State of Alabama

Alabama Law Institute

Alabama Uniform Collaborative Law Act

January 2013

ALABAMA LAW INSTITUTE
www.ali.state.al.us

Alabama State House
Suite 207
11 South Union Street
Montgomery, AL 36130
(334) 242-7411
FAX (334) 242-8411

Law Center
Room 326
Post Office Box 861425
Tuscaloosa, AL 35486
(205) 348-7411
FAX (205) 348-8411

Table of Contents

Page

PREFACE

The Uniform Collaborative Law Rules/Act (UCLR/A), was originally promulgated by the Uniform Law Commission as an act in 2009 and subsequently amended in 2010. The 2010 Amendments to the Uniform Collaborative Law Rules/Act created an explicit mechanism for the operative provisions of the act to be adopted in rule, rather than statute, thereby giving the state the option of the method for adoption. Alabama chose a hybrid position. The majority of the provisions are being presented as statutes to the Legislature for their consideration. However, several of the provisions that are more suited to adoption by rule have been omitted and will be left to court rule. The Act also provides states with the option to either limit application of the Act to family law matters or to not impose such a limitation. Alabama chose to limit the application of the Act to family law matters, but did broaden the application to family law matters in Probate Court, such as guardianships.

Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having the matter decided by a court. Under the provisions of the Act the lawyers and clients agree that the lawyers will represent the clients solely for purposes of settlement, and that the clients will hire new counsel if the case does not settle. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. No one is required to participate, and parties are free to terminate the process at any time.

The basic ground rules for collaborative law are set forth in a written agreement ("collaborative law participation agreement") in which parties designate collaborative lawyers and agree not to seek a judicial resolution of a dispute during the collaborative law process. The parties agree that they have a mutual right to terminate collaborative law at any time without giving a reason.

The Act mandates essential elements of a process of disclosure and discussion between prospective collaborative lawyers

and prospective parties to better insure that parties who sign participation agreements do so with informed consent. It requires collaborative lawyers to make reasonable inquiries and take steps to protect parties against the trauma of domestic violence.
Specifically, the Act:

- applies only to collaborative law participation agreements that meet the requirements of the act;

- establishes minimum requirements for collaborative law participation agreements,;

- specifies when and how a collaborative law process begins and is concluded;

- creates a stay of proceedings when parties sign a participation agreement to attempt to resolve a matter related to a proceeding pending before a court while allowing the court to ask for periodic status reports;

- makes an exception to the stay of proceedings for emergency orders to protect health, safety, welfare or interests of a party or child of a party;

- requires parties to voluntarily disclose relevant information during the collaborative law process without formal discovery requests and update information previously disclosed that has materially changed; and

- authorizes judicial discretion to enforce agreements that result from a collaborative law process.

This proposed act is the result of a study committee chaired by Senator Cam Ward who also served on the national committee. Penny Davis served as the reporter on the project.

January 2013

Othni J. Lathram
Director

UNIFORM COLLABORATIVE LAW ACT

SECTION 1. SHORT TITLE. This act may be cited as the Alabama Uniform Collaborative Law Act.

Alabama Comment

SECTION 2. DEFINITIONS. 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 collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

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

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

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

(5) "Collaborative matter" 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 but not limited to, the following:

(A) marriage, divorce, dissolution, annulment, and property distribution;

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

(C) alimony, maintenance, and child support;

(D) adoption and other probate court matters involving families and children;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

~~**Alternative B**~~

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

~~**End of Alternatives**~~

~~(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.~~

(6) "Law firm" means: a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization.

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

(8) "Party" means a person that signs a collaborative law

participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual or entity including those acting in a fiduciary capacity, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(11) "Prospective party" means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

(14) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, 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.

Alabama Comment

This section is similar to Section 2 of the Uniform Collaborative Law Act (Uniform Act) except for the definitions of (5) "Collaborative matter", (6) "Law firm" and (9) "Person".

The definition of (5) "Collaborative matter" is very similar to Alternative A from the Uniform Collaborative Law Act. However,

two changes in the definition were made. First, after the word "including" Alabama added the words "but not limited to, the following". Second, Alabama expanded coverage under subsection (D) by adding after the word "adoption" the words "and other probate court matters involving families and children".

The definition of (6) "Law firm" is from the "Terminology" in Alabama Rules of Professional Conduct.

The phrase "or entity including those acting in a fiduciary capacity" was added after the word "individual" in definition (9) to reflect the expansion of Alternative A in subsection (5) to include "other probate court matters involving families and children." Consequently, conservators, as well as others acting in a fiduciary capacity, may be involved in the collaborative process.

Although certification as a collaborative lawyer is not required under this law, lawyers have an ethical duty to provide competent representation to a client, which requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. It is recommended that a lawyer who holds himself/herself out as a collaborative lawyer satisfy the Minimum Standards for Collaborative Practitioners adopted by the International Academy of Collaborative Professionals.

Comment

"Collaborative law process" and "collaborative law participation agreement." A collaborative law process is created by written contract, a collaborative law participation agreement. It requires parties to engage collaborative lawyers. The minimum requirements for collaborative law participation agreements are specified in Section 4.

"Collaborative law communication." Section 17 creates an evidentiary privilege for collaborative law communications, a term defined here.

The definition of "collaborative law communication" parallels the definition of "mediation communication" in the Uniform Mediation Act Section 2(2). Collaborative law communications are statements that are made orally, through conduct, or in writing or other recorded activity. This definition is similar to the general rule, as reflected in Federal Rule of Evidence 801(a), which defines a "statement" as "an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a).

Understandable confusion has sometimes resulted because the terms "oral *or* . . . verbal" are both used in Section 2(1) and some think the terms are synonymous. They are not. "Oral" can be defined as "[u]ttered by the mouth or in words; spoken, not written." BLACK'S LAW DICTIONARY 1095 (6th ed. 1990). Although commonly used interchangeably with "oral," "verbal" is defined strictly as "of or pertaining to words; expressed in words, whether spoken or written." *Id*. at 1558. "Thus, 'verbal' is a broader term, and it is possible for something to be verbal but not oral." Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 102 n.6 (2001); *see also* Lynn E. MacBeth, *Lessons In Legalese: Words Commonly Misused by Lawyers ... or, Sounds Like*, LAW. J., May 2002, at 6 ("Unfortunately, the word verbal has been so misused that . . . it has come to mean 'oral.' However, in standard English verbal means 'consisting of words,' as opposed to nonverbal, which is communication by signs, symbols, and means other than words. . . . The correct adjective for a spoken communication is *oral*, or if you want to sound more erudite, *parol*. Verbal communication encompasses both written and spoken communication that consists of words.").

Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. ARK. CODE ANN. § 16-7-206 (1999); CAL. EVID. CODE § 1119 (West 1997); IOWA CODE ANN. §§ 679C.102, 679C.104 (West Supp. 2009); KAN. STAT. ANN. § 60-452a (2008) (assertive representations); MASS. GEN. LAWS ch. 233, § 23C (1986); MONT. CODE ANN. § 26-1-813 (2009); NEB. REV. STAT. § 25-2914 (LexisNexis 2004); NEV. REV. STAT.

ANN. § 48.109 (West 2004); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OHIO REV. CODE ANN. § 2317.023 (West 2004); OKLA. STAT. ANN. TIT. 12, § 1805 (West 1993); OR. REV. STAT. ANN. § 36.220 (West 2003); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (2004); VA. CODE ANN. § 8.01-576.10 (2007); WASH. REV. CODE ANN. § 5.60.070 (West 2009); WIS. STAT. § 904.085 (West 2000); WYO. STAT. ANN. § 1-43-102 (2009). The same is true of the privilege created by this act.

The mere fact that a person attended a collaborative law session—in other words, the physical presence of a person—is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a "communication" because it is meant as an assertion; however nonverbal conduct such as smoking a cigarette during the collaborative law session typically would not be a "communication" because it was not meant by the actor as an assertion.

Mental impressions that are based even in part on collaborative law communications would generally be protected by privilege. More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid collaborative law communications. *But see* U.S. v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) (finding that ordinarily the act of giving a document to an attorney will not be privileged). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. *But see* U.S. v. White, 950 F.2d 426, 430 & n.2 (7th Cir. 1991) (noting the distinction between communication and lack of communication). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.14[3][a] (Joseph M. McLaughlin, ed., 2nd ed. 1997). Similarly, a client's revelation of a hidden scar to an attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a

communication.

If evidence of mental impressions would reveal, even indirectly, collaborative law communications, then that evidence would be blocked by the privilege. *See* Gunther v. U.S., 230 F.2d 222, 223-24 (D.C. Cir. 1956). For example, a party's mental impressions of the capacity of another party to enter into a binding settlement agreement would be privileged if that impression was in part based on the statements that the party made during the collaborative law process, because the testimony might reveal the content or character of the collaborative law communications upon which the impression is based. In contrast, the mental impression would not be privileged if it was based exclusively on the party's observation of that party wearing heavy clothes and an overcoat on a hot summer day because the choice of clothing was not meant to inform. *See e.g.* Darrow v. Gunn, 594 F.2d 767, 774 (9th Cir. 1979) (discussing California law which states that observations and impressions of clients are not privileged).

The definition of "collaborative law communication" has a fixed time element—it only includes communications that occur between the time a collaborative law participation agreement is signed and before a collaborative law process is concluded. The methods and requirements for beginning and concluding a collaborative law process are specified in Section 5. The defined time period and methods for ascertaining are designed to make it easier for tribunals to determine the applicability of the privilege to a proposed collaborative law communication.

The definition of collaborative law communication does include some communications that are not made during actual negotiation sessions, such as those made for purposes of convening or continuing a negotiation session after a collaborative law process begins. It also includes "briefs" and other reports that are prepared by the parties for the collaborative law process.

Whether a document is prepared for a collaborative law process is a crucial issue in determining whether it is a "collaborative

law communication." For example, a tax return brought to a collaborative law negotiation session for a divorce settlement would not be a "collaborative law communication," even though it may have been used extensively in the process, because it was not created for "purposes of conducting, participating in, continuing, or reconvening a collaborative law process," but rather because it is a requirement of federal law. However, a note written on the tax return to clarify a point for other participants during a negotiation session would be a collaborative law communication. Similarly, a memorandum specifically prepared for the collaborative law process by a party or a party's counsel explaining the rationale behind certain positions taken on the tax return would be a collaborative law communication. Documents prepared for a collaborative law process by experts retained by the parties would also be covered by this definition.

"Collaborative lawyer." A collaborative lawyer represents a party in a collaborative law process. As discussed in the Preface, a party must be represented by a lawyer to participate in a collaborative law process; it is not an option for the self-represented. Section 4(a)(5) requires that a collaborative law participation identify the collaborative lawyer who represents each party and Section 4(a)(6a) requires that the agreement contain a statement by the designated lawyer confirming the representation.

"Collaborative matter." The act uses the term "matter" rather the narrower term "dispute" to describe what the parties may attempt to resolve through a collaborative law process. Matter can include some or all of the issues in litigation or potential litigation, or can include issues between the parties that have not or may never ripen into litigation. The broader term emphasizes that parties have great autonomy to decide what to submit to a collaborative law process and encourages them to use the process creatively and broadly.

The drafting committee provides two alternatives for enacting states to define "collaborative matter" and thus the scope of matters that can be submitted to the collaborative law process. Alternative A limits "collaborative matter" to those which arise under the family or

domestic relations law of a state. States which choose to include this language will thus limit the collaborative law process to those substantive areas where it has so far achieved the greatest acceptance and growth and in which collaborative lawyers have the greatest experience. They will, however, exclude matters which do not arise under the family or domestic relations law of a state from the collaborative law process.

Alternative B, in contrast, places no substantive limitation on matters that can be submitted to a collaborative law process, relying instead on the informed consent of parties based on the information provided by their counsel under the standards for informed consent specified in Rules 12 and 13. Under Alternative B collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter.

Under either Alternative A or B, the parties must describe the matter that they seek to resolve through a collaborative law process in their collaborative law participation agreement. *See* Section 4(a)(4). That requirement is essential to determining the scope of the disqualification requirement for collaborative lawyers under Section 9, which is applicable to the collaborative matter and matters "related to the collaborative matter," and the application of the evidentiary privilege under Section 17.

The parties must, however, describe the matter that they seek to resolve through a collaborative law process in their collaborative law participation agreement. *See* Section 4(a)(4). That requirement is essential to determining the scope of the disqualification requirement for collaborative lawyers under Section 9, which is applicable to the collaborative matter and matters "related to the collaborative matter," and the application of the evidentiary privilege under Section 17.

"Law firm." This definition of "law firm" is adapted from the definition of the term in the American Bar Association's Model

Rules of Professional Conduct Rule 1.0 (c). It includes lawyers representing governmental entities whether employed by the government or by a private law firm. It is included to help define the scope of the imputed disqualification requirement of Section 9.

"Nonparty participant." This definition parallels the definition of "nonparty participant" in the Uniform Mediation Act Section 2(4). It covers experts, friends, support persons, potential parties, and others who participate in the collaborative law process. Nonparty participants are entitled to assert a privilege before a tribunal for their own collaborative law communications under Section 17(b) (2). This provision is designed to encourage mental health and financial professionals to participate in a collaborative law process without fear of becoming embroiled in litigation without their consent should the process terminate.

