



**NEW JERSEY LAW REVISION COMMISSION**

**Final Report**

**Relating to**

**New Jersey Family Collaborative Law Act**

**July 23, 2013**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.  
Please consult the New Jersey statutes in order to determine the law of the State.

Please send comments concerning this 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](mailto:njlrc@njlrc.org)  
Web site: <http://www.njlrc.org>

## INTRODUCTION

The Uniform Collaborative Law Act (UCLA) was recommended for enactment by the Uniform Law Commission (ULC) in 2009. In 2010, it was revised, amended, and re-titled the Uniform Collaborative Law Rules/Act (UCLR/A).

As of the date of this report, Alabama, Hawaii, Ohio, Nevada, Texas, Utah, Washington, and the District of Columbia, have adopted the uniform law.<sup>1</sup> In 2013, the UCLR/A has been introduced in the legislatures of Illinois, Massachusetts, Oklahoma, New Mexico, and South Carolina. In addition, 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.

Collaborative law is a voluntary, non-adversarial settlement process. 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 other collaborative professionals, 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 not included in the draft below) 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 allow 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.

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, advise clients of their legal rights, and protect client confidences.<sup>2</sup>

According to the website of the International Academy of Collaborative Professionals (“IACP”)<sup>3</sup>, the collaborative process of dispute resolution is now practiced in 39 states and the

---

<sup>1</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.

<sup>2</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).

District of Columbia<sup>4</sup>, involving more than 235 practice groups. 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.

### **Limited Scope of 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 the issue, 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," which is permitted by the Model Code of Professional 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>5</sup>

---

<sup>3</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.

<sup>4</sup> The 39 states 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>5</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

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 concern is the potential hardship for a client if the attorney is required to withdraw and the client is 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.”

Lawyers are permitted to limit the scope of their representation pursuant to RPC 1.2(c) 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.

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 RPC 1.6 pertaining to confidentiality.

Since the issuance of Opinion 699, limitation of the scope of legal 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 services, is now well-recognized in New Jersey and has 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).

---

examined the propriety of collaborative law itself and whether the “general contours of collaborative practice are consistent with the Rules of Professional Conduct.”

At least eight state bar ethics committees, in states other than New Jersey, have expressly approved the use of collaborative law as a form of limited-scope representation<sup>6</sup> and the UCLR/A has broad support.<sup>7</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 UCLA. The ABA House of Delegates, at its 2011 annual meeting in Toronto, rejected a resolution calling for the ABA to endorse the UCLR/A. Speakers at the meeting opposed ABA adoption of the collaborative law guidelines, citing concerns about the regulation of lawyers by state legislatures.<sup>8</sup> Collaborative law practitioners advised 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.

### **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 an enforceable privilege. 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 uniform law (unlike the draft below) 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

---

<sup>6</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>7</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 UCLA was also designated as “Suggested State Legislation” by the Council of State Governments.

<sup>8</sup> Rachel M. Zahorsky, *ABA Rejects Proposed Measure for Collaborative Law Guidelines*, ABA JOURNAL, [http://www.abajournal.com/mobile/article/the\\_aba\\_house\\_of\\_delegates\\_rejected\\_resolution\\_11b/](http://www.abajournal.com/mobile/article/the_aba_house_of_delegates_rejected_resolution_11b/) (last visited July 5, 2013).

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). Pursuant to the uniform law (unlike the draft below), application for emergency court orders is permitted, if needed, without causing the parties' attorneys to be disqualified (Rules/Sections 7 and 9).<sup>9</sup>

The uniform law imposes many requirements on attorney conduct that have not been incorporated in the Commission draft. The uniform 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 also provides 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, made several significant changes to the original act. 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 include 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.

### **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 careful crafting of a New Jersey version of the uniform act.

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

---

<sup>9</sup> 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.

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>10</sup> The proposed New Jersey version follows the uniform law approach and in doing so, includes language from similar provisions in the Uniform Mediation Act, N.J.S. 2A:23C-1 *et seq.* (see section 11 below).<sup>11</sup>

The privilege held by parties, though derived from the lawyer-client privilege, provides protection to all collaborative law communications as defined in the act (see section 2 below). 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 be protected by the privilege against the disclosure of information they provide during the course of the collaborative process. 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.”<sup>12</sup>

Since privileges for 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>13</sup>

Adapting the uniform law to New Jersey, however, requires deference to the role of the judiciary in regulating attorneys and court practice and procedure. The New Jersey Constitution affords the Supreme Court, and not the legislative or executive branches of government, jurisdiction over the practice of law and attorney conduct. See Article 6, §2, ¶3. As a result, certain provisions of the uniform law are more appropriately addressed in New Jersey by court rule rather than by statute. Section 14 of the uniform act, for example, requires that a prospective collaborative lawyer assess with the prospective party factors that the lawyer reasonably believes

---

<sup>10</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>11</sup> Under current New Jersey Law, there is a victim counselor confidentiality privilege (2A:84A-22.15) which pertains to 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.

