person (the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client, a conflict to which the client may not consent.

<sup>8</sup> Organizations in support of the UCLR/A are the ABA Sections of Dispute Resolution, Family Law and Individual Rights & Responsibilities; the Association of the Bar of the City of New York; the Ohio Bar Association; the South Carolina Bar Association; the Tennessee Bar Association Board of Governors; the Vermont Bar Association Board of Managers; the Family Law Sections of the Minnesota, New Mexico and Wisconsin Bar Associations; the Association of the Bar of the City of New York; and the ADR sections of the Virginia and Wisconsin Bar Associations. The UCLR/A was also designated as "Suggested State Legislation" by the Council of State Governments.

## Proposing a New Jersey Version of the Uniform Law

The Commission determined that the goals sought to be achieved by adoption of the uniform law required very careful crafting of a New Jersey version of the uniform act for several reasons.

First, at the outset of the project, commenters advised the Commission that creating an evidentiary privilege for collaborative law parties and non-party professionals was essential and should be a primary focus of a New Jersey version of the law. The uniform law creates a privilege to the benefit of the party with regard to all collaborative law communications. It also creates a privilege to the benefit of the non-party participant with regard to the communications of that non-party participant made during the collaborative law process.<sup>9</sup> The proposed New Jersey version adopts the uniform law approach and in doing so, adopts language from similar provisions in the Uniform Mediation Act, N.J.S. 2A:23C-1 *et seq.* See section 11 of the proposed act in this report.<sup>10</sup>

The privilege held by parties, though derived from the lawyer-client privilege, extends the protection to all collaborative law communications as defined in the act. See section 2 of the proposed act in this report. The privilege held by non-party participants is important because of the use of “neutral” experts in the collaborative process (some of whom are jointly retained by the parties) who will not give informal opinions in the course of the collaborative process without a privilege against disclosure of their collaborative communications. As noted in the ULC comment to the source section, “[e]xtending the privilege to nonparties for their own communications seeks to facilitate the candid participation of experts and others who may have information and perspective that would facilitate resolution of the matter.”

Lawyers are not included in the definition of “non-party participant”, however, and the privilege does not extend to the communications of collaborative lawyers. This is because the protection from disclosure of any confidential communication afforded by the statute, just as with the attorney-client privilege, ultimately is for the benefit of the client and thus controlled by the client. See ULC Comment to Rule 2 Definitions, “Nonparty participant” (quoting from *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that “the [attorney-client] privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney.”) At the same time, the ULC further states in the Comment that because an attorney has no right to “override a client’s decision to waive privilege” and must abide by a client’s decisions

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<sup>9</sup> See sections 17 and 18 of the uniform law concerning privilege against disclosure for collaborative law communication and waiver and preclusion of the privilege.

<sup>10</sup> Under current New Jersey Law, there is a victim counselor confidentiality privilege (2A:84A-22.15) which pertains confidential communications between victim and counselor, a marriage and family therapist privilege (45:8B-29) which protects the secrecy and confidentiality of communications between the therapist and the person in therapy; a physician and patient privilege (2A:84A-22.2) which only applies if the professional is a doctor and then only to communications between the doctor and the patient; and a licensed social worker privilege (45:15BB-13) which protects from disclosure any confidential information that the social worker may have acquired from the client or patient while performing social work services, under certain circumstances. None of these privileges has been deemed sufficient to protect non-party professionals in a collaborative law process.

concerning the objectives of representation, the attorney does not have an additional right to “independently assert” privilege as a participant in the collaborative law process.

Since privileged communications are created by statute and not by court rule in New Jersey, enactment of a New Jersey statute is necessary and creation of this evidentiary privilege is the crux of the proposed statute.<sup>11</sup>

Adapting the uniform law to New Jersey also requires deference to the role of the judiciary in regulating attorneys and court practice. Statutory regulation of attorney conduct is not permissible in New Jersey. The New Jersey Constitution gives the Supreme Court, and not the legislative or executive branch of government, jurisdiction over the practice of law and attorney conduct. See Article 6, §2, ¶3. Thus, many provisions of the uniform law may only be addressed in New Jersey by court rule rather than by statute. For example, section 14 of the uniform act, which requires that a prospective collaborative lawyer assess with the prospective party factors that the lawyer reasonably believes relate to whether the process is appropriate for the party’s dispute and provide the prospective party with sufficient information to make an informed decision about the benefits and risks of collaborative law, regulates attorney conduct. This section is not recommended for statutory adoption. Nor is section 15.<sup>12</sup>

The *entire* uniform law also would not be suitable for statutory enactment in New Jersey because of *Winberry v. Salisbury* concerns. Thus, drafting is further limited to those provisions that do not impose or interfere with matters of court procedure. And those sections of the act which the ULC Drafting Committee suggests should be enacted by judicial rule rather than by legislation are not included in the proposed act. They are section 6 (Proceedings pending before tribunal, status report), section 7 (Emergency orders), section 8 (Approval of agreement by tribunal), section 9 (Disqualification of collaborative lawyer and lawyers in associated law firm), section 10 (Low income parties), and section 11 (Governmental entity as party).

