

**Background Drafting Materials Prepared for the
Uniform Collaborative Law Act Drafting
Committee**

*The National Conference of Commissioners on Uniform
State Laws*

**Professor Andrew Schepard, Esq., Reporter for the
Drafting Committee**

Rebecca Miller, Class of 2007; Elizabeth Bruzzo, Class of 2007

Laura Daly, Class of 2008; Angela Burton, Class of 2009

Hofstra University School of Law

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SECTION ONE

**I. Introduction and Questions for the Committee
Andrew Shepard, Esq., Reporter**

Memorandum

To: Drafting Committee for the National Conference of Commissioners on Uniform State Laws Collaborative Law Act ("UCLA")

From: Hofstra Law School Collaborative Law ("CL") Study Group*

Re: Background Materials and Questions for the Committee

Date: March 2007

Introduction

We prepared this Memorandum and the enclosed materials in anticipation of the Committee's first meeting on April 20th and 21st. We look forward to that discussion and working with the Committee through the process of drafting the UCLA.

We understand that one of the major goals of the meeting is for the Committee to provide guidance to the Reporter in preparing the first draft of a statute. The enclosed materials provide background for the Committee on the policy and practice of CL. The questions listed in this memorandum are those we think are important for the Committee to provide us guidance on so that drafting can begin.

The Enclosed Materials

The enclosed materials were prepared by our law student members under Professor Schepard's supervision. Their aim is to give the Committee a reasonably brief, hopefully reader friendly, overview of the current status of CL regulation and practice as well as the secondary literature on the subject.

The materials include the sections described below. Each section begins with a brief summary of the research undertaken to create it.

CL Statutes and Court Rules

This section contains two charts, one that summarizes and compares the key provisions of existing CL statutes and another which summarizes and compares CL court rules. You will see that current CL statutes and court rules vary greatly in depth and detail.

* Professor Andrew Schepard, UCLA Drafting Committee Reporter, Rebecca Miller, class of 2007, Elizabeth Bruzzo, class of 2007, Laura Daly, class of 2008 and Angela Burton, class of 2009.

CL Agreements and Organizations

This section contains a list of the many CL organizations that we were able to identify. It also contains samples of CL agreements, samples which again illustrate great variation in depth and detail.

CL Ethics Opinions

A number of state bar ethics committees have addressed CL related issues in written opinions. All of them, with the exception of the recent Colorado opinion, find that CL is consistent with current rules of professional responsibility for lawyers. The Colorado opinion essentially holds that the CL disqualification provision violates a lawyer's duty of loyalty to the client by restricting the advice the lawyer can give to the client and cannot be consented to by the client. This section includes a chart summarizing the key ethics provisions interpreted by the ethics committees, the concerns that CL raises about them, and how the ethics committees reconciled the concerns with the rules. This section includes the full text of two of the most detailed ethics opinions, along with the recent Colorado opinion.

CL Outside of Family Law

CL has had its greatest growth and development in family law, particularly divorce practice. The Committee will, we understand, consider the possibility that the CL statute should cover additional fields such as estate disputes and other civil matters. This section includes material on CL outside of family law. While there has been much discussion of that subject in the literature, we have been unable to find a great deal of information on CL as actually practiced outside of family law.

CL Articles and Bibliography

A great number of articles have been written about CL in recent years. We have included the full text of several for the Committee. Our selections were necessarily a bit arbitrary, as there were many excellent articles to choose from. We chose those we believed gave the Committee the best overview of the policy issues raised by CL in the shortest amount of space. This section also includes a bibliography and brief summary of additional CL articles, some of which Committee members may be interested in consulting.

Questions for Drafting Committee Discussion

We raise the following questions for Committee discussion. While we are sure that the Committee will add additional questions for discussion, we thought that our creating a preliminary list would provide a useful starting point. In some cases we include subheadings under the major question that we list to give the Committee a better idea of what we mean by the question.

- What is CL?

