COLLABORATIVE PROCESS ACT

Proposed Statutes, Rule of Family Law Procedure and Modification of Ethics Rule

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Proposal of the Collaborative Sub-Committees of the Rules and Forms Committee
and Legislative Committee

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Collaborative Practice - Definitions and Overview

Collaborative Practice is a contractually based alternative dispute resolution process in which parties negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. ”[T]he objectives of collaborative [practice] are to change the context for negotiation itself and provide a strong incentive for early, collaborative, negotiated settlement without resorting to litigation.” JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 89 (2008) (hereinafter MACFARLANE, THE NEW LAWYER). The distinctive feature of a collaborative process is that parties are represented by lawyers (“collaborative lawyers”) during negotiations and know in advance that their lawyers will all be disqualified from further representing parties if the collaborative process ends without agreement (“disqualification requirement”). See William H. Schwab, Collaborative Law: A Closer Look at an Emerging Practice, 4 PEPP. DISP. RESOL. L.J. 351 (2004). Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the collaborative law process. Each party has the right to terminate the collaborative law process at any time without cause and without giving a reason, which would require all parties to engage new counsel.

The ground rules for collaborative process are set forth in a written agreement (“collaborative participation agreement”) in which parties designate collaborative lawyers and agree not to seek tribunal (usually judicial) resolution of a dispute during the collaborative law process. Pauline H. Tesler, Collaborative Family Law, 4 PEPP. DISP. RESOL. L.J. 317, 319 (2004). The participation agreement also provides that if a party seeks judicial intervention, or otherwise terminates the collaborative law process, the disqualification requirement takes effect. Id. at 319-20.

Parties thus make a economic and emotional commitment towards settlement by signing a collaborative participation agreement. The disqualification requirement means parties must bear the costs of engaging new counsel and collaborative lawyers are ethically required to end their representation if the collaborative process terminates. “Each side knows at the start that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement.” Scott R. Peppet, The (New) Ethics of Collaborative Law, J. DISP. RESOL. (forthcoming 2008) (emphasis in original).

The goal of these commitments to settlement is to encourage parties and their collaborative lawyers to focus on problem solving rather than positional negotiations. See generally ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991). There are many different models of collaborative law practice that build on the core feature of the disqualification requirement to accomplish this goal in different ways. See John Lande, Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering, 64 OHIO ST. L.J. 1315 (2003). Most collaborative participation agreements, for example, require parties to voluntarily disclose relevant data requested by another party without formal discovery requests and to supplement responses to information

requests previously made.

"By their own account, it is rare for collaborative lawyers to experience situations in which either their client will not disclose relevant information or they suspect the other side of not meeting their obligations." MACFARLANE, THE NEW LAWYER supra at 89. Additional provisions in collaborative participation agreements may require parties to jointly retain neutral experts rather than hire their own. Sometimes agreements require that negotiations take place in four-way meetings in which counsel and parties focus on their underlying interests, share information and "brainstorm" solutions to problems. Typically, in order to promote productive negotiations, collaborative participation agreements provide that communications during the collaborative law process are confidential. N.Y. ASS'N OF COLLABORATIVE PROF'LS: COLLABORATIVE LAW PARTICIPATION AGREEMENT, available at http://collaborativelawny.com/participation_agreement.php; TEX. COLLABORATIVE LAW COUNCIL: PARTICIPATION AGREEMENT (2005).

The Tradition of the Lawyer as Counselor/Peacemaker and the Growth of Alternative Dispute Resolution

Collaborative lawyering draws from the tradition of the lawyer as counselor, and the rapid growth and development of alternative dispute resolution. Lawyers have long productively advised clients broadly about the benefits of settlement and the costs of continued conflict. For example, Abraham Lincoln, a great trial lawyer in Illinois before his election as President, advised young lawyers in 1850 in his Notes for a Law Lecture:

> "Discourage litigation. Persuade your neighbors to compromise whenever you can point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough." ABRAHAM LINCOLN, LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Philip V. D. Stern ed., 1940).