Nonparty participant does not, however, include a collaborative lawyer for a party. The attorney-client privilege is applicable to communications between a collaborative lawyer and the party whom he or she represents. The collaborative attorney thus has the obligation placed upon all lawyers to maintain client confidences and assert evidentiary privilege for client communications. The obligations of professional responsibility for a lawyer are not altered by the lawyer's representation of a party in collaborative law. Section 13. Under the Model Rules of Professional Conduct the attorney-client privilege is held by the client and can only be waived by the client, even over the attorney's objection. *See* MODEL RULES OF PROF'L CONDUCT R 1.6(a) (2002) ("A lawyer shall not reveal information relating to the representation of a client *unless the client gives informed consent* . . . .") (emphasis added); *see also* 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."). An attorney does not have the right to override a client's decision to waive privilege, and including collaborative lawyers in the category of nonparty participants entitled to independently assert privilege might be thought of as changing that traditional view. *See,*

e.g., Comm'r v. Banks, 543 U.S. 426, 436 (2005) (stating that "[t]he attorney is an agent who is dutybound to act only in the interests of the principal . . . ."); s*ee also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); RESTATEMENT (SECOND) OF AGENCY § 1(3) cmt. e (1958) (stating that an attorney is an agent authorized to act under the control of another). A collaborative lawyer thus does not have any additional right to independently assert privilege because of the lawyer's participation in the collaborative law process as a "nonparty."

A few states declare ADR neutrals incompetent to testify about communications in the ADR processes. The declaration of incompetence to testify normally does not apply to lawyers representing clients, but is limited to third party neutrals, such as mediators and arbitrators. CAL. EVID. CODE § 703.5 (West 1995). In Minnesota, the competency standard has been extended to lawyers participating in mediation as well. *See* MINN. STAT. ANN. § 114.08 (West 2008); MINN. STAT. ANN. § 595.02(1)(b) (West 2000).

"Party." The act's definition of "party" is central to determining who has rights and obligations under the act, especially the right to assert the evidentiary privilege for collaborative law communications. Fortunately, parties to a collaborative law process are relatively easy to identify—they are signatories to a collaborative law participation agreement and they engage designated collaborative lawyers.

Participants in a collaborative law process who do not meet the definition of "party," such as an expert retained jointly by the parties to provide input, do not have the substantial rights under additional sections that are provided to parties. Rather, these nonparty participants are granted a more limited evidentiary privilege under Section 17(b)(2)—they can prevent disclosure of their own collaborative law communications but not those of parties or others who participate in the process. Parties seeking to apply broader restrictions on disclosures by such nonparty participants should consider drafting such a confidentiality obligation into a valid and

binding agreement that the nonparty participant signs as a condition of participation in the collaborative law process.

"Person." Section 2(9) adopts the standard language recommended by the Uniform Law Commission for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

"Proceeding." The definition of "proceeding" is drawn from Section 2(7) of the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 2(7), 7A U.L.A. 105–06 (2006). Its purpose is to define the adjudicative type proceedings to which the act applies, and should be read broadly to effectuate the intent of the act. It was added to allow the drafters to delete repetitive language throughout the act, such as "judicial, administrative, arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions, conferences, and discovery; or . . . a legislative hearing or similar process." *Id.*

"Prospective party." The definition of "prospective party" is drawn from the ABA Model Rules of Professional Conduct Rule 1.18(a) which defines a lawyer's duty to a prospective client. MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2009). The act uses the term "party" rather than "client" to clarify that it does not change the standards of professional responsibility applicable to lawyers. The collaborative lawyer's obligations to prospective parties are described in sections 14 and 15.

"Related to a collaborative matter." Under Section 9, a collaborative lawyer and lawyers in a law firm with which the collaborative law is associated are disqualified from representing parties in court in a matter "related to a collaborative matter" when a collaborative law process concludes. The definition of "related to a collaborative matter" thus determines the scope of the disqualification provision. The rationale and application of the definition of "related to a collaborative matter" is discussed in detail in the Prefatory Note. *See supra*.

"Sign." The definitions of "record" and "sign" adopt

standard language approved by the Uniform Law Commission intended to conform Uniform Acts with the Uniform Electronic Transactions Act ("UETA") and its federal counterpart, Electronic Signatures in Global and National Commerce Act ("E-Sign"). Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001–7002 (2009)**;** UNIF. ELECTRONIC TRANSACTION ACT § 2 (1999), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf. Both UETA and E-Sign were written in response to broad recognition of the commercial and other uses of electronic technologies for communications and contracting and the consensus that the choice of medium should not control the enforceability of transactions. UNIF. ELECTRONIC TRANSACTION ACT (Prefatory Note) (1999); DEPARTMENT OF COMMERCE & FEDERAL TRADE COMMISSION, ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT: THE CONSUMER CONSENT PROVISION IN SECTION 101(s)(1)(c)(ii) i (2001). These sections are consistent with both UETA and E-Sign. UETA has been adopted by the Commission and received the approval of the American Bar Association House of Delegates. *See* UNIF. ELECTRONIC TRANSACTION ACT (1999); Richard L. Field & Michael H. Byowitz, *Recommendation in Support of the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2006 A.B.A. SEC. SCI. & TECH. LAW 303, *available at* http://www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf; The Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, A Few Facts on the Uniform Electronic Transactions Act, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Oct. 19, 2009). As of December 2001, it had been enacted in more than 35 states. The National Conference of State Legislatures, Uniform Electronic Transactions Act, http://www.ncsl.org/default.aspx?tabid=13484 (last visited Oct. 19, 2009).

The practical effect of these definitions is to make clear that electronic signatures and documents have the same authority as written ones for such purposes as establishing the validity of a

collaborative law participation agreement under Section 4, notice to terminate the collaborative law process under Section 5(d)(1), party agreements concerning the confidentiality of collaborative law communications under Section 16, and party waiver of the collaborative law communication privilege under Section 19(f).

"Tribunal." The definition of "tribunal" is adapted from Rule 1.0(m) of the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2009). It is included to insure the provisions of this act are applicable in judicial and other forums such as arbitration and is consistent with the broad definition of "proceeding" in subsection (10).

SECTION 3. APPLICABILITY. This act applies to a collaborative law participation agreement that meets the requirements of Section 4 signed on or after ŧthe effective date of this ŧact‡‡.

Alabama Comment

This section is identical to Section 3 of the Uniform Collaborative Law Act. The act becomes effective on January 1, 2014 and governs only the collaborative law participation agreement that meets the requirements of Section 4 of this act on or after that date. Any collaborative law participation agreement entered into prior to the effective date of this act is governed by contract law and any other applicable laws at the date of signing. Any collaborative law participation agreement entered into after the effective date of this act that is not covered under this act is also governed by contract law and any other applicable laws.

Comment

Section 3 defines the scope of the act and limits its applicability to collaborative law participation agreements that meet the requirements of Section 4. While parties are free to collaborate in any other way they choose, if parties want the benefits and

protections of this act they must meet its requirements, subject to the "savings" provisions of Section 20.