<sup>12</sup> Lawyers are not included in the definition of “non-party participant” and the privilege does not extend to the communications of collaborative lawyers. The protection from disclosure of any confidential communication afforded by the statute, just as with the attorney-client privilege, 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.”)) The ULC explains 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 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.

<sup>13</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.”

relate to whether the process is appropriate and provide the prospective party with sufficient information to make an informed decision about the benefits and risks of collaborative law. This provision appears to regulate attorney conduct and is not recommended for statutory adoption. Nor is section 15.<sup>14</sup>

Sections of the uniform act that the ULC Drafting Committee suggested should be enacted by judicial rule rather than by legislation are not included in the proposed act. Those sections 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).

The Commission also considered these additional factors during the drafting process:

**1. Contents of the collaborative law participation agreement.** The goal of the proposed law is not to regulate attorney conduct, but to 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. 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. Beyond minimum requirements, however, the rules/act leaves the collaborative law process to agreement between parties and collaborative lawyers.”

Section 4 of the draft below requires that the collaborative participation agreement memorialize the limitation of representation that is a hallmark of the collaborative law process and is permitted by Opinion 699 and clearly indicate that the conduct of the collaborative lawyer is governed by the Rules Governing the Courts of the State of New Jersey and the Rules of Professional Conduct.

**2. Limitation of the act to family law disputes.** Consistent with other jurisdictions, commenter suggestions, and prevalent collaborative law practice, the act is limited to family law matters.<sup>15</sup>

The goal of the draft below is not 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.

---

<sup>14</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.

<sup>15</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.



In order to address concerns raised informally by the Administrative Office of the Courts (“AOC”), the draft was revised several times in an effort to remove aspects of the uniform law that pertained to attorney conduct and court procedures. The proposed New Jersey statute contained in this Report is drafted to create a privilege, establish the limits of that privilege, and to recognize the parameters of the collaborative law process so that the privilege may be exercised.

Provisions of the uniform law that regulate attorney conduct and are also important to the effectiveness of the law, such as those 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 more appropriate for inclusion in the court rules.<sup>16</sup>

### **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>17</sup> A “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>18</sup>

Identical bills proposing a collaborative law act for divorce proceedings were introduced in the New Jersey Assembly Judiciary Committee in the 2004 and 2006 Legislative sessions, but were not released from committee for a vote of the full Assembly.<sup>19</sup> Those bills did not address all of the issues covered by the uniform law, or this draft, especially the issue of evidentiary privilege.

The principles set forth in the original Tentative Report were 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

---

<sup>16</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>17</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>18</sup> See Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (2005).

<sup>19</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.

collaborative law groups noted above, made further recommendations, many of which are incorporated in this revised Report. As already noted, modifications were also made in response to comments received from the AOC.

### **Commission Recommendations**

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 other provisions deemed necessary for enforceability of the collaborative law participation agreement as proposed in this Report.

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 the comments to each section). Section 5 of the uniform act is incorporated into three separate sections in the proposed act (Sections 5, 6, and 7), and Sections 4 (Section 4 below) and 20 (Section 14 below) of the uniform act were modified to comport with Ethics Opinion 699 and to address the role of the New Jersey judiciary.

It is respectfully suggested that – if the proposed act is adopted by the Legislature – the New Jersey Supreme Court may wish to consider implementing additional court rules to impose affirmative responsibilities upon collaborative lawyers. The Commission defers to the Court as to the propriety of any such rules, but encourages consideration of provisions contained in the uniform act, but left out of this Report as explained above, including the following:

1. A requirement that the lawyer 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 (Rule/Section 14 (1) and (2) of the UCLR/A).

2. A requirement that the lawyer 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 initiate 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 (Rule/Section 14 (3) of the UCLR/A).

3. A requirement that the lawyer make a reasonable inquiry, and 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 request 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 (Rule/Section 15 of the UCLR/A).