The organized bar formally encourages the kind of broad client counseling emphasizing the important values behind peaceful resolution of disputes articulated by Lincoln in the Model Rules of Professional Conduct. Model Rule 1.4 provides that "[a] lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so . . . . A lawyer should advise the client of the possible effect of each legal alternative . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002). Model Rule 2.1 provides that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002). Comment [2] to Model Rule 2.1 amplifies the sentiment by stating that "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be

inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. [2] (2002)

The rapid development of alternative dispute resolution processes such as mediation has enhanced the importance of the lawyer's role as counselor and peacemaker by creating a climate and mechanisms to help lawyers encourage clients to settle disputes responsibly. See generally MCFARLANE, THE NEW LAWYER, supra. In 1976, 200 judges, scholars, and leaders of the bar gathered at the Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems and dissatisfaction with the administration of justice. Then Chief Justice Warren Burger called for exploration of informal dispute resolution processes. The Pound Conference emphasized ADR processes – particularly mediation – as better for litigants who had continuing relationships after the trial was over because it emphasized their common interests rather than those that divided them. Professor Frank Sander, Reporter for the Pound Conference's follow-up task force, projected a powerful vision of the court as not simply "a courthouse but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case." Frank E. A. Sander, Varieties of Dispute Processing, 70 F.R.D. 111 (1976).

Today, approximately 40 years after the Pound Conference, alternative dispute resolution has been fully integrated into the dispute resolution systems of most jurisdictions. See LexisNexis 50 State Comparative Legislation/ Regulations: Alternative Dispute Resolution (March 2008), available at http://w3.lexis.com/lawschoolreg/researchlogin08.asp?t=y&fac=no. All 50 states have combined to adopt 186 alternative dispute resolution statutes or regulations, including: Ariz. Rev. Stat. § 10-1806 (2008) (Close Corporations-Settlement of Disputes-Arbitration); Cal. Bus. & Prof. Code § 465 (2007) (Department of Consumer Affairs dispute resolution programs); Col. Rev. Stat. §13-22-201 (2007) (Courts and Procedure; Arbitration Proceedings); Fla. Stat. Ann. § 455.2235 (2007) (Business and Professional Regulation: General Provisions; Mediation); Wash. Rev. Code. Ann.§ 7.06.010 (2008) (Mandatory Arbitration of Civil Actions).

In many states lawyers are required to present clients with alternative dispute resolution options- mediation, expert evaluation, arbitration- in addition to litigation. California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Texas and Virginia impose mandatory duties on attorneys to discuss alternatives to litigation with their clients via court rule. See N.J. Ct. R. 5:4-2(h); Marshall J. Berger, Should An Attorney Be Required Be Required to Advise a Client of ADR Options, 13 GEO. J. LEGAL ETHICS 427, Appendix I-II (2000) (comprehensive listing of court rules, state statutes and ethics provisions); Bobbi McAdoo, A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota, 25 HAMLINE L. REV. 401 (2002); Bobbi McAdoo & Art Hinshaw, The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri, 67 MO. L. REV. 473 (2002) (empirical studies analyzing the impact of rules requiring lawyers to discuss ADR with clients).

The collaborative process is thus part of a broader movement to adopt the civil justice system to the needs of the public. "The wide spread introduction of court connected and private mediation programs, case management, and judicial mediation is testament to concerns about costs and delays in justice. The rate of resolution before trial has risen to 98.2 percent. All courts function differently than they did twenty years ago, with at least some shift toward the judicial management of cases and their settlement. Some of the most significant innovations in developing an early and informal dispute resolution process have grown out of the dissatisfaction felt by some members of the profession with the limits of traditional litigation to bring peace and closure to their clients." MACFARLANE, THE NEW LAWYER, supra at 7.

Collaborative Law- Growth and Development

The concept of collaborative law was first described by Minnesota lawyer Stuart Webb approximately eighteen years ago in the context of representation in divorce proceedings, the leading subject area for the collaborative law practice today. Stuart Webb, Collaborative Law: An Alternative For Attorneys Suffering 'Family Law Burnout,' 18 MATRIM. STRATEGIST 7 (2000).