Section 3 also sets an effective date for the act so that the parties can decide when to "opt in" to its provisions. It precludes application of the act to collaborative law participation agreements before the effective date on the assumption that most of those making these agreements did not take into account the changes in law. The evidentiary privilege created by the act in Section 17, for example, does not apply retroactively to agreements made before the act's effective date. If parties to these collaborative law participation agreements seek to be covered by the act, they can sign a new agreement on or after the effective date of the act or amend an existing agreement to conform to the act's requirements.

SECTION 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intention to resolve a collaborative matter through a collaborative law process under this act;

(4) describe the nature and scope of the matter and the collaborative law process;

(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) contain a provision informing the client that the collaborative lawyer and his or her law firm must withdraw from their representation of the client should the collaborative law process terminate under section 5(d); and

(8) contain a statement explaining the disclosure of information required under Section 12.

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

Alabama Comment

This section is similar to section 4 of the Uniform Collaborative Law Act. Alabama has modified subsection (a) (4) and added subsections (a)(7) and (8). The definition for a "record" in subsection (a) (1) and "signed in (a) (2) are located in section 2, (12) and (14) respectively.

Subsection (a) (4) was expanded to required the collaborative law participation agreement include an explanation of the collaborative law process to the parties.

Subsection (a)(7) was added to make it clear that the collaborative lawyers and their firms will not be able to represent a

party once the collaborative process has been terminated.

The addition of subsection (a)(8) is intended ensure that the parties understand the full ramifications of the disclosure of information they are agreeing to permit during the collaboration.

Comment

Subsection (a) sets minimum conditions for the validity of collaborative law participation agreements. They are designed to insure that a written record evidences the parties' agreement and intent to participate in a collaborative law process under the act. They were formulated to require collaborative law participation agreements to be fundamentally fair, but simple and thus to make collaborative law more accessible to potential parties with matters in a wide variety of areas.

To qualify as a collaborative law participation agreement, the parties must explicitly state their intention to proceed "under this act." The participation agreement must thus specifically reference this act to make its provisions such as the evidentiary privilege for collaborative law communications applicable. This requirement is designed to help insure that parties make a deliberate decision to "opt into" in a collaborative law process rather than participate by inadvertence. It is also designed to differentiate a collaborative law process under this act from other types of cooperative or collaborative behavior or dispute resolution involving parties and lawyers.

The requirements of subsection (a) are also designed to help tribunals and parties more easily administer and interpret the disqualification and evidentiary privileges provisions of the act. It is, for example, difficult to determine the scope of the disqualification requirement unless the parties describe the matter submitted to collaborative law in their participation agreement and designate collaborative lawyers.

The requirements of subsection (a) are subject to the provisions of Section 20 which give a tribunal discretion to find that,

despite flaws in their written participation agreement, parties reasonably believed they were participating in a collaborative law process and thus to apply the provisions of the act "in the interests of justice."

Section 4(a)(6) requires that participation agreements "contain a statement by each collaborative lawyer confirming the lawyer's representation of the party in the collaborative law process. The confirmation of representation required by this section does not make the collaborative lawyer to be a "party" to the participation agreement, a status which, as discussed in the Preface, would raise professional responsibility concerns. See Preface, supra. The act explicitly notes that it does not in any way change the lawyer's responsibilities to the client under the rules of professional responsibility. Section 13(1). The requirement of a confirmation of representation simply is designed to identify the party's collaborative lawyer so that the disqualification provision can be more easily administered.

Many collaborative law participation agreements are far more detailed than the minimum form requirements of subsection (a) contemplate and contain numerous additional provisions. In the interest of encouraging further continuing growth and development of collaborative law, subsection (b) authorizes additional provisions to be included in participation agreements if they are not inconsistent with the act.

Subsection (b), however, does not give unlimited discretion to add provisions to a collaborative law participation agreement. They cannot modify the defining characteristics of the collaborative law process or agree to waive the act's protections for prospective parties. Parties thus cannot waive the a party's right to terminate collaborative law with or without cause, for any reason at any time during the process set forth in Section 5, the disqualification requirements of sections 9, 10, and 11, the informed consent requirements of Section 14, or the prospective collaborative lawyer's duty to inquire into a history of coercive and violent relationships between parties required by Section 15. This provision of the act

should thus be interpreted as analogous to those which set minimum provisions for valid arbitration agreements, which also cannot be waived. *See* UNIF. ARBITRATION ACT § 4(b) (2000) (provisions that parties cannot waive in a pre-dispute arbitration clause such as the right to counsel).

Parties are, however, free to supplement the required provisions under the act with additional terms that meet their particular needs and circumstances that are not inconsistent with the fundamental nature of the collaborative law process. For example, they may define the scope of voluntary disclosure under Section 12. They may provide for broader protection for the confidentiality of collaborative law communications than the privilege against disclosure in legal proceedings provided in Section 16. *See supra*. They may provide, as do many models of collaborative law practice, for the engagement of jointly retained neutral experts to participate in collaborative law and prohibit parties from retaining their own experts. They may provide that experts retained for the purpose of consulting with parties during the collaborative law process may testify at trial if the collaborative law process concludes. They may provide that if the collaborative law process terminates, litigation may not be instituted for a short, set period of time, a common provision in collaborative law participation agreements. They may agree to toll applicable statutes of limitations during the collaborative law process or include choice of law clauses in their participation agreements. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton Inc., 514 U.S. 52, 63–64 (1995) (holding that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration provision covers arbitration; neither sentence intrudes upon the other."); Homa v. Am. Express Co., 558 F.3d 225, 228 (3d Cir. 2009) (stating that New Jersey courts will uphold choice-of-law provisions so long as they do not violate public policy); Badger v. Boulevard Bancorp, Inc., 970 F.2d 410, 410-11 (7th Cir. 1992) (enforcing an agreement tolling the statue of limitations); SEC v. DiBella, 409 F. Supp. 2d 122, 129 (D. Conn. 2006) (finding the tolling agreement of the statute of limitations valid and binding); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (stating that judicial respect for the parties' choice of law advances the policy party autonomy).

Appropriate bar groups should be encouraged to develop form collaborative law participation agreements for use by lawyers and parties that comply with the requirements of this act. *See* Fawzy v. Fawzy, 973 A.2d 347, 363 (N.J. 2009) (New Jersey Supreme Court makes similar suggestion for arbitration agreements in family law).

SECTION 5. BEGINNING AND CONCLUDING 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.

(c) A collaborative law process is concluded by a:

(1) resolution of a collaborative matter 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) termination of the process.

(d) A collaborative law process terminates:

(1) when a party gives notice to other parties in a

record that the process is ended;

(2) when a party:

(A) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(ii) requests that the proceeding be put on the [tribunal's active calendar];or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

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

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

Alabama Comment

This section is identical to section 5 of the Uniform Collaborative Law Act.

