



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report

Relating to

New Jersey Collaborative Law Act

May 7, 2012

This tentative report is distributed to advise interested persons of the Commission's 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. The Commission often substantially revises tentative recommendations as a result of the comments it receives. 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 tentative report or direct any related inquiries, to:

Marna L. Brown, Esq., Counsel
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: <http://www.njlrc.org>

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 experts and social workers trained in collaborative law) attempt to negotiate in good faith a mutually acceptable resolution of the parties’ dispute without court involvement. The hallmark of collaborative law is the lawyer disqualification clause whereby both parties agree that their attorneys will be disqualified from court representation of the parties if the collaborative law process should fail and the parties end up in an adversarial forum. The lawyer disqualification 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.

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 parties’ contract, i.e., the participation agreement. 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. The uniform law requires that the attorney disqualification provision and the full, fair and voluntary disclosure of all relevant information are made part of every participation agreement. 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. 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. Screening for domestic violence or other coercive behavior is mandatory under the law and application for emergency court orders, if needed, are permitted without causing the parties’ attorneys to be disqualified.

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.

The process of collaborative law raises ethical issues that have been analyzed by individual states and by the ABA. Even before enactment of the uniform law, the New Jersey Supreme Court Advisory Committee on Professional Ethics examined 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. See Opinion 699, issued in 2005 by the New Jersey Supreme Court Advisory Committee on Professional Ethics.¹

Of particular concern is the affect of attorney disqualification on the lawyer's ability to represent a client competently for a reasonable fee. The Advisory Committee opined that:

A fundamental principle of collaborative law . . . is that a lawyer is retained for a limited purpose: settlement of the dispute without litigation. If for whatever reason the collaborative process fails and either party resorts to traditional litigation, then the lawyers for both sides are required to withdraw, and any lawyer associated with the same firm as withdrawing counsel would be barred from accepting the representation. Thus, in some sense the client's continuing relationship with the lawyer is at the discretion of the opposing spouse. This could conceivably work a considerable hardship upon a client, who would then be required to retain new counsel to take up the case from scratch. [RPC citation omitted]. Because this imposed limitation on the scope of the lawyer's services is known at the outset of the representation, we think it is more accurate to analyze this condition as a limitation on the scope of representation, rather than as a withdrawal under RPC 1.16. Lawyers are permitted to impose some limitations on the nature of their practice. [citing to RPC 1.2(c).]

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. However, such representation and putative withdrawal 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.

The Advisory Committee found the requirement of informed consent to be essential to the process. 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.

¹ 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 concluded that if the limitation on the scope of the lawyer's representation is reasonable and the client proceeds with informed consent, then collaborative law practice is not inconsistent with the Rules of Professional Conduct. At the same time, an attorney's actions in pursuing the collaborative law approach are fully subject to all the requirements of those very Rules, including the strictures of RPC 1.6 pertaining to confidentiality.

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 representation² and the UCLR/A has broad support.³ In addition, at least six separate organizations/associations of professionals practice collaborative law in New Jersey as members of the International Academy of Collaborative Professionals ("IACP")⁴. These associations include attorneys, financial professionals and mental health professionals who focus primarily on collaborative divorce.⁵ 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."⁶

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. However, 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.

² 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.

³ 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; 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.

⁴ 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.

⁵ They are Jersey Shore Collaborative Group; Mid-Jersey Collaborative Law Alliance; New Jersey Collaborative Divorce Alliance; The New Jersey Collaborative Law Group; North Jersey Collaborative Law Group; and South Jersey Collaborative Law Group. The IACP has been in existence in some form since 1999.

⁶ See Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (2005).

Despite a difference of opinion in the ABA regarding adoption of the UCLR/A, clearly, in New Jersey, collaborative practice has been embraced as a successful form of dispute resolution, at least to resolve matrimonial disputes. 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.⁷ These bills, however, do not address many of the issues the uniform law seeks to mandate and clarify.