When drafting a proposed New Jersey version of the uniform law, the Commission considered these additional factors:

**1. Contents of the collaborative law participation agreement.** Because of State constitutional considerations, as earlier discussed, the proposed law does not regulate attorney conduct but does set forth threshold requirements for the collaborative law participation agreement without which the agreement is not complete and the collaborative process cannot begin. Knowing when the process begins and ends is important for understanding when the privilege applies. But also as stated by the ULC in its Introductory Comment, “[t]he rules/act’s philosophy is to set a standard minimum floor for collaborative law participation agreements to inform and protect prospective parties and make a collaborative law process easier to administer.

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<sup>11</sup> The Comment to the UCLR/A states that the ULC drafting committee recommends that Rule 17 be enacted by legislation rather than court rule because, although the earliest recognized privileges were judicially created, this practice stopped over a century ago. Evidentiary privileges now are “rooted within legislative action.”

<sup>12</sup> Section 15 of the uniform law requires that the attorney make a reasonable inquiry, before a prospective party signs a collaborative law participation agreement, whether the prospective party has a history of a coercive or violent relationship with another prospective party.

Beyond minimum requirements, however, the rules/act leaves the collaborative law process to agreement between parties and collaborative lawyers.”

Consistent with commenter suggestions and the concerns expressed above, section 4 of the proposed New Jersey version of the act requires that the collaborative participation agreement memorialize the limitation of representation that is a hallmark of the collaborative law process and permitted by Opinion 699, as previously discussed. Also required in the participation agreement are representations by the parties that they will make full, good faith disclosure of information to each other and that the collaborative law process will terminate unilaterally if full disclosure is not made.<sup>13</sup> Most important, the proposed statute provides that the collaborative law participation agreement must state that the agreement, along with the collaborative process, shall comply with the Rules of Professional Conduct.

**2. Limitation of the act to family law disputes.** Consistent with other jurisdictions and commenter suggestions, and prevalent collaborative law practice, the application of the act is limited to family law matters.<sup>14</sup>

The statute recommended in this report is not proposed to undermine or conflict with the New Jersey Supreme Court Rules of Professional Conduct or the Court’s general rulemaking power. It is contemplated, however, that a New Jersey statute would be more effective if implemented in tandem with court rules that regulate attorney conduct in this area, keeping in mind that many collaborative professionals are *not* attorneys.

In order to address concerns raised informally by the Administrative Office of the Courts (“AOC”), the draft was further revised to eliminate virtually all aspects of the uniform law that pertain to attorney conduct and court procedures. The New Jersey statute is drafted to create a privilege, the limits of that privilege, and to recognize the parameters of the collaborative law process so that the privilege may be exercised. Those provisions of the uniform law that regulate attorney conduct but are also deemed critical to the effectiveness of the law, such as the provisions pertaining to the attorney’s assessment of the appropriateness of the collaborative law process for the prospective client, and the disqualification of the attorney from the process, are recommended for court rule. Changes made in the New Jersey version of the uniform law that are the result of AOC concerns that were communicated to Commission Staff, are noted in the Comment to the revised section, as appropriate.

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<sup>13</sup> As with parties who choose mediation without court intervention to resolve their dispute, participants in the collaborative law process do not participate in a formal discovery process contemplated by court rules. A court rule may be useful, however, to ensure that parties are informed by their attorneys of this key difference between a litigated and non-litigated resolution of the dispute.

<sup>14</sup> Some commenters have suggested other concerns that the Commission believes are more appropriately addressed by Court Rules than by statutory enactment. Examples are providing attorneys with a mechanism by which to compel the parties to move forward in a timely fashion in a collaborative law matter and allowing the attorneys to file and make applications for stays without causing the collaborative law process to terminate.

## **Current Status of New Jersey Collaborative Law Practice**

In New Jersey, collaborative practice has been embraced as a successful form of dispute resolution, at least to resolve matrimonial disputes. Nine separate organizations/associations of professionals practice collaborative law in New Jersey as members of the IACP. These associations include attorneys, financial professionals and mental health professionals who focus primarily on collaborative divorce.<sup>15</sup> A modest “Google” search reveals numerous New Jersey law firms that tout collaborative law as a part of their practice expertise. Although collaborative law is not limited in practice to family law dispute resolution, one study from 2005 described collaborative law’s “exponential growth” as “one of the most significant developments in the provision of family legal services in the last 25 years.”<sup>16</sup>

Identical bills proposing a collaborative law act for divorce proceedings were introduced in the New Jersey Assembly Judiciary Committee successively in the 2004 and 2006 Legislative sessions, but never released from committee for a vote of the full Assembly.<sup>17</sup> These bills, however, do not address many of the issues the uniform law, and this proposed revision, seek to mandate and clarify, especially the issue of evidentiary privilege.