Comment

Section 5 protects a party's right to terminate participation in a collaborative law process at any time, with or without reason or cause for any or for no reason. Subsection (b) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in a collaborative law process over that person's objection.

Section 5 is also designed to make it as administratively easy for parties and tribunals as possible to determine when a collaborative law process begins and ends. To the extent feasible, it links those events to signed records communicated between the parties and collaborative lawyers or events that are documented in the record of a tribunal. Establishing the beginning and end of a collaborative law process is particularly important for application of the evidentiary privilege for collaborative law communications recognized by Section 17 which applies only to communications in that period.

The evidentiary privilege for collaborative law communications ends when the collaborative law process concludes.

The act specifies two methods of concluding a collaborative law process: (1) agreement for resolution of all or part of a matter in a signed record (assuming that the parties do not agree to continue the collaborative law process to resolve the remaining issues); and (2) termination of the process. A party can terminate the process in several ways, including sending notice in a record of termination and by taking acts that are inconsistent with the continuation of collaborative law, such as commencing or recommencing an action in court. Withdrawal or discharge of a collaborative lawyer also terminates the process, and triggers an obligation to give notice on the former collaborative lawyer. *See supra* Section 5(e).

Section 5(g) allows for continuation of a collaborative law proves even if a party and a collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative lawyer is engaged in a defined period of time and under conditions and with documentation which indicate that the parties want the collaborative law process to continue.

Section 5(h) allows the parties to agree to present an agreement resulting from a collaborative law process to a tribunal for approval under Section 8 without terminating the process. Read together, these sections allow, for example, collaborative lawyers in divorce proceedings to present uncontested settlement agreements to the court for approval and incorporation into a court order as local practice dictates. The collaborative law process—and the evidentiary privilege for collaborative law communications—is not terminated by presentation of the settlement agreement to the court.

SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file

promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Sections 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes by agreement of the parties or by either party if the process is terminated. The stay of the proceeding under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

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

Alabama Comment

This section is identical to section 6 of the Uniform Collaborative Law Act except for the addition in subsection (b) of the language "by agreement of the parties or by either party if the process is terminated". This addition is designed to clarify that either party can give notice upon termination of the collaboration.

Comment

Section 6 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Section 6 be enacted by judicial rule rather than legislation.

This section authorizes parties to enter into a collaborative law participation agreement to attempt to resolve matters in pending proceedings, a subject discussed in the Prefatory Note. *See supra*. To give the collaborative law process time and breathing space to operate, it creates an application for a stay of proceedings upon the filing of a collaborative law participation agreement. The stay should normally be granted from the time the tribunal receives written notice that the parties have executed a collaborative law participation agreement until it receives written notice that the collaborative law process is concluded. The stay of proceedings is qualified by Rule 7, which authorizes a tribunal to issue emergency orders notwithstanding the stay and Rule 8, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Section 6 and its accompanying legislative note give states an

option to treat the signing of a participation agreement as the occasion for a mandatory stay of proceedings or to treat it as an application for a stay which the tribunal has the discretion to grant or deny. States differ on this subject. In some states, the signing of an agreement to mediate or collaborative law participation agreement creates an automatic stay of pending proceedings, while in other states the tribunal retains the discretion to continue previously scheduled hearing and trial dates. *Compare* 2010 Laws of Utah § 78B-19-106 (signing of collaborative law participation agreement treated as application for a discretionary stay) *and* Or. Rev. Stat. § 36.190(3) (2009) (same for an agreement to mediate},*with* N.C. Gen. Stat. § 50-74 (2009) (mandatory stay created by signing of a collaborative law participation agreement) and Tex, Fam. Code Ann. § 6.603(e) (Vernon 2006) (same).

The stay of proceedings is qualified by Section 7, which authorizes a tribunal to issue emergency orders notwithstanding the stay and Section 8, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Section 6(c) authorizes a tribunal to ask for status reports on the collaborative law process in pending proceedings while the stay created by party entry into a collaborative law process is in effect. It also put limitations on the scope of the information that can be requested by the status report. The provisions of these [rules][sections] are based on Section 7 of the Uniform Mediation Act, adapted for collaborative law. *See* UNIF. MEDIATION ACT § 7, 7A U.L.A. 135–36 (2006). [Rules][Sections] 6(c) and (d) recognize that the tribunal asking for the status report may rule on the matter being negotiated in the collaborative law process and should not be influenced by the behavior of the parties or counsel therein. Its provisions would not permit the tribunal to ask in a status report whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. *See* Lande, *Using Dispute System Design Methods*, supra, at 104 & n.185. The status report only can ask for non-substantive information related to scheduling and whether the collaborative law process is ongoing.

Some jurisdictions use statistical analysis of the timeliness of case dispositions to evaluate judicial performance, and sometimes those statistics are made available to the public. *See* COLO. REV. STAT. ANN. §§ 13-5.5-103, -105 (West Supp. 2009); UTAH ADMIN. CODE r. 3-111.01, -111.02 (2009); Colorado Office of Judicial Performance Evaluation, Commissions on Judicial Performance, http://www.cojudicialperformance.com/index.cfm (last visited Oct. 20, 2009). Judicial administrators are encouraged to recognize that while cases in which a collaborative law participation agreement is signed are technically "pending," they should not be considered under active judicial management for statistical or evaluation purposes until the collaborative law process is terminated.

SECTION 7. EMERGENCY ORDER. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or a child of either party ~~[insert term for family or household member as defined in [state civil protection order statute]]~~.

Alabama Comment

This section is similar to section 7 of the Uniform Collaborative Law Act. Alabama chose to limit the emergency orders to the parties or children of either of the parties.

Comment

Section 7 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Section 7 be enacted by judicial rule rather than legislation.

The collaborative law process terminates if a party seeks an emergency order of the kind authorized by this section. Section

5(c)(2) ends the stay of proceedings created by Section 6(a). Parties may, however, fail to provide notice of the termination of a collaborative law process to each other and the tribunal. Additionally, an emergency order might be sought in a new proceeding after a collaborative law process terminates.

To avoid any possible confusion, this section authorizes tribunals to issue emergency orders to do so despite the execution of a collaborative law participation agreement or a stay of proceedings under Section 6(a). A collaborative lawyer is also authorized to seek or defend an application for an emergency order despite the termination of the collaborative law process under the time limited terms and conditions of Section 9(c)(2).

Section 7 is thus one of the act's provisions addressing the safety needs of victims of coercion and violence in collaborative law. It is based on the concern that a party in a collaborative law process may be a victim of such violence or coercion or a dependent of a party such as a child may be threatened with abuse or abduction while a collaborative law process is ongoing. A party should not be left without access to a tribunal during such an emergency.