## **Proposed Act**

### **Section 1. Short title**

This act may be cited as the New Jersey Family Collaborative 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 1a. Legislative findings**

a. Since at least 2005, attorneys in New Jersey have participated in the dispute resolution method known as collaborative law, in 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 because the parties intend to resolve their dispute without litigation. Instead, each party, represented by his or her attorney, meets 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, 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 subject matter to be addressed through the collaborative process before a court or other tribunal other than to seek incorporation of a settlement agreement into a final judgment.

c. 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. The non-party participants in the collaborative law process described in subsection b. of this section, 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 that created by New Jersey's adoption of the Uniform Mediation Act. This section is also intended to recognize that collaborative law practice has existed in New Jersey for quite some time.

## Section 2. Definitions

In this act:

a. “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.

b. “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.

c. “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: (1) sign a collaborative law participation agreement; and (2) are represented by collaborative lawyers.

d. “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.

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

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

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

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

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

f. “Nonparty participant” means a person other than a party and the party’s collaborative lawyer, who participates in a collaborative law process.

g. “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.

h. “Proceeding” means a judicial or arbitral or adjudicative process before a tribunal.

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

j. “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.

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

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

m. “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.

n. “Tribunal” means a court, 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 incorporates most of Section 2 of the uniform act 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 that the agreement should 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.

The second sentence of subsection b. was stricken since it contained a substantive requirement not appropriate in a definition and was arguably inconsistent with the language contained in Section 6. Language was initially added to subsection c. in an attempt to accommodate AOC concerns, but that language was moved to Section 6 since it contained a substantive provision most appropriate for inclusion in the body of the statute rather than in the definitions section. The second sentence of subsection d. was similarly relocated to Section 6. In addition, Subsection d. was modified to remove “who has been trained in the collaborative law process” – this language had been included in an earlier draft at the request of the New Jersey State Bar Association, but was removed from the Final Report as a result of concerns about the nature, source and extent of the training required and concerns that the provision might infringe on the Supreme Courts power to control the practice of law.

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. Since this act is limited to family law disputes and the term “person” is broadly defined to include legal entities, 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” included in this report was adopted from bill A410 as introduced in 2006 with slight modifications. That bill sought to establish collaborative divorce. The definition of “law firm” was eliminated because the concept as defined is 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” were 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.

The Uniform Collaborative Law Rules/Act of 2010 can be accessed at [www.uniformlaws.org](http://www.uniformlaws.org).

### **Section 3. Applicability**

This act applies to a collaborative law process that is subject to a collaborative law participation agreement, 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 incorporates 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. If parties wish to be covered by the act, they may 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 pursuant to 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 that a collaborative lawyer's role is limited as defined in this act, consistent with the New Jersey Supreme Court Rules of Professional Conduct;
- (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 any collaborative law communication of a party or a nonparty participant is confidential and subject to an evidentiary privilege under this act, and that the privilege may be waived only expressly and by both parties or, in the case of a 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 the Rules of Professional Conduct and any other applicable Court Rules.

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

#### COMMENT

Subsections a. (1) through (6) were drawn from section 4 of the uniform act with minor modifications. Subsections a. (7) through (9) are additions that reflect 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. Provisions pertaining to the regulation of attorney conduct were removed from this section.

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

### **Section 5. Beginning a collaborative law process**

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

b. 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 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 as evidenced by a signed settlement agreement; or

(2) termination of the process.

b. A collaborative law process terminates when:

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

(2) a party files a document that begins a proceeding with a tribunal or any other litigation process related to the family law dispute without the agreement of all parties; or

(3) either party is subject to, or obtains, a temporary or final restraining order in accordance with the Prevention of Domestic Violence Act of 1991, N.J.S. 2C:25-17, et seq., as amended; or

(4) an action is commenced requesting that a tribunal issue emergency relief to protect the health, safety, welfare or interests of a party or the defense against such a request is commenced; or

(5) except as otherwise provided by section 7 of this act, a party discharges a collaborative lawyer; or

(6) a party fails to provide information pursuant to Section 8 of this act that is necessary to address the issues in dispute, and one of the parties chooses to terminate the collaborative process as a result; or

(7) a collaborative lawyer ceases further representation of a party.

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 incorporate a settlement agreement into a final judgment.

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.

e. In the event the collaborative law process does not result in a judgment resolving the family law dispute and the dispute is, instead, submitted to a tribunal for adjudication, the collaborative lawyer will not continue to represent the party in that family law dispute.

#### COMMENT

This section contains the substance of most of Section 5 of the uniform act with modifications to clarify and refine language, but is limited to the standards for conclusion or termination of the collaborative law process.