Since then, collaborative law has matured and emerged as a viable option on the continuum of choices available to parties to resolve a dispute. Examples of its growth and development include:

• In Florida there are three circuits that have adopted administrative orders related to the collaborative process and numerous practice groups are utilizing versions of the collaborative process throughout the state.

• Thousands of lawyers have been trained in collaborative law. Christopher M. Fairman, A Proposed Model Rule for Collaborative Law, 21 OHIO ST. J. ON DISP. RESOL. 73, 83 at n.65 (2005) (citing Jane Gross, Amicable Unhitching, With a Prod, N.Y. TIMES, May 20, 2004, at F11).

• Collaborative law processes have been used to resolve thousands of cases in the United States, Canada, and elsewhere. David A. Hoffman, Collaborative Law: A Practitioner's Perspective, 12 DISP. RESOL. MAG. 25 (Fall 2005).

• Collaborative law practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions. *See id* at 28; *see also* Int'l Acad. Collaborative Prof'ls., http://www.collaborativepractice.com (follow "Find a Collaborative Professional" hyperlink) (last visited Aug. 1, 2007).

• A number of states have enacted statutes of varying length and complexity which recognize and authorize collaborative law. *See, e.g.*, CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).

• A number of courts have taken similar action through enactment of court rules. *See, e.g.*, CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS tit. IV, § 3 (2005); UTAH CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial*

Circuit of Florida, Case No. 07-01 (Court Administration) Administrative Order No. 07-08 (Miami Dade County, Fla. Oct. 19, 2007); Eighteenth Judicial Circuit Administrative Order No. 07-
20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (Brevard County Fla. June 25, 2007); MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

• The first empirical research on collaborative law found generally high levels of client and lawyer satisfaction with the process and that negotiation under collaborative law participation agreements is more problem solving and interest based than those in the more traditional adversarial framework. It found no evidence that "weaker" parties fared worse in collaborative law than in adversarial based negotiations. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (June 2005) (Can.), *available at* http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf (last visited Aug. 1, 2007).

• Chief Judge Judith S. Kaye of New York established the first court based Collaborative Family Law Center in the nation in New York City. In announcing the Center, Chief Judge Kaye stated: "[w]e anticipate that spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved—surely a step in the right direction." JUDITH S. KAYE, 2007 THE STATE OF THE JUDICIARY 11 (New York State Office of Court Administration 2007).

• The American Bar Association Dispute Resolution Section has organized a Committee on Collaborative Law. Section of Dispute Resolution: Collaborative Law Committee, *available at*, http://www.abanet.org/dch/committee.cfm?com=DR035000 (last visited Aug. 1, 2007);

• Britain's leading family law judges and lawyers began a formal campaign to encourage divorcing couples to participate in collaborative law. Frances Gibb, *Family Judges Campaign to Take the Bitterness and Cost Out of Divorce*, TIMES ONLINE Oct. 4, 2007 (http://business.times onlink.co.uk/tol/business/law/public_law/article2584817.ece).

• Many professionals from other disciplines, especially financial planning and psychology, have been trained to participate in the collaborative process. *See* Tesler, *supra* at 5.

• Numerous articles have been written about collaborative law in scholarly journals, *See, e.g.*, Gay G. Cox & Robert J. Matlock, *Problem Solving Process: Peacemakers and the Law: The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003); Joshua Issacs, *Current Developments, A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004); James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Sherri

Goren Slovin, *The Basics of Collaborative Family Law – A Divorce Paradigm Shift*, 18 AM. J. FAM. L. 2 (Summer 2004) available at http://www.mediate.com/articles/slovinS2.cfm; Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004); Gary L. Vogel, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WILLIAM MITCHELL L.REV. 971 (2007). Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes,* 84 N.C. L. REV. 979 (2006); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, PSYCHOL. PUB. POL□Y. & L. 967 (1999) and the popular press. *See, e.g.*, Stephanie Coontz, *Separate Peace*, WALL. ST. J. June 6, 2008 at W11*;* Mary Flood, *Collaborative Law Can Make Divorces Cheaper, Civilized*, HOUS. CHRON., June 05, 2007; Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11; Janet Kidd Stewart, *Collaboration is Critical: Couples Find That Breaking Up Doesn't Have to Mean Breaking the Bank*, CHI. TRIB., Feb. 9, 2005 at 3.