The principles set forth in the original tentative report have been endorsed by Resolutions of the Collaborative Divorce Professionals Practice Group, the Jersey Shore Collaborative Law Group, the South Jersey Collaborative Law Group, the Mid-Jersey Collaborative Law Alliance, the North Jersey Collaborative Law Group and the New Jersey Collaborative Law Group. The New Jersey Council of Collaborative Practice Groups, on its own behalf and on behalf of the collaborative law groups noted above, made further recommendations, many of which are incorporated in this revised tentative report. As already noted, modifications have also been made in response to comments received from the Administrative Office of the Courts.

This revised tentative report attempts to incorporate the majority of comments from those who practice collaborative law while limiting the scope of the New Jersey version of the statute to the evidentiary privilege and related issues in an effort to address the concerns identified by the courts with regard to its rulemaking authority.

### **Commission Recommendations**

In sum, taking into account the above considerations, the Commission recommends adoption, in statutory (and not rule) form, of a New Jersey version of the uniform law that incorporates the privilege provisions and those provisions deemed necessary for enforceability of the collaborative law participation agreement as proposed in this revised tentative report.

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<sup>15</sup> They are Collaborative Divorce Professionals of New Jersey; Collaborative Law Institute of New Jersey; Jersey Shore Collaborative Law Group; Mid-Jersey Collaborative Law Alliance; New Jersey Collaborative Divorce Alliance; The New Jersey Collaborative Law Group; North Jersey Collaborative Law Group; South Jersey Collaborative Law Alliance; and South Jersey Collaborative Law Group.

<sup>16</sup> See Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (2005).

<sup>17</sup> Assemblymen Francis L. Bodine (District 8) and Larry Chatzidakis (District 8) introduced A3375 in October of 2004 and A410 in 2006, both acts establishing collaborative divorce.

Since not all of the uniform act/rules are recommended for adoption, the numbering of the proposed sections does not match the uniform act in some instances (see comments to each section). In addition, section 5 of the uniform act is incorporated into three separate sections in the proposed act (sections 5, 6, and 7) for ease of understanding. Section 4 of the uniform act (included below as section 4) and section 20 of the uniform act (included below as section 14) are modified to comport with the requirements of Ethics Opinion 699 and the role of our judiciary. Section 17 of the uniform act, pertaining to a privilege against disclosure for collaborative law communications, is now section 11 in the proposed act.

It is further respectively suggested that -- should the proposed act be adopted by the Legislature-- the New Jersey Supreme Court also consider implementing additional court rules that would impose upon collaborative lawyers certain affirmative responsibilities before a prospective party signs a collaborative law participation agreement. Although the Commission defers to the court as to the appropriateness of any proposed rules, consistent with the uniform law, such rules might include:

1. Requiring the lawyer to determine, prior to the signing of a collaborative law participation agreement, whether the lawyer reasonably believes the collaborative law process is appropriate for the prospective client's family law dispute, and further requiring the lawyer to provide information to the prospective client that the lawyer reasonably believes is sufficient for the client 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 resolution of the dispute, such as litigation, mediation, arbitration or expert evaluation. These factors include the lack of formal discovery in a collaborative law approach (as is also the case with mediation outside of litigation) and the attorney's limited representation of a party in the collaborative matter. This is consistent with Rule/Section 14 (1) and (2) of the UCLR/A.

2. Requiring the lawyer to advise the prospective client that the collaborative law process will terminate if after signing a collaborative law participation agreement, the client, or the other party to the dispute, initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, other than to incorporate the terms of the settlement of the dispute into a final order of the court. This is consistent with Rule/Section 14 (3) of the UCLR/A.

3. Requiring the lawyer to make a reasonable inquiry, and to continually assess throughout the collaborative process, whether the prospective party has a history of a coercive or violent relationship with another prospective party. If the lawyer reasonably believes this to be the case, the lawyer may not begin or continue a collaborative law process unless (a) the party or the prospective party requests beginning or continuing a collaborative law process; and (b) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a collaborative law process. This is consistent with Rule/Section 15 of the UCLR/A.

## Proposed Act

[Changes in text from the May 2012 tentative report are noted with underscoring and strikethroughs; changes from the November 2012 report are also noted in “red” in the on-line version of the report]

### Section 1. Short title

This act may be cited as the New Jersey Family Collaborative ~~Family~~ Law Act.

#### COMMENT

This section modifies section 1 of the uniform act as noted. The law is specifically limited to family law disputes as defined in section 2.