Subsection a. was modified to address AOC concerns about potential piecemeal litigation and because in New Jersey collaborative professionals do not seek to incorporate the settlement agreement into a final judgment until the entire dispute is resolved.

In subsection b.(2), the word "court," which had been inserted before "tribunal" at the request of the NJSBA was removed after additional review since "tribunal" is a defined term that includes "court" in its definition. In that same subsection, the word "a" before "family dispute" was changed to "the" to clarify that the reference is to the family law dispute that is the subject of the collaborative law process.

The language contained in subsection b.(3) was initially added to Section 2 c. in an attempt to accommodate AOC concerns, but was later moved to Section 6 since it contains a substantive provision most appropriate for inclusion somewhere other than the definitions section. Subsection d. was modified in an attempt to accommodate AOC concerns. Subsection b.(4) was previously Section 7 b., but its location in that Section was causing confusion about whether it conflicted with subsections c. (2) or (3) – since those subsections are not identical, they are now collected in this section in an effort to make the language more clear.

Subsection 6. e. contains language that was moved from Section 2, the definitions section, to this section since it is a substantive provision. The language of subsection e. was drawn from the UCLA, and revised for inclusion in this Report. The UCLA extends the disqualification beyond the original matter contemplated by the collaborative law participation agreement to include related matters. It also applies to lawyers in a law firm with which the collaborative lawyer is associated, rather than applying only to the collaborative lawyer individually. As noted in the Introduction to this Report, the uniform law is not, in its entirety, suitable for statutory enactment in New Jersey because of *Winberry v. Salisbury* concerns and the Commission's goal was to limit its drafting to the provisions of the uniform law that do not interfere with matters of court practice and procedure.

The goal of the Commission in revising the language of what is now subsection e. of this section was to make sure that the provision reflected the guidance provided by New Jersey law, Court Rules and the Rules of Professional Conduct. Based on the information available to the Commission at the time this Report was issued, it does not appear that the issue of a collaborative lawyer's later representation of a collaborative law client in subsequent litigation has been a significant one to this time. To the contrary, the information available suggested that lawyers who practice collaborative law are unlikely to engage in such representation. The language of subsection e., as currently drafted, however, would permit a collaborative lawyer to represent a client in a collaborative matter, conclude that representation with the entry of a judgment, and subsequently represent the client in matters related to the family law dispute that had been resolved by the collaborative process. Post-judgment motions are one example of such a circumstance. Since subsection e., as drafted, makes the disqualification of the lawyer contingent on the failure of the collaborative law process, a process that concludes with a judgment would not likely be deemed to have failed, so the disqualification would not apply. The Commission takes no position on the merits of allowing the collaborative lawyer to represent the collaborative client in a subsequent matter, it simply recognizes that the current language permits such representation.



Finally, it was of concern to the Commission that the collaborative lawyer's limited representation of his or her clients not run afoul of the prohibition against an attorney agreeing to forgo legal representation of a client as a part of a settlement agreement. Based on a review of the Rules of Professional Conduct and the New Jersey case law interpreting the RPCs, the limitation of representation specifically authorized by *RPC 1.2(c)* ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.") does not appear to be problematic in that regard. As the Court explained in *Cardillo v. Bloomfield 206 Corp.*, 411 N.J. Super. 574, 578-80 (App. Div. 2010),

under *RPC 5.6(b)* "[a] lawyer shall not participate in offering or making:...(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." *RPC 5.6(b)* is modeled after the American Bar Association's (ABA) *Model Rule of Professional Conduct 5.6(b)*. See *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 19, 607 A.2d 142 (1992) (explaining that New Jersey adopted the ABA *Model Rules of Professional Conduct*, including *RPC 5.6*, in 1984).<sup>1</sup> The rationale for the *Model Rule* has been explained as follows:

First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the [*Model Rules*] generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the strong countervailing policy favoring the public's unfettered choice of counsel.

[ABA Comm. Ethics and Prof'l Responsibility, Formal Op. 93-371 (1993) (discussing *RPC 5.6* in the context of settlement of mass tort litigation)].

Thus, if Cardillo agreed to restrict her practice as part of the settlement of the *Rubinstein* litigation, *RPC 5.6(b)* was violated.

Defendants maintain that *RPC 5.6(b)* is inapplicable because the Cardillo Agreement was not "part of the settlement of a controversy between private parties."...

We reject this argument because it ignores the fact that the two agreements were being negotiated simultaneously and were intertwined...