Collaborative Process Act - An Overview

The overall goal of the Collaborative Process Act is to support the continued development and growth of collaborative process by making it a more uniform, accessible dispute resolution option for parties. The collaborative process has thus far largely been practiced under the auspices of private collaborative participation agreements developed by private practice groups. These agreements vary substantially in depth and detail, and their enforcement must be accomplished by actions for breach of contract.

The Collaborative Process Act is based on the policy that the collaborative process should continue to be a contractual, voluntary dispute resolution option for those parties who opt for it with informed consent. The Act aims to protect consumers by minimally standardizing collaborative participation agreements. The Act also aims to facilitate the collaborative process by authorizing courts to enforce its key features- the disqualification provision and the evidentiary privilege for collaborative law communications- in pending actions without a separate action for breach of contract.

Specifically, the Collaborative Process Act and the proposed Rule of Family Law Procedure and the modification to the ethics rule:

- establish minimum terms for the form and provisions of collaborative participation agreements;
- specify when and how a collaborative process begins and is terminated;
- describes the appropriate relationship between collaborative process and the civil justice system when the collaborative process is used to attempt to resolve proceedings pending in court;
- extends the disqualification requirement to matters "substantially related" to that submitted to a collaborative law process by parties, imputes it to the law firm of a collaborative lawyer, and empowers courts to enforce it in a pending proceeding without a separate action for breach of contract;
- meets the reasonable expectations of parties and counsel for confidentiality of

communications during the collaborative process by creating an evidentiary privilege provisions for such communications; and

• gives courts discretion to enforce agreements, the disqualification requirement and the evidentiary privilege provisions of the Act.

Collaborative Process Public Policy Benefits

The Collaborative Process Act's goal is to help collaborative process take its place as a recognized and viable option for dispute resolution. Making the collaborative process more broadly and uniformly available will gives parties another dispute resolution option to meet their needs. The Act will thus increase the likelihood that disputes will be resolved earlier in their life cycle, at less economic and emotional cost. See generally Report of the Ad Hoc Panel on Disp. Resol. & Pub. Pol'y, Nat'l Inst. of Disp. Resol., Paths to Justice: Major Public Policy Issues of Dispute Resolution (1983), reprinted in LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 3-4 (2d ed. 1997); Nancy H. Rogers & Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998). Society benefits when conflicts are resolved earlier and with greater party satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of those affected by the dispute. See JEFFREY RUBIN, DEAN PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT 68-116 (2d ed. 1994) (discussing reasons for and consequences of conflict escalation).

When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. Voluntary earlier settlement increases the likelihood that parties will be satisfied with the process that produced the settlement and that they will adhere to its terms. Earlier settlement also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005) ("It is the policy of this state to encourage the peaceable resolution of disputes... and the early settlement of pending litigation through voluntary settlement procedures."); See also Wayne D. Brazil, Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Robert K. Wise, Mediation in Texas: Can the Judge Really Make Me Do That?, 47 S. TEX. L. REV. 849, 850 (Summer 2006). "Procedural justice research suggests that not only that participation in decision making over negotiation strategies is important, but that there are important values surround the way in which the negotiation process unfolds- did the other side listen and take their concerns seriously? Were they civil and polite? Did they acknowledge some fault or ambiguity? – which have an eventual bearing on a sense of 'justice' having been done." MACFARLANE, THE NEW LAWYER, supra at 94. See generally ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing the causes for the decline of civic engagement and ways of ameliorating the situation).

Not all disputes can or should be resolved through negotiation and compromise encouraged by collaborative law. Litigation and judicial determinations serve vital social

purposes. They protect legal rights and entitlements. Courts provide a measure of predictability in outcome by application of precedent and procedures rooted in due process. They articulate, apply and expand principals of law necessary to provide order to social life. They resolve factual conflicts through the time tested procedures of the adversely system. Courts can require discovery of information that one side wants to keep from the other. Courts can issue orders backed by sanctions that protect the vulnerable and weak against the manipulative and powerful. These benefits of the judicial process are generally not available when settlements occur through private, confidential processes such as collaborative law. See Owen Fiss, Against Settlement, 93 YALE L. J. 1073 (1984).