### [Section x. Legislative findings

a. The statute is intended to recognize that since at least 2005, attorneys in New Jersey have participated in the dispute resolution method known as collaborative law by which an attorney is retained for the limited purpose of assisting his or her client in resolving a family law dispute in a voluntary, non-adversarial manner, without court intervention.

b. The collaborative law process is distinct from other dispute resolution mechanisms in that the parties, at the outset, do not intend to litigate their dispute. Instead, each party, represented by his or her attorney, meets together with the other party to the dispute, that party’s attorney, and, as needed, one or more non-party participants who are not attorneys but are professionals in their fields, such as certified financial planners, certified public accountants, mental health professionals, including licensed clinical social workers, psychologists, licensed professional counselors, licensed marriage and family therapists and psychiatrists, trained in collaborative law. All participants in the collaborative law process understand and agree that the process is intended to replace litigation and that the process will terminate if either party or either attorney commences a proceeding related to the collaborative matter before a court or other tribunal other than to seek incorporation of a settlement agreement into a final judgment.

c. It is further recognized that in order to facilitate full and fair disclosure by the parties to the collaborative process, the parties must have an evidentiary privilege to protect them from disclosure of any collaborative law communication. It is also recognized that the non-party participants in the collaborative law process described in subsection a., since they serve as neutral experts, need a privilege from disclosure of communications made by them during the process similar to the privilege created for mediators in the Uniform Mediation Act, N.J.S.

2A:23C-1 et seq. This will enable non-party participants to participate candidly in the process and thereby facilitate resolution of the dispute. This statute provides both evidentiary privileges.]

#### COMMENT

This section is new and intended to memorialize the purpose and need for a statutory privilege that benefits the parties to a collaborative law process as well as non-party participants. The privilege held by the parties to the collaborative process is derived from the attorney-client privilege. The privilege held by non-attorney collaborative professionals is similar to what was achieved by New Jersey adoption of the Uniform Mediation Act. This section also is intended to recognize that collaborative law practice has existed in New Jersey for quite some time.

## **Section 2. Definitions**

a. In this act:

(1) “Collaborative law communication” means a statement, whether oral or in a record that is made in the course of a collaborative law process and occurs after the parties sign a collaborative law participation agreement but before the collaborative law process is concluded.

(2) “Collaborative law participation agreement” means a written agreement by the parties to participate in a collaborative law process, in accordance with section 4 of this act, in order to resolve their family law dispute. A participation agreement shall provide that a complaint, petition or claim may not be filed with a tribunal before or during the collaborative law process although a party may request, in accordance with section 7 of this act, that a tribunal incorporate a settlement agreement into a final judgment.

(3) “Collaborative law process” means a procedure intended to resolve the family law dispute without intervention by a tribunal provided that the individuals in the dispute: (A) sign a collaborative law participation agreement; and (B) are represented by collaborative lawyers. A collaborative law process may not proceed if either party is subject to a restraining order, in accordance with the Prevention of Domestic Violence Act of 1991, N.J.S. 2C:25-17, et seq.

(4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law process and whom the party acknowledges is retained for that limited purpose. Thus, in the event the collaborative process does not resolve the family law dispute and the dispute is, instead, ~~determined by~~ submitted to a tribunal, the collaborative lawyer will not continue to represent the party.

(5) “Family law dispute” means a dispute, claim or issue ~~in a proceeding, or in anticipation of a proceeding,~~ which is described in a participation agreement and arises under the family or domestic relations law of this State, including but not limited to:

(A) marriage, civil union, domestic partnership, divorce, dissolution, annulment, or property distribution;

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

(C) alimony, maintenance, or child support; or

(D) premarital, marital or post-marital agreements, or comparable agreements affecting civil unions or domestic partnerships.

(6) “Nonparty participant” means a person, other than a party and the party’s collaborative lawyer ~~that~~ who participates in a collaborative law process ~~and includes, but is not limited to, experts and other financial or mental health professionals; support persons; and potential parties.~~

(7) “Party” means an individual who signs a collaborative law participation agreement and whose consent is necessary to resolve a family law dispute under this act.

(8) “Proceeding” means a judicial or arbitral or adjudicative process before a tribunal, including related pre-hearing and post-hearing motions, conferences, and discovery.

(9) “Prospective party” means an individual who discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(10) “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.

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

(12) “Settlement agreement” means an agreement entered into by the parties to a collaborative law participation agreement that sets forth a resolution of the parties’ family law dispute.

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

(14) “Tribunal” means a court, ~~or~~ arbitrator, or administrative agency, as applicable, that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter.

#### COMMENT

This section adopts most of section 2 of the uniform act in statutory (and not rule) form with certain modifications. “Collaborative law communications” are statements that are made orally, through conduct, or in writing or another recorded form. As stated by the ULC comment, most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. The same is true of the privilege created here.

The term “Collaborative law participation agreement” has been modified in response to the AOC concern to clarify that the agreement will clarify that a complaint, petition or claim may not be filed with a tribunal before or during the collaborative process except to incorporate a settlement agreement into a final judgment.