What characteristics that typically define CL are fundamental to its practice? - the provision that counsel for all parties be disqualified if litigation begins?
The intensive focus on interest based, as opposed to adversarial, negotiations?
Full and voluntary disclosure? Joint retention of experts? Confidentiality?

- Is CL an ADR process or simply a definition of the way law is or should be practiced?
 - This question raises the question of what government agency is responsible for the regulation of CL- ethics disciplinary committees? A state court office of dispute resolution?
 - It also raises the question whether the Committee should recommend changes in the *Model Rules of Professional Conduct* to encourage CL in addition to or instead of UCLA.
- What are the purposes of UCLA? – many are possible, including:
 - To define the essential characteristics of CL, differentiate it from other forms of legal practice and standardize its operation.
 - To provide procedural rights and protections for CL, such as confidentiality and exemption from case management practices, that will encourage lawyers to practice it.
 - To insure that potential consumers of collaborative law services are protected by high quality practice.
- Should any lawyer be entitled to practice CL?

If not, how do we identify competent CL practitioners? – Willingness to sign a CL agreement? Participation in CL trainings, continuing education (if so, regulated by whom)? Membership in a CL organization? Which?
- Should all potential clients be told of the availability of CL? How? By whom?
- What constitutes informed client consent to enter CL? What should a client be told about the risks and benefits of CL?
- Are some family law matters (e.g. those involving domestic violence or child abuse) inappropriate for CL? If so, what obligations do CL lawyers have to screen such cases before accepting them into CL?

- Are some family law clients (e.g. mentally ill, substance abusers) incompetent to participate in CL? If so, what obligations do CL lawyers have to screen such cases before accepting them into collaborative practice?
- Is it possible to have some of the disputes arising from a divorce (e.g. parenting issues) dispute addressed through CL while other disputes (e.g. valuation of assets) are addressed through an adversary process (what might be called “unbundling CL”)?
- Should appropriate regulatory authorities develop standard form CL agreements?
- Should the court be notified of the signing of a CL agreement, even if the case is not filed in court?
- Conversely, should cases already filed in court be eligible for CL?
- Should a CL case be exempt from any or all of a court’s case management requirements (e.g. status conferences? filing deadlines? mandated parent education? mediation? early neutral evaluation?)
- What confidentiality protections should apply to CL (privilege versus confidence)?
- What exceptions should be made to confidentiality protections provided for CL (e.g. allegations of child abuse, domestic violence)?
- What are the disclosure requirements of CL? Are they the same as those under the rules of procedure for divorce cases?
- What is the role of experts (psychologists, financial planners, mediators) in collaborative law?
 - Should only specially trained experts be allowed to participate in CL cases?
 - What confidentiality protections apply to CL experts?
 - Must all experts in a CL case be jointly retained? Is there any role in CL for a party retained expert?
 - Must all CL experts sign a joint retainer agreement? What are its contents?
 - Are CL experts barred from testifying in later court proceedings?
- At what point are oral settlement agreements made during CL enforceable if not signed and reduced to writing? Under what circumstances?

- Can CL practitioners represent clients for the purpose of presenting an agreement to the court?
- How and when is the CL disqualification provision triggered?
 - What happens to the case after the disqualification provision is invoked?
 - Does a withdrawing lawyer have an obligation not to tell the other side what his or her reasons are for triggering the disqualification provision?
 - Should there be an exception to the disqualification provision for emergencies (e.g. an incident of domestic violence triggering the need for an application for a protective order)?
 - How can prejudice to the client be minimized once the withdrawal provision is triggered?
 - What happens to fees incurred to date and case related documents when the disqualification provision is triggered?
- Should CL extend to fields in addition to family law where it currently has its greatest growth and acceptance?
- Can the benefits of CL be extended to those unable to afford counsel?

We note with interest the recent proposal of Chief Judge Kaye of New York to establish a CL center with government funded CL advocates in Manhattan's divorce court.