The benefits of courts and litigation are not, however, without costs. Lincoln alluded to them by noting that "the nominal winner [in litigation] is often a real loser—in fees, expenses and waste of time." Not all conflicts implicate "rights". "Many do, and it is a critical underpinning of the principles of social democracy and respect for equality to deal with these within an adjudicative framework." MACFARLANE, THE NEW LAWYER, supra at 93. Many clients, however, want practical solutions to the problems they bring to a lawyer, not sometimes abstract vindication. Parties can find adjudication to be emotionally and economically draining. Judge Learned Hand, in his customarily succinct style, summarized the consequences of full fledged adversary litigation for many by stating that "[a]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926). See Robert H. Heidt, When Plaintiffs Are Premium Planners For Their Injuries: A Fresh Look At The Fireman's Rule, 82 IND. L.J. 745, 769 (2007) (referring to Judge Learned Hand's quote while discussing the benefit of the fireman's rule, how it avoids substantial litigation, refers to litigation as "toxic and protracted" in character, noting that "incessant wrangling will leave professional rescuers and defendants "dispirited" and may stretch on for years, leaving the parties and witnesses bitter, stressed, and frustrated); Andrew S. Boutros & Jeffrey O'Connell, Treating Medical Malpractice Claim Under A Variant Of The Business Judgment Rule, 77 NOTRE DAME L. REV. 373, 420 (2002) (referring to Judge Learned Hand's quote while discussing the benefit of prompt settlement to personal injury tort claims, including those arising from medical malpractice). Parents in divorce and family disputes in particular have negative reactions to litigation as a method of resolving family problems. ANDREW I. SCHEPARD, CHILDREN COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 42-44 (2004).

The overall question for social policy is not how to eliminate adjudication. Rather, it is how to authorize and develop responsible alternatives to it so that informed parties can decide for themselves if the costs of litigation outweigh its benefits in their particular circumstances. The greater the range of dispute resolution options that parties have for "fitting the forum to the fuss," the better. John Lande & Gregg Herman, supra at 7. The collaborative process should be an attractive dispute resolution option for many parties to consider. Many parties may want the advice and support of counsel in helping them negotiate a settlement, but under ground rules which reduces the risk of emotionally and economically expensive litigation. Collaborative lawyers help assure that parties enter the process with informed consent, provide expert advice and support during the negotiation process and a measure of protection against improvident

agreements.

Collaborative Law and the Legal Profession

The further growth and development of the collaborative process also has significant benefits for the legal profession. The collaborative process is part of the movement towards delivery of "unbundled" or "discreet task" legal representation, as it separates representation in settlement-oriented processes from representation in pretrial litigation and the courtroom. By increasing the range of options for services that lawyers can provide to clients, unbundled legal services reduces costs and increases client satisfaction with the services provided. The organized bar has recognized unbundled services like collaborative law as a useful part of the lawyer's representational options. See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002); FOREST S. MOSTEN, UNBUNDLED LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (Am. Bar Ass'n 2000). See generally Symposium, A National Conference on Unbundled Legal Services October 2000, 40 FAM. CT. REV. 26 (Jan. 2002); Franklin R. Garfield, 40 FAM. CT. REV. 76, Unbundling Legal Services in Mediation (Jan. 2002); Robert E. Hirshon, Unbundled Legal Services and Unrepresented Family Litigants, Papers from the National Conference on Unbundling, 40 FAM. CT. REV. 13 (Jan. 2002); Forrest S. Mosten, Guest Editorial Notes, 40FAM. CT. REV. 10 (Jan. 2002); Andrew Schepard, Editorial Notes, 40 FAM. CT. REV. 5 (Jan. 2002).

Additionally, the collaborative process has an intangible benefit for the lawyers who practice it greater satisfaction in the profession they have chosen. Collaborative lawyers, for example, generally feel that the collaborative law process enables them to work productively with other professionals (particularly with mental health experts and financial planners) in service to parties. Instead of using these professionals in an adversarial framework as expert witnesses or consultants to further their "case", collaborative lawyers draw on their expertise to help shape creative negotiations and settlements.