Language was added to subsection a. (3) in an attempt to accommodate AOC concerns.

The concept of “Collaborative matter” though adopted from the uniform law is replaced with the label “family law dispute” since the proposed law is limited to family law disputes. “Person” is already defined in Title 1 of the New Jersey statutes and its definition is not repeated here. Again, since this act is limited to family law disputes and the term “person” is broadly defined to include legal entities, in many cases, in the text of the act, the term “person” is replaced with the term “individual”. References to family or domestic relations law, as set forth in Alternative A to the UCLA (and which are included in this report) are written to include civil union and domestic partnerships in order to comply with New Jersey law.

The term “settlement agreement” is included in this report as adopted from bill A410, a bill that established collaborative divorce as introduced in 2006, with slight modifications. The definition of “law firm” is eliminated because the concept as defined is entirely unworkable when dealing with legal services organization; it would be impossible for a person represented by such an entity to be able to obtain successor representation if another attorney from legal services was eliminated as a possible successor. The definitions of “proceeding” and “tribunal” are modified to accommodate the limitation of the act to family law disputes. The definition of “collaborative lawyer” takes into consideration the limitations imposed by New Jersey Supreme Court Ethics Opinion 699. The definition of “collaborative law process” is modified for clarity. All definitions are modified from the uniform law to reflect the limitations of this act to family law matters.

Reference may be made to the Uniform Law Commission Comments to the Uniform Collaborative Law Rules/Act of 2010, which can be accessed at [www.uniformlaws.org](http://www.uniformlaws.org).

### Section 3. Applicability

This act applies to a collaborative law process as defined by section 2 that is subject to a collaborative law participation agreement, also as defined by section 2, ~~that~~ which meets the requirements of section 4 and is signed on or after the effective date of this act. This act does not apply to any other collaborative law process or any other collaborative law participation agreement.

#### COMMENT

This section continues the substance of section 3 of the uniform act with minor modifications.

As noted in the uniform law comments, while parties are free to collaborate in any way they choose, if parties want the benefits and protections of this act, they must meet the requirements of this act. The effective date of the act sets the limitations of applicability so that the evidentiary privilege created by section 11 will not apply retroactively to agreements made before the act's effective date. Should parties wish to be covered by the act, they can sign a new collaborative law participation agreement on or after the effective date of this act or amend their existing agreement to conform to the act's requirements.

#### **Section 4. Collaborative law participation agreement requirements**

a. A collaborative law participation agreement shall:

- (1) be in a record;
- (2) be signed by the parties;
- (3) state the parties' intention to resolve a family law dispute through a collaborative law process under this act;
- (4) describe the nature and scope of the family law dispute;
- (5) identify the collaborative lawyer who represents each party in the process;
- (6) contain a statement by each collaborative lawyer confirming the lawyer's limited representation of a party in the collaborative law process, consistent with the New Jersey Supreme Court Rules of Professional Conduct [rest of November 5<sup>th</sup> text omitted]
- (7) set forth the manner by which a collaborative law process begins and the manner by which it terminates or concludes in accordance with sections 5 and 6 of this act;
- ~~(8) state that the parties will make a good faith effort to disclose information to each other during the collaborative law process in a timely, full and candid manner and without formal discovery in accordance with this act and that if either party fails to do so the other party may terminate the collaborative law process in accordance with section 6 of this act;~~
- ~~(9) [entire section from May 22<sup>nd</sup> version is omitted]~~
- ~~(10) [entire section from May 22<sup>nd</sup> version is omitted]~~
- ~~(11) describe the type of professional services and neutral expertise of nonparty participants that may be used by the parties during the collaborative law process and how those services will be compensated;~~
- ~~(12)~~ 8 state that any collaborative law communication of a party or a nonparty participant is confidential and ~~may be~~ subject to an evidentiary privilege under this act, and that the a privilege ~~which~~ may be waived only expressly and by both the parties or in the case of a or

nonparty participant, also by the nonparty participant having the right to exercise the privilege; and

(9) state that the conduct of the collaborative lawyer is governed by this act, the Rules Governing the Courts of the State of New Jersey, and the New Jersey Supreme Court Rules of Professional Conduct, and that this act does not alter the collaborative lawyer's responsibilities to the client under court rules.

b. Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this act or other law.

#### COMMENT

Subsections a. (1) through (6) are adopted from section 4 of the uniform act with minor modifications. Subsections a. (7) through (9) are additions suggested by New Jersey law. The statements to be contained in the collaborative law participation agreement have been expanded to accommodate concerns addressed by Ethics Opinion 699 and the New Jersey Constitution. All provisions that pertain to the regulation of attorney conduct (incorporated in earlier versions of the draft) are now removed from this section.

A collaborative law participation agreement is still required to set forth the manner by which a collaborative law process begins and ends (subsection a. (7). This is so the holders of the evidentiary privileges created by section 11 will know when the privileges may be invoked.