Nevada, Texas and Utah have adopted the UCLA.⁸ In 2012, thus far the UCLR/A has been introduced in the legislatures of five more jurisdictions: Hawaii, Maryland, Massachusetts, Washington, and the District of Columbia. California has created a task force to outline protocol for adoption of the UCLR/A in 2012-13.

When drafting a proposed New Jersey version of the uniform law, the Commission considered several factors as discussed below:

Evidentiary privilege for non-party professionals. The uniform law provides a privilege for communications made during the collaborative law process by non-attorney professionals and experts in order to further that process. Several commenters expressed the view that creating such a privilege in New Jersey is essential because of the parties' use of "neutral" experts (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. Thus, the privilege is the crux of the proposed act. In order to make the privilege enforceable, the proposed act expressly defines the manner in which the collaborative law process begins and ends, also a concern of commenters.

Informed consent to the collaborative law process. Ever mindful of the principles set forth in New Jersey Supreme Court Ethics Opinion 699, the Commission was concerned that the statute include a mechanism to help potential parties understand that they are entitled to make informed choices about the suitability of the collaborative law process vis a vis other types of dispute resolution. To make these choices, prospective parties are entitled to information about legal fees; the possible costs of other professionals, such as financial and mental health experts; and the requirement that, in the event the collaborative law process terminates, the parties may not retain their collaborative law attorneys in any litigation of the dispute that is the subject of the participation agreement.

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, section 14 of the uniform act, which requires 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 compel the lawyer to provide the prospective

⁷ 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.

⁸ 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.

party with sufficient information to make an informed decision about the benefits and risks of collaborative law, are not recommended for adoption. Nor is section 15.⁹ Instead, the proposed law is written to regulate the contents of the collaborative law participation agreement, requiring, among other things, that the agreement contain confirmation from each prospective party that he or she received information from the prospective attorney in order to make an informed decision about the collaborative law dispute resolution process. This information includes the risks and benefits of the collaborative law process and the attorney's view of the suitability of the collaborative law process for resolution of the prospective party's dispute (see proposed section 4). Additional requirements for the contents of the collaborative law participation agreement have been imposed, without which the participation agreement is not complete and the collaborative process cannot begin. Defining the scope of the collaborative law participation agreement also is necessary for enforcement of the privilege set forth in proposed section 11, as already mentioned.

Contents of the collaborative law participation agreement. Consistent with commenter suggestions and the concerns expressed above, section 4 of the proposed act requires the collaborative participation agreement to include confirmation of the party's understanding that should the collaborative process fail, and litigation ensue, the party's attorney will not represent the party going forward. Commenters also have suggested that when crafting a New Jersey version of the uniform law, the collaborative law participation agreement should require full, good faith disclosure of information by the parties to each other; and provide for unilateral termination of the collaborative law process if full disclosure is not made. Formal discovery is not part of the collaborative process but full disclosure and exchange of information is deemed essential.

Winberry v. Salsbury concerns. The Commission believes that the *entire* uniform law would not be suitable for statutory enactment in New Jersey because of *Winberry* 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).

Limit 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.¹⁰

⁹ See also section 15 of the uniform law which 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.

¹⁰ 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.

In sum, taking into account the above considerations, the Commission recommends adoption, in statutory (and not rule) form, of the privilege provisions of the uniform law and those provisions deemed necessary for enforceability of the collaborative law participation agreement. Since not all of the uniform act/rules are recommended for adoption, the numbering of the proposed sections do 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. Section 17 of the uniform act, pertaining to a privilege against disclosure for collaborative law communications, is now section 11 in the proposed act.

Proposed Act

Section 1. Short title

This act may be cited as the New Jersey Uniform 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 2. Definitions

a. In this act:

(1) “Collaborative law communication” means a statement, whether oral or in a record, ~~or verbal or nonverbal~~, that: ~~(A) is made to conduct, participate in, continue, or reconvene a~~ in the course of a collaborative law process; and ~~(B) occurs after the parties sign a collaborative law participation agreement and but before the collaborative law process is concluded.~~

(2) “Collaborative law participation agreement” means ~~an~~ a written agreement by persons 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.