The reach of this section is not limited to victims of coercion and violence themselves. It extends to members of their families and households. Each state is free to define the scope of this section by cross referencing its civil protection order statute. *Compare* CAL. FAM. CODE § 6211 (West 2004) (defining family or household member to include current and former spouses, cohabitants, and persons in a dating relationship, as well as persons with a child in common, or any other person related by blood or marriage), *with* WASH. REV. CODE ANN. § 26.50.010 (West 2005) (includes current and former spouses, domestic partners, and cohabitants, persons with a child in common, persons in a current or former dating relationship, and persons related by blood or marriage), *and* S.C. CODE ANN. § 20-4-20(b) (Supp. 2008) (defining family or household member to mean current or former spouses, persons with a child in common, or a male and female who are or were cohabiting).

The reach of this section is also not limited to emergencies involving threats to physical safety. The term "interest" encompasses financial interest or reputational interest as well. This section, in effect, authorizes a tribunal otherwise authorized to do so to issue emergency provisional relief to protect a party in any critical area as it would in any civil dispute. A party who finds out that another party is secretly looting assets from a business, for example, while participating in a collaborative law process can seek an emergency restraining order under this section and the court is authorized to grant it despite the stay of proceedings under Section 6(b).

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

Alabama Comment

This section is identical to section 8 of the Uniform Collaborative Law Act.

Section 8 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Section 8 be enacted by judicial rule rather than legislation.

Section 5(h) authorizes parties who reach agreements to present them to a tribunal for approval without terminating a collaborative law process. This section authorizes the tribunal to review and approve the agreement of the parties if required by law, as in, for example, many divorce settlements, settlements of infants' estates, or class action settlements. *See* UNIF. MARRIAGE & DIVORCE ACT § 306 (d) (1998) (Parties' agreement may be incorporated into the divorce decree if the court finds that it is "not unconscionable" regarding the property and maintenance and "not unsatisfactory" regarding support); FED. R. CIV. P. 23(e)(2) (standard for judicial evaluation of settlement of a class action, which is that the settlement

must not be a result of fraud or collusion and that the settlement must be fair, adequate, and reasonable); Mnookin, *supra*, at 1015–16.

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

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter. This disqualification is not subject to waiver by the parties.

(b) Except as otherwise provided in subsection (c) ~~and Sections 10 and 11~~, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a) or other court order.

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to ask a tribunal to approve an agreement resulting from the collaborative law process and prepare and file all documents necessary to obtain a final order; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or the party's child ~~[insert term for family or household member as defined in [state civil protection order statute]]~~ including, but not limited to, a proceeding filed under the Protection from Abuse Act (Ala. Code 31-5-1through 11) if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or the party's child ~~[insert term for family or household member]~~ only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

Alabama Comment

Section 9 is similar to section 9 of the Uniform Collaborative Law Act. In subsection (a) Alabama added the last sentence ensuring that the disqualification cannot be waived by the parties.

In subsection (b), Alabama added "or other court rule" at the end of the sentence to clarify that a lawyer may also be disqualified from appearing before a court to represent a party in a proceeding relating to a collaborative matter by court rule.

In subsection (c)(1), Alabama added "and prepare and file all

documents necessary to obtain a final order" to clarify that there were no restrictions with regard to the lawyer preparing and filing documents necessary to obtain the desired final order proved in the agreement.

In subsection (c)(2), Alabama inserted in the bracketed language the reference to the Alabama Protection from Abuse Act which is consistent with the bracketed language in the Uniform Act. Additional language enables a lawyer to seek or defend an emergency order on behalf of a party, or the party's child, including but not limited to, in a proceeding brought under the Protection from Abuse Act.

In subsection (d) "the party's child" was added to be consistent with the change in subsection (c).

Comment

Section 9 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Section 9 be enacted by judicial rule rather than legislation.

The disqualification requirement for collaborative lawyers after collaborative law concludes is a fundamental defining characteristic of collaborative law. As previously discussed in the Prefatory Note, this section extends the disqualification provision to "matters related to the collaborative matter" in addition to the matter described in the collaborative law participation agreement. *See supra*. It also extends the disqualification provision to lawyers in a law firm with which the collaborative lawyer is associated in addition to the collaborative lawyer him or herself, so called "imputed disqualification." Appropriate exceptions to the disqualification requirement are made for representation to seek emergency orders for a limited time (see Section 7) and to allow collaborative lawyers to present agreements to a tribunal for approval (Section 5(f) and 8).

SECTION 10. LOW INCOME PARTIES.

[RESERVED]

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

~~(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Section 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:~~

~~(1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;~~

~~(2) the collaborative law participation agreement so provides; and~~

~~(3) the collaborative lawyer is isolated~~ screened ~~from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.~~

Alabama Comment

Alabama agreed with the suggestion of the Uniform drafting committee that Section 10 should be address by court rule rather than by legislation. Section 10 in the Uniform Act regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates

Comment

Section 10 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Section 10 be enacted by judicial rule rather than legislation.

As previously discussed in the Prefatory Note, this section allows parties to modify the imputed disqualification requirement by advance agreement for lawyers in a law firm which represents low income clients without fee. *See supra*.

SECTION 11. GOVERNMENTAL ENTITY AS PARTY.

[RESERVED]

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

~~(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the~~

~~collaborative matter if:~~

~~(1) the collaborative law participation agreement so provides; and~~

~~(2) the collaborative lawyer is isolated~~ screened ~~from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.~~

Alabama Comment

Alabama agreed with the suggestion of the Uniform drafting committee that Section 10 should be address by court rule rather than by legislation. Section 11 in the Uniform Act regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates.

Comment

Section 11 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Section 11 be enacted by judicial rule rather than legislation.

This section allows parties to agree in advance to modify the imputed disqualification requirement for lawyers in a law firm which represents the government or its agencies or subdivisions. The rationale for creating this exception to the imputed disqualification rule is discussed in the Prefatory Note. *See supra*.

SECTION 12. 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 timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed.

(b) The parties may define the scope of disclosure under subsection (a) during the collaborative law process.

Alabama Comment

This section is similar to Section 12 of the Uniform Collaborative Law Act. Alabama subdivided the only paragraph in the Uniform Act into subsections (a) and (b). Also, the language "on the request of another party" in the first line was deleted. A cross reference to subsection (a) was added in the last sentence of the Uniform Act which became subsection (b) in the Alabama act.

Alabama added a requirement in Section 4, subsection (a) (8) that the collaborative law participation agreement include a provision explaining the disclosure of information required in the discovery process.

Comment

Voluntary informal disclosure of information related to a matter is a defining characteristic of collaborative law. The rationale for this section is described in the Prefatory Note. *See supra*.

SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED. This act does not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

Alabama Comment

This section is identical to Section 13 of the Uniform Collaborative Law Act.