~~In order to effectuate subsections of this section, as well as other provisions of the uniform act, the New Jersey court rules also may need modification.~~

### Section 5. Beginning a collaborative law process

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

b. ~~A tribunal may not order a party to participate in a collaborative law process is~~ Participation in a collaborative law process is voluntary and may not be compelled by a tribunal.

#### COMMENT

This section contains portions of section 5 of the uniform act but intentionally is limited to the standards for commencement of the collaborative law process.

### Section 6. Concluding a collaborative law process

a. A collaborative law process is concluded by either:

(1) resolution of a family law dispute, or part of a family law dispute in which the parties agree that the remaining parts of the matter will not be resolved in the process, as evidenced by a signed ~~record~~ settlement agreement; or

(2) termination of the process.

b. A collaborative law process terminates when a party:

(1) gives notice to other parties in a record that the process is ended, which a party may do with or without cause; or

(2) files a document that begins a proceeding related to a family law dispute without the agreement of all parties; or

(3) except as otherwise provided by section 7 of this act, discharges a collaborative lawyer or a collaborative lawyer ~~withdraws from~~ ceases further representation of a party in accordance with the limited representation clause of a collaborative law participation agreement; or

(4) ~~the other party~~ does not comply with section 8 of this act and a party chooses to terminate the process ~~the parties have agreed that such noncompliance is a basis for termination of the collaborative law process.~~

c. A collaborative law process does not terminate if, with the consent of the parties, a party, or the party's collaborative lawyer on the party's behalf, requests a tribunal to ~~approve~~ incorporate a settlement agreement into a final judgment or any part thereof as evidenced by a signed record ~~or in accordance with section 7 of this act (1) requests a tribunal to issue emergency relief or (2) defends against such a request.~~

d. A collaborative law participation agreement may provide additional methods of terminating or concluding a collaborative law process consistent with this act and the Rules of Professional Conduct.

#### COMMENT

This section contains the substance of most of section 5 of the uniform act with modifications to clarify and refine language. It is also intentionally limited to the standards for conclusion or termination of the collaborative law process. See also section 7, subsection b, for further guidelines when termination is the result of disqualification or withdrawal of the collaborative lawyer. Subsection d. is modified in an attempt to accommodate AOC concerns.

#### **Section 7. Disqualification or withdrawal of collaborative lawyer in accordance with the limitation of representation clause; requirements; when process continues**

a. Except as otherwise provided in subsection c., a limitation of representation clause for purposes of a collaborative law participation agreement shall state that a lawyer may not appear

~~before a tribunal to represent a party in a proceeding related to the collaborative matter;~~

~~b. If a collaborative lawyer, in accordance with a limitation of representation clause in a collaborative law participation agreement as described in section a., ceases further representation of a client or is disqualified from representation of a party, A party's the collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal the cessation of representation or discharge.~~

~~e. b. A collaborative law participation agreement does not terminate if a collaborative lawyer, on behalf of a party:(1) requests that a tribunal incorporate a settlement agreement into a final judgment; or Although an attorney may request a tribunal to issue emergency relief to protect the health, safety, welfare or interests of the party (or defend against such a request), upon commencement of such an action, the collaborative law process will terminate in accordance with Section 6 (b) (2).~~

~~(2) requests a tribunal to issue emergency relief to protect the health, safety or welfare of a party or the members of that party's household, including but not limited to a restraining order, or defending against such a request~~

~~b. c. Notwithstanding section 6 ab.(3)(4), and subsection e. b. of this section, if a collaborative lawyer is discharged or withdraws from ceases representation of a party in accordance with the limitation of representation clause of a collaborative law participation agreement, the collaborative process continues if, not later than 30 days after the date of notice of the discharge or withdrawal cessation of representation is sent to the parties, as required by subsection a., the unrepresented party:~~

~~(1) retains a successor collaborative lawyer who is identified in an amended collaborative law participation agreement; and~~

~~(2) in that amended collaborative law participation agreement or other signed record, the parties consent to continue the process and the successor lawyer confirms representation of the party.~~

#### COMMENT

This section contains portions of sections 9 and 5 of the uniform act with modifications for clarity and appropriate deference to the court's authority to regulate attorney conduct and court procedure. This section is intentionally limited to the standards for a collaborative lawyer's withdrawal or disqualification from representing limitation of representation of a party to the collaborative law process and continuation of the process.

## Section 8. Disclosure of information

a. Except as provided by law other than this act, during the collaborative law process, on the request of ~~another~~ the other party, a party shall, ~~make a~~ in good faith, ~~effort to~~ provide timely, full, candid, and informal disclosure of information related to the family law dispute without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process except as provided by law other than this act.

b. ~~The parties may agree that~~ Unless the parties agree otherwise, failure to comply with section a. is a basis for termination of the collaborative law process shall terminate if either party does not comply with section a.