(3) “Collaborative law process” means a procedure intended to resolve the family law dispute a collaborative matter without intervention by a tribunal ~~in which persons provided that the individuals in the dispute:~~

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law process 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 a tribunal, the collaborative lawyer will not continue to represent the party.

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

~~Alternative A~~

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

- ~~A. marriage, divorce, dissolution, annulment, and property distribution;~~
- ~~B. child custody, visitation and parenting time;~~
- ~~C. alimony, maintenance, and child support;~~
- ~~D. adoption;~~
- ~~E. parentage; and~~
- ~~F. premarital, marital, and post-marital agreements.~~

~~Alternative B~~

~~is described in a collaborative law participation agreement.~~

(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) “Law firm” means:(A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and~~

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

(7) “Nonparty participant” means a person, other than a party and the party’s collaborative lawyer that participates in a collaborative law process and includes, but is not

limited to, experts and other financial or mental health professionals; support persons; and potential parties.

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

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

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

~~(B) a legislative hearing or similar process.~~

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

(1210) “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.

(1311) “Related to a ~~collaborative matter~~ family law dispute” means involving the same parties, transaction or occurrence, nucleus of operative fact, claim, matter or issue as the ~~collaborative matter~~ 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.

(1413) “Sign” means, with present intent to authenticate or adopt a record: ~~(A) to execute or adopt a tangible symbol; or (B) to~~ ~~attach to or logically associate with the record an electronic symbol, sound, or process.~~

(1514) “Tribunal” means: ~~(A) a court, or arbitrator, administrative agency, or other body acting in an adjudicative capacity which that,~~ after presentation of evidence or legal argument,

has jurisdiction to render a decision affecting a party's interests in a matter; ~~or (B) a legislative body conducting a hearing or similar process.~~

COMMENT

This section adopts most of section 2 of the uniform act in statutory (and not rule) form with certain modifications. 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, 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 [provide link.]

Section 3. Applicability

This act applies to a collaborative law participation agreement that meets the requirements of Section 4 and is signed on or after the effective date of this act.

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 ~~must~~:
 - (1) be in a record;
 - (2) be signed by the parties;
 - (3) state the parties' intention to resolve a family law dispute ~~collaborative matter~~ through a collaborative law process under this act;
 - (4) describe the nature and scope of the family law dispute ~~matter~~;

- (5) identify the collaborative lawyer who represents each party in the process; ~~and~~
- (6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process;
- (7) set forth the manner by which a collaborative law process begins and the manner by which it is terminated or concluded in accordance with section 5 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) contain a statement by each party that the party has received from his or her collaborative lawyer (which may not, in and of itself, be construed or deemed a waiver of the lawyer-client privilege) of:
- (A) information about the benefits and risks of the collaborative process as compared with other issue resolution alternatives, including, but not limited to, the consequences of the lawyer's limitation of representation of the party in accordance with the collaborative law participation agreement, and the potential consequences of that limited representation;
- (B) an assessment of the appropriateness of the collaborative law process for resolving the family law dispute that is the subject of the collaborative law participation agreement;
- (C) notification that participation in the collaborative law process is voluntary and that any party has the right unilaterally to terminate the process without cause, which right cannot be waived;
- (D) notification that the collaborative law process will terminate if, after signing the collaborative law participation agreement, a party initiates before a tribunal a proceeding that is related to the family law dispute covered by the participation agreement, provided that a party may request a tribunal to approve a resolution of all or part of the family law dispute, as evidenced by a signed writing, without terminating or concluding the collaborative law process;

(E) notification that at any time during the collaborative law process, or if the collaborative law process is terminated, the collaborative lawyer, or any lawyer in a law firm with which the collaborative lawyer is employed or shares an ownership interest, will not, in accordance with the collaborative law participation agreement, represent the party before a tribunal in any proceeding related to the family law dispute covered by the collaborative law participation agreement; and

(F) notification that this act does not change in any way the collaborative lawyer's responsibilities to the client under the Rules of Professional Conduct.