Indeed, the Cardillo Agreement is expressly tied to the *Rubinstein* litigation, because in the Cardillo Agreement, defendants agreed to waive any conflict Cardillo had in the *Rubinstein* litigation and to withdraw any conflict of interest application pending in court against her. As the trial court noted on the motion for reconsideration, Cardillo agreed not to represent any clients against defendants in the future in exchange for defendants' agreement to withdraw the motion to disqualify Cardillo in the *Rubinstein* litigation. The parties cannot circumvent the import of *RPC 5.6(b)*, and the reality of their transaction by expressly claiming during the negotiations that they are negotiating the two agreements separately and then by executing two separate agreements. Nor may they defeat application of the *RPC* by the device of arranging to execute the agreements on different days or with minor negotiations in the interim.

The Cardillo Agreement violates *RPC 5.6(b)* because it restricts Cardillo's right to practice law and it was part of the settlement of the *Rubinstein* litigation.

Based on the Court's determination in *Cardillo*, the ability of an attorney to limit the scope of his or her representation of a client pursuant to *RPC 1.2(c)* in the manner contemplated by the proposed statutory language pertaining to collaborative law does not appear to be precluded by the language of *RPC 5.6(b)*.

## **Section 7. Disqualification or withdrawal of collaborative lawyer; notice requirement; when process continues**

a. If a collaborative lawyer ceases or is disqualified from representation of a party, prompt notice of the cessation or discharge shall be given to all parties in a record.

b. Notwithstanding section 6 b.(5), if a collaborative lawyer is discharged or ceases representation of a party, the collaborative process continues if, not later than 30 days after the

date of notice of the discharge or cessation of representation is sent to the parties pursuant to subsection a. of this section, 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, 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. The original subsection b. has been moved to Section 6, which identifies other bases for the termination of the collaborative process, so the scope of this Section is now limited to impact of a collaborative lawyer's termination of representation of a party on the collaborative law process and the continuation of the process.

### **Section 8. Disclosure of information**

Except as provided by law other than this act, during the collaborative law process a party shall, in good faith, provide timely, full, and candid 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.

#### 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, 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).

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.

### **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 incorporates 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 provided by law.

#### **COMMENT**

This section incorporates 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) of this section, 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 by 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 created by 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, readily available from other sources, 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 incorporates Section 17 of the uniform act, which sets forth the uniform act's general structure for creating a privilege prohibiting disclosure of collaborative law communications in legal proceedings, and which is based on similar provisions in the Uniform Mediation Act.

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 base for the collaborative law communications privilege is particularly appropriate since the extensive participation of attorneys is a hallmark of collaborative law.

Extending the privilege to nonparties for their own communications will, in the ULC view, facilitate the candid participation of experts and others who may have information and perspectives 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. As with 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 right to independently assert privilege as a participant in the collaborative law process.

Subsection d. 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 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 who discloses or makes a representation about a collaborative law communication that prejudices another person in a proceeding 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 incorporates 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) 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 both parties to the agreement; or

(4) a disclosure in a report of suspected domestic violence or of suspected child abuse 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.

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

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

f. The privileges under section 11 do not apply if the parties agree in advance in a signed record that all or part of a collaborative law process is not privileged.

#### COMMENT

This section incorporates Section 19 of the uniform act with modifications to clarify and refine language and incorporate New Jersey law. For the most part, this Section mirrors a comparable section in the Uniform Mediation Act, enacted in New Jersey at N.J.S. 2A:23C-6. However, in one instance, the exception to privilege in N.J.S. 2A:23C-6 is broader than the UCLA/R. See N.J.S. 2A:23C-6 a.(5). Modifications made to subsections a.(4) and c.(1) were suggested by comments from the AOC.

### **Section 14. Agreement to participate in a collaborative process may be enforceable in case of noncompliance**

If a collaborative law participation agreement fails to meet the requirements of section 4, the parties may be found to have intended to enter into a collaborative law participation agreement if 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.

#### COMMENT

This language is found at section 20 of the uniform act with 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."

### **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 drawn 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, or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

**COMMENT**

This section incorporates Section 22 of the uniform act.

**Section 17. Effective date**

This act takes effect on [fill in date].

**COMMENT**

This section incorporates 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. Severability**

If any provision of this act or its application to any person or circumstance is held invalid, the invalidity shall 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 language found in other New Jersey statutes (see, for example, Titles containing the Uniform Commercial Code, Professions and Occupations, Municipalities and Counties, etc.).