More globally, collaborative lawyers feel they help their clients resolve their disputes productively, thus fulfilling Lincoln's vision of the lawyer "as a peacemaker" with the "superior opportunity of being a good man [or woman]" for whom "[t]here will still be business enough." The professional satisfaction of the collaborative lawyer's role may have best been summed up nearly one hundred years after Lincoln wrote by another great figure who was also a practicing lawyer, Mohandas Gandhi. Gandhi served as a lawyer in the South African Indian community before he returned to India to lead its fight for independence. Reflecting on his experience encouraging a settlement by a client of a commercial dispute, Gandhi wrote: "My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul." MOHANDAS GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 168 (1948).

Collaborative Process and Professional Responsibility

Given the tradition of lawyers as counselors and the support that the bar has shown for unbundled legal services, it is not surprising that the bar association ethics committees that have addressed the subject generally support the practice of collaborative law. See Kentucky Bar Ass'n Op. E-425 (June 2005), "Participation in the 'Collaborative Law' Process," available at http:// www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; New Jersey Adv. Comm. on Prof'l Eth. Op. 699 (Dec. 12, 2005); "Collaborative Law," available at http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; North Carolina State Bar Ass'n 2002 Formal Eth. Op. 1 (Apr. 19, 2002); "Participation in Collaborative Resolution Process Requiring Lawyer to Agree to Limit Future Court Representation," available at http://www.ncbar.com/ethics/ethics.asp? page=2&from=4/ 2002&to=4/2002; Pennsylvania Bar Ass'n Comm. on Legal Eth. & Prof'l Resp. Inf. Op. 2004-24 (May 11, 2004), available at http:// www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf.

One state bar ethics opinion concluded to the contrary, arguing that by when collaborative lawyers sign a collaborative law participation agreement with parties, they assume contractual duties to other parties besides their client, creating an intolerable conflict of interest. Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007); "Ethical Considerations in the Collaborative and Cooperative Law Contexts," available at http://www.cobar.org/group/display.cfm?GenID=10159 &EntityID=ceth, Colorado's unique view has, however, been specifically rejected by American Bar Association Formal Op. 07-447 Ethical Considerations in Collaborative Law Practice (2007). The ABA Opinion concluded that collaborative law is a "permissible limited scope representation," the disqualification provision is "not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation" and "[i]f the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process."

The act thus assumes that the limited scope representation in settlement negotiations provided by collaborative lawyers is consistent with standards of professional responsibility for lawyers.

Collaborative Law Regulation and Party Autonomy

The overall regulatory philosophy of the Act is to maximize party autonomy in shaping the provisions of collaborative participation agreements and the collaborative process. Parties can add additional provisions to their agreements which are not inconsistent with the minimum terms. The act's philosophy of minimal standardized regulation enables parties and their collaborative lawyers to design a collaborative process that best satisfies their needs and economic circumstances. It is similar to the philosophy that animates the Uniform Arbitration Act. ("[A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs"). UNIFORM ARBITRATION ACT Prefatory Note (2000).

As previously described, the collaborative process has many different models. There are many varieties of participation agreements – some short, some long, some in technical legal language and some in plain language. Some models of the collaborative process do not require the parties to hire any additional experts to play any role. In other models, the collaborative process involves many professionals (e.g., mental health and financial planners) from other disciplines (See EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTStit. IV, § 3 (2005); in others, it does not (See CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007).

In some of models of the collaborative process experts are hired as neutrals by both parties, while in others they are engaged by only one. In others, mental health professionals play roles such as "divorce coach" or "child specialist". Neutral experts can be engaged by the parties to do a specific task such as an appraisal or valuation of assets or evaluation of parenting issues. Some models of the collaborative process encourage parties and collaborative lawyers to mediate disputes and call in a neutral third party for that purpose. Others use arbitration to resolve issues that the parties cannot resolve themselves.

In the interests of stimulating diversity and experimentation, the Act does not regulate in detail how the collaborative process should be conducted. Each model of collaborative process has different benefits and costs, as do different models of mediation or arbitration. A dispute resolution process which involves