(10) contain a statement by each party confirming that the party understands the information, assessment and notifications set forth in sections (9) (A), (B), (C), (D), (E) and (F) and consents to participation in the collaborative law process;

(11) describe the type of professional services and neutral expertise of a nonparty participant that may be used by the parties during the collaborative law process and how those services will be compensated; and

(12) 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, a privilege which may be waived by the party or nonparty having the right to exercise the privilege.

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

COMMENT

This section contains section 4 of the uniform act with 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. 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 ~~and concluding~~ a collaborative law process

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

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

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. ~~e.~~ A collaborative law process is concluded by either a:

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

~~(3)~~ (2) termination of the process.

~~b.~~ A collaborative law process terminates:~~(1)~~ 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) when a party:~~(A) begins a proceeding related to a ~~collaborative matter~~ family law dispute without the agreement of all parties; or

~~(3)~~(B) in a pending proceeding related to the matter: ~~(i) initiates~~ files a pleading, motion, or order to show cause, or requests ~~for~~ a conference with the tribunal or ~~(ii) requests~~ that the proceeding be put on the [tribunal's active calendar]; or ~~(iii) takes similar action requiring notice to be sent to the parties;~~ or

~~(3)~~ (4) except as otherwise provided by ~~subsection (e) 7,~~ when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party; or

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

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

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

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

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

~~(2) in a signed record:~~

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

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

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

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

~~(i) d. A collaborative law participation agreement may provide additional methods of terminating or concluding a collaborative law process consistent with this act.~~

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.

Section 7. Disqualification or withdrawal of collaborative lawyer; requirements; when process continues

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

b. Notwithstanding section 6 a.(4), if a collaborative lawyer is discharged or withdraws from representation of a party, the collaborative process continues if, not later than 30 days after the date of notice of the discharge or withdrawal 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 section 5 of the uniform act with modifications for clarity. This section is intentionally limited to the standards for a collaborative lawyer's withdrawal or disqualification from representing 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 party, a party shall make a good faith effort to provide timely, full, candid, and informal disclosure of information related to the collaborative matter 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.

b. The parties may agree that 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.

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

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

This act does not affect:

a. the professional responsibility obligations and standards applicable to a lawyer or other licensed professional in this State; 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 sState.

COMMENT

This section adopts section 13 of the uniform act.

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 ~~law of this state other than this act~~ N.J.S. 2A:84A-20 or other law.

COMMENT

This section adopts section 16 of the uniform act with minor modifications to reference New Jersey law.

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

a. Subject to ~~S~~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, 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.

ed. 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 may be waived by the client even over the lawyer's objection.

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 ~~47~~ 11 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

b. A person that makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Section ~~47~~ 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.

Section 13. Limits of privilege

~~a. There is no privilege under Section 17 for a collaborative law communication that is:~~
The privileges under Section 11 for a collaborative law communication do not apply to the extent that a communication is:

(1) available to the public under the Open Public Records Act, N.J.S.[fill in cite] 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 a threaten or statement of a plan to inflict bodily injury or a crime of violence; ~~(3) intentionally used to plan a crime,~~ to commit or attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity; or

~~(4) (3) in an~~ settlement agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement; or

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

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

(2) ~~(5)~~ 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; or

~~e. There is no privilege under Section 17 if a (6) 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, and the collaborative law communication is sought or offered in:~~

~~(1) a court proceeding involving a felony or misdemeanor; or~~

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

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

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

f. ~~d.~~ The privileges under ~~§~~section 47 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.

Section 14. Authority of tribunal in case of noncompliance

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

- (1) signed a record indicating an intention to enter into a collaborative law participation agreement;
- (2) reasonably believed they were participating in a collaborative law process; and
- (3) received from each 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, ~~6, 9, 10 and 11~~ to which the parties agreed; and
- (3) apply a privilege under ~~§~~section 47 11.

COMMENT

This language is found at section 20 of the uniform act with minor modifications. 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 to accommodate concerns raised by Ethics Opinion 699.

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(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

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.