### COMMENT

This section contains the substance of section 12 of the uniform act with minor modifications for clarity. The ULC notes in its comment to Section 12, and in referring to the Prefatory Note, that voluntary informal disclosure of information related to a matter in a collaborative law process is a defining characteristic of collaborative law. The ULC further notes that 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 requests early in a matter in the hope of encouraging careful assessment and settlement. The Federal Rule of Civil Procedure, for example, requires that a party to litigation disclose names of witnesses, documents, and computation of damages “without awaiting a discovery request.” FED. R. CIV. P. 26(a)(1)(A).

Subsection b. is added at the suggestions of commenters and section 6 is modified accordingly.

Although there is no formal discovery procedure in collaborative law, the parties are not precluded from seeking legal recourse (which would terminate the process) for either a failure of disclosure or a fraudulent disclosure by either party. In this regard, collaborative law is no different from any other dispute resolution mechanism that is used outside of the court system, such as mediation, that is commenced without litigation.

## Section 9. Standards of professional responsibility and mandatory reporting not affected

This act does not affect, waive or supersede:

a. the professional responsibility obligations and standards applicable to a lawyer or other licensed professional in this State, including but not limited to the Rules of Professional Conduct; or

b. the obligation of a person to report abuse or neglect, abandonment, or exploitation of a

child or adult under the law of this State.

**COMMENT**

This section adopts section 13 of the uniform act. Opinion 699, issued in 2005 by the New Jersey Supreme Court Advisory Committee on Professional Ethics, is instructive with regard to the obligations of a collaborative lawyer to his or her client. References to the Rules of Professional Conduct are added here and elsewhere in the statute to underscore that the RPC governs the conduct of the collaborative lawyer just as it would in a litigated matter.

**Section 10. Confidentiality of collaborative law communication**

A collaborative law communication is confidential to the extent agreed to by the parties in a signed record or ~~as a communication between a lawyer and client~~, as provided by ~~N.J.S. 2A:84A-20~~ or other law.

**COMMENT**

This section adopts section 16 of the uniform act with minor modifications.

**Section 11. Privilege against disclosure for collaborative law communication; admissibility; discovery**

a. Subject to sections 12 and 13, a collaborative law communication made by a party, or any nonparty participant, is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

b. In a proceeding, and in addition to application of the lawyer-client privilege provided under New Jersey law, the following privileges apply:

(1) A party may refuse to disclose, and may prevent the party's lawyer, or a nonparty participant, or any other person from disclosing, a collaborative law communication.

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

c. The privilege of this section may be claimed by the party or nonparty participant in person, or if incapacitated or deceased, by the party or nonparty participant's guardian or personal representative. Where a corporation or association or other legal entity is the nonparty participant claiming the privilege, and the corporation, association or other entity has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

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

#### COMMENT

This section adopts section 17 of the uniform act. As stated in the ULC comment to this section, this section sets forth the uniform act's general structure for creating a privilege prohibiting disclosure of collaborative law communications in legal proceedings, which is based on similar provisions in the Uniform Mediation Act. The comments in that Act should be consulted for additional discussion of the issues raised here.

As noted by the ULC in its comment to the source section, parties are holders of the collaborative law communications privilege. The privilege of the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege in that the paramount justification of the privilege set forth by this section is to encourage candor by the parties, just as encouraging client candor is the central justification for the attorney-client privilege. The comment also notes that using the attorney-client privilege as a core base for the collaborative law communications privilege is also particularly appropriate since the extensive participation of attorneys is a hallmark of collaborative law.

Extending the privilege to nonparties for their own communications, in the ULC view, seeks to facilitate the candid participation of experts and others who may have information and perspective that would facilitate resolution of the dispute. According to the ULC, this provision also covers statements prepared by experts and other similar reports prepared for the collaborative law process and submitted as part of it.

Collaborative lawyers are not nonparty participants under the act. ~~A collaborative lawyer maintains a traditional attorney-client relationship with the party the lawyer represents, subject to the traditional attorney-client privilege, which~~ Similar to the attorney-client privilege, the privilege under this act is held by the client and may be waived by the client even over the lawyer's objection. ~~The lawyer's allegiance and responsibility is to the client and the lawyer must abide by a client's decisions. As a result, the lawyer has no additional right to independently assert privilege as a participant in the collaborative law process. See ULC Comment to Rule 2 Definitions and source section.~~

Subsection b. is intended to reaffirm that for purposes of the collaborative law communication privilege, what is protected is the communication that is made in the collaborative process --and not the underlying evidence giving rise to the communication.

### Section 12. Waiver and preclusion of privilege

a. A privilege under Section 11 may be waived in a record or orally during a proceeding if it is expressly waived by ~~all~~ both 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~~ who ~~makes a disclosure~~ discloses or makes a representation about a collaborative law communication ~~which~~ that prejudices another person in a proceeding ~~may not~~ is precluded from asserting a privilege under Section 11, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

#### COMMENT

This section adopts section 18 of the uniform act with minor word changes.