Comment

The relationship between the act and the standards of professional responsibility for collaborative lawyers is discussed in the Prefatory Note. *See supra*. In the interests of clarity, this section reaffirms that the act does not alter the professional responsibility or child abuse and neglect reporting obligations of all professionals, lawyers and non lawyers alike, who participate in a collaborative law process.

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

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

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

(3) advise the prospective party that:

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

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

(C) the collaborative lawyer and any lawyer in a

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

Alabama Comment

This section is almost identical to Section 14 of the Uniform Collaborative Law Act except for:

1. the deletion of "such as litigation, mediation, arbitration, or expert evaluation" under subsection (2); and

2. the deletions of the cross-references in (3) (C) to subsections 10(b) and 11(b) which were not included in the Alabama Act .

Comment

The policy behind and the act's requirements for a prospective collaborative lawyer's facilitating the informed consent of a party to participate in a collaborative law process are discussed in the Prefatory Note. *See supra*.

SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history

of a coercive or violent relationship with another prospective party.

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

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

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

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

Alabama Comment

This section is identical to section 15 of the Uniform Collaborative Law Act.

Comment

The section is a major part of the act's overall approach to

assuring safety for victims of coercive and violent relationships who are prospective parties or parties in collaborative law. The subject is discussed extensively in the Prefatory Note which covers the scope of the lawyer's duty under this section. *See supra*.

SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION. A collaborative law communication is confidential except to the extent agreed by the parties in a signed record or as provided by law of this state other than this act.

Alabama Comment

Other than the addition of the word "except", this section is identical to section 16 of the Uniform Collaborative Law Act.

Comment

In subsequent sections, the act creates an evidentiary privilege for collaborative law communications that prevents them from being admitted into evidence in legal proceedings. As previously discussed in the Prefatory Note, the Drafting Committee recommends that a statute only assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. *See supra*. This section encourages parties to a collaborative law process to reach agreement on broader confidentiality matters such as disclosure of collaborative law communications to third parties between themselves.

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

[RESERVED]

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

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

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

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

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

Alabama Comment

Alabama chose to omit this section, deciding that the subject matter of this section could best be governed by the Rules of Court. In the Uniform Act, section 17 concerned "privilege against disclosure for collaborative law communication; admissibility; discovery".

Comment

In many states legislation is required to create a privileged communication. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.*, CAL. EVID. CODE § 911 (West 2009); WIS. STAT. ANN. § 905.01 (West 2000). The Drafting Committee recommends that Section 17 be enacted by legislation rather than court rule.

Overview

Section 17 sets forth the act's general structure for creating a privilege prohibiting disclosure of collaborative law communications in legal proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary should be consulted for more expansive discussion of the issues raised here.

Holders of the Privilege for Collaborative Law Communications Parties

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 its paramount justification is to encourage candor by the parties, just as encouraging the client's candor is the central justification for the attorney-client privilege. 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.

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because collaborative law involves parties whose interests appear to be adverse, such as marital partners now seeking a divorce. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the collaborative law communications privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. *See* United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); Static Control Components, Inc. v. Lexmark Int'l, Inc., 250 F.R.D. 575, 578-79 (D. Colo. 2007); United States v. Pizzonia, 415 F. Supp. 2d 168, 178 (E.D.N.Y. 2006); Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 428–29 (Cal. Ct. App. 1989); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 689–91 (2008). *But see* Dexia Credit Local v. Rogan, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (stating that the joint defense doctrine can be waived if parties become adverse); Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. Ct. App. 1985) (refusing to apply the joint defense doctrine to parties who were not directly adverse). *See generally* Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981) (exploring the logical extensions of the attorney-client privilege, including the doctrine of joint defense). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *See, e.g.*, Med. Protective Co. v. Pang, 606 F. Supp. 2d 1049, 1060 (D. Ariz. 2008); *In re* Rules of Prof'l Conduct, 2 P.3d 806, 812 (Mont. 2000);

Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 200–01 (2005).

Nonparty Participants Such as Experts

Of particular note is the act's addition of a privilege for the nonparty participant, though limited to the communications by that individual in the collaborative law process. Joint party retention of experts such as mental health professionals and financial appraisers to perform various functions is a feature of many models of collaborative law, and this provision encourages and accommodates it. Extending 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. This provision would also cover statements prepared by such persons for the collaborative law process and submitted as part of it, such as experts' reports. Any party who expects to use such an expert report prepared to submit in a collaborative law process later in a legal proceeding would have to secure permission of all parties and the expert in order to do so. This is consistent with the treatment of reports prepared for a collaborative law process as collaborative law communications. *See* Section 2(1).

As previously discussed in the comments to Section 2(7), collaborative lawyers are not nonparty participants under the act, as they maintain a traditional attorney-client relationship with parties, which allocates to clients the right to waive the attorney-client privilege, even over their lawyer's objection.

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Section 17(c) concerning evidence otherwise discoverable and admissible makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative law process. *See* CAL. EVID. CODE §§ 1119–20 (2009); U.S. Fid. & Guar. Co. v. Dick Corp., 215 F.R.D.

503, 506 (W.D. Pa. 2003); Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004). For purposes of the collaborative law communication privilege, it is the communication that is made in the collaborative law process that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in collaborative law is subject to discovery, just as it would be if the collaborative law process had not taken place. There is no "fruit of the poisonous tree" doctrine in the collaborative law communication privilege. For example, a party who learns about a witness during a collaborative law proceeding is not precluded by the privilege from subpoenaing that witness should collaborative law terminate and the matter wind up in a courtroom. FED. R. EVID. 408 (evidence not excluded if offered for proving bias, prejudice, undue delay, or obstruction); Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 214 (Cal. App. Dep't Super. Ct. 2007); Feldman v. Kritch, 824 So. 2d 274, 276 (Fla. Dist. Ct. App. 2002) (citing FLA. STAT. ANN. § 44.102 (West Supp. 2009) and DR Lakes, Inc. v. Brandsmart U.S.A. 819 So. 2d 971, 974 (Fla. Dist. Ct. App. 2002) (holding that privilege does not bar evidence to correct a mutual mistake in settlement amount)).

SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.

[RESERVED]

~~(a) A privilege under Section 17 may be waived in~~ writing ~~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~~ in writing ~~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 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.~~

Alabama Comment

Alabama chose to omit this section, deciding that the subject matter of this section could best be governed by the Rules of Court. Section 18 of the Uniform Act concerned "waiver and preclusion of privilege".

Comment

The Drafting Committee recommends that Section 18 be enacted by legislation rather than court rule. See comment to Section 17 *supra*.

SECTION 19. LIMITS OF PRIVILEGE.

[RESERVED]

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

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

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

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

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

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

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

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

~~(c) There is no privilege under Section 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or~~

~~the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:~~

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

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

~~(d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the 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 17 do not apply if the parties agree in advance in a signed record, or if a record of a~~

~~proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made~~.