### Section 13. Limits of privilege

a. There is no privilege under section 11 for a collaborative law communication that is:

(1) ~~available to the public under the *Open Public Records Act*, N.J.S. 47:1A-1 et seq., or made during a session of a collaborative law process that is open, or is required by law to be open, to the public; or~~

(2) sought, obtained or used to threaten or plan to inflict bodily injury or a crime, or to commit or attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity; or

(3) in a settlement agreement resulting from the collaborative law process, evidenced by a record signed by ~~all~~ both parties to the agreement; or

~~(4) sought or offered in a proceeding involving a crime, or seeking rescission or reformation of a contract arising out of the collaborative law process or a defense thereto, if the 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, and the need for the evidence substantially outweighs the interest in protecting confidentiality.~~

(4) a disclosure in a report of suspected domestic violence to an appropriate agency under New Jersey law.

b. There is no privilege under Section 11 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 crime; or

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

c. The privileges under Section 11 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 or the unreasonableness of a collaborative lawyer's fee arising from or related to a collaborative law process; or

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

~~ed.~~ If a collaborative law communication is subject to an exception under subsection ~~a.(4)~~ ~~or b.~~ or c., only the part of the communication necessary for the application of the exception may be disclosed or admitted.

~~de.~~ Disclosure or admission of evidence excepted from the privilege under subsection ~~a.(4)~~ ~~or b.~~ or c. does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

~~ef.~~ The privileges under section 11 do not apply if the parties agree in advance in a signed record, ~~or if a record of a proceeding reflects agreement by the parties,~~ that all or part of a collaborative law process is not privileged. ~~This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.~~

#### COMMENT

This section adopts section 19 of the uniform act with modifications to clarify and refine language and adopt New Jersey law. For the most part, this section mirrors a comparable section in the Uniform Mediation Act, adopted in New Jersey at N.J.S. 2A:23C-6. However, in one instance, the exceptions to privilege in 2A:23C-6 is broader than the UCLA/R. See 2A:23C-6 a. (5). [Modifications made to subsection a. \(4\) and c. \(1\) are suggested by comments from the AOC.](#)

### **Section 14. ~~Authority of tribunal~~ Agreement may be enforceable in case of noncompliance**

~~a.~~ If a collaborative law participation agreement fails to meet the requirements of section 4, ~~a tribunal may nonetheless find that~~ the parties may be found to have intended to enter into a collaborative law participation agreement if:~~(1) they signed a record indicating an intention to enter into a collaborative law participation agreement and reasonably believed they were participating in a collaborative law process; and(2) each party received from that party's own lawyer the information as required to be set forth in a statement in accordance with subsection (a) (9) of section 4 of this act.~~

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

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

~~(2) apply the disqualification provisions of sections 5 and 7 to which the parties agreed; and~~

~~(3) apply a privilege under section 11.~~

**COMMENT**

This language is found at section 20 of the uniform act with ~~minor~~ significant modifications because of Winberry concerns. The Comment to the uniform act source section states that by establishing protections that cannot be waived by the parties the act protects persons from inadvertently, or inappropriately, entering into a participation agreement. It also states that “while parties should not be forced to participate in collaborative law involuntarily (citation omitted), the failures of collaborative lawyers in drafting agreements and making required disclosures and inquiries should not be visited on parties whose conduct indicates an intention to participate in collaborative law.” Additional language is added Changes to court rules are suggested to accommodate concerns raised by Ethics Opinion 699 and the issues raised by subsection 20(b) of the UCLR/A, which are not incorporated here. See end of Introduction to this revision.

**Section 15. Uniformity of application and construction**

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

**COMMENT**

This language is adopted from section 21 of the uniform act.

**Section 16. Relation to electronic signatures in global and national commerce act**

This act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, ~~15 U.S.C. Section 7001(e)~~, or authorize electronic delivery of any of the notices described in Section 103(b) of that act, ~~15 U.S.C. Section 7003(b)~~.

**COMMENT**

This section adopts section 22 of the uniform act.

**Section 17. Effective date**

This act takes effect on [fill in date].

**COMMENT**

This section adopts section 24 of the uniform act. In accordance with the commentary in the uniform act, the effective date should be no earlier than 90 days after the act is enacted so as to allow substantial time for notice to the bar and the public of the act’s provisions and for the training of collaborative lawyers.

**Section 18. Rules of Court**

The Supreme Court of New Jersey may adopt Rules of Court appropriate or necessary to effectuate the purposes of this act.

**COMMENT**

This section is new and is added to accommodate AOC concerns.

### **Section 19. Severability**

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

#### **COMMENT**

This section is new and is consistent with customary New Jersey statutory form.