Alabama Comment

Alabama chose to omit this section, deciding that the subject matter of this section could best be governed by the Rules of Court. Section 19 of the Uniform Act concerned "limits of privilege" for a collaborative law communication.

Comment

The Drafting Committee recommends that Section 19 be enacted by legislation rather than court rule. See comment to Section 17 *supra*.

Unconditional Exceptions to Privilege

The act articulates specific and exclusive exceptions to the broad grant of privilege provided to collaborative law communications. They are based on limited but vitally important values such as protection against serious bodily injury, crime prevention and the right of someone accused of professional misconduct to respond that outweigh the importance of confidentiality in the collaborative law process. The exceptions are similar to those contained in the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 6, 7A U.L.A. 124 (2006).

As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the act contemplates that a court will hold an in camera proceeding at which

the claim for exemption from the privilege can be confidentially asserted and defended.

Exception to Privilege for Written, But Not Oral, Agreements

Of particular note is the exception that permits evidence of a collaborative law communication "in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement." Section 19(a)(4). The exception permits such evidence to be introduced in a subsequent proceeding convened to determine whether the terms of that settlement agreement have been breached.

The words "agreement . . . evidenced by a record signed by all parties" in this exception refer to written and executed agreements, those recorded by tape recording and ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in sections 2(12) and 2(14). In other words, a party's notes about an oral agreement would not be "an agreement . . . signed by all parties." On the other hand, the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.

This exception is noteworthy only for what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a collaborative law session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule of privilege. As a result, parties might be less candid, not knowing whether a controversy later would erupt over an oral agreement.

Despite the limitation on oral agreements, the act leaves parties other means to preserve the agreement quickly. For example, parties can state their oral agreement into the tape recorder and record their assent. One would also expect that counsel will incorporate

knowledge of a writing requirement into their collaborative law representation practices.

Case by Case Exceptions

The exceptions in Section 19(a) apply regardless of the need for the evidence because society's interest in the information contained in the collaborative law communications may be said to categorically outweigh its interest in the confidentiality of those communications. In contrast, the exceptions under Section 19(b) would apply only in situations where the relative strengths of society's interest in a collaborative law communication and a party's interest in confidentiality can only be measured under the facts and circumstances of the particular case. The act places the burden on the proponent of the evidence to persuade the court in a non-public hearing that the evidence is not otherwise available, that the need for the evidence substantially outweighs the confidentiality interests and that the evidence comes within one of the exceptions listed under Section 19(b). In other words, the exceptions listed in Section 19(b) include situations that should remain confidential but for overriding concerns for justice.

Limited Preservation of Party Autonomy Regarding Confidentiality

Section 19(f) allows the parties to opt for a non-privileged collaborative law process or session of the collaborative law process by mutual agreement and thus furthers the act's policy of party self-determination. If the parties so agree, the privilege sections of the act do not apply, thus fulfilling the parties reasonable expectations regarding the confidentiality of that session. Parties may use this option if they wish to rely on, and therefore use in evidence, statements made during the collaborative law process. It is the parties and their collaborative lawyers who make this choice. Even if the parties do not agree in advance, they and all nonparty participants can waive the privilege pursuant to Section 18(a).

If the parties want to opt out, they should inform the nonparty participants of this agreement, because without actual notice, the

privileges of the act still apply to the collaborative law communications of the persons who have not been so informed until such notice is actually received. Thus, for example, if a nonparty participant has not received notice that the opt-out has been invoked and speaks during the collaborative law process, that communication is privileged under the act. If, however, one of the parties tells the nonparty participant that the opt-out has been invoked, the privilege no longer attaches to statements made after the actual notice has been provided, even though the earlier statements remain privileged because of the lack of notice.

SECTION 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.

(a) If an 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; and

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

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

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

(2) apply the disqualification provisions of Sections 5, 6, and 9~~, 10, and 11~~; and

(3) apply ~~a~~ any privilege under law ~~Section 17.~~

Alabama Comment

This section is similar to Section 20 of the Uniform Collaborative Law Act except for the deletions of the cross-references to the subsections that have been omitted from Alabama's act.

Comment

The act protects persons from inadvertently or inappropriately entering into a collaborative law participation agreements by establishing protections that cannot be waived by the parties. Section 4 sets forth minimum standards for a collaborative law participation agreement. Section 14 sets forth requirements for a lawyer's facilitating informed party consent to participate in collaborative law. Section 15 requires a lawyer to inquire into potential coercive and violent relationships and take appropriate safety precautions.

Section 20 anticipates, however, that, as collaborative law expands in use and popularity, claims will be made that agreements reached in collaborative law should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet these requirements. This section takes the view that, while parties should not be forced to participate in collaborative law involuntarily (see Section 5(b)), 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.

By analogy to the doctrine established allowing enforcement of arguably flawed arbitration agreements, this section places the burden of proof on the party seeking to enforce a collaborative law

participation agreement or agreements resulting from a collaborative law process despite the failures of form, disclosure or inquiry. *See* Fleetwood Enterprises. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) ("The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration . . ."); Layton-Blumenthal, Inc. v. Jack Wasserman Co., 111 N.Y.S.2d 919, 920 (N.Y. App. Div. 1952) ("The burden is upon a party applying to compel another to arbitrate, to establish that there was a plain intent by agreement to limit the parties to that method of deciding disputes.").

Doubts about the parties' intentions should be resolved against enforcement. To invoke its discretion under this section the tribunal must find that a signed record of some kind—usually a written agreement—indicates that the parties intended to participate in a collaborative law process. It cannot find that the parties entered into a collaborative law process solely on the basis of an oral agreement. The tribunal must also find that, despite the failings of the participation agreement or the required disclosures, the parties nonetheless intended to participate in a collaborative law process and reasonably believed that they were doing so. If the tribunal makes those findings this section gives it the discretionary authority to enforce agreements resulting from the process the parties engaged in and the other provisions of this act if the tribunal also finds that the interests of justice so require.

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

Comment

While the Drafting Committee recognizes that some such variations of collaborative law are inevitable given its dynamic and diverse nature and early stage of development, the specific benefits of uniformity of law should also be emphasized. As discussed in the Prefatory Note, uniform adoption of this act will make the law governing collaborative law more accessible and certain in key areas and will thus encourage parties to participate in a collaborative law process. Collaborative lawyers and parties will know the standards under which collaborative law participation agreements will be enforceable and courts can reasonably anticipate how the statute will be interpreted. Moreover, uniformity of the law will provide greater protection of collaborative law communications than any one state or choice of law doctrine has the capacity to provide. No matter how much protection one state affords confidentiality of collaborative law communications, for example, the communication will not be protected against compelled disclosure in another state if that state does not have the same level of protection.

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

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

SECTION 24. EFFECTIVE DATE. This [act] takes effect January 1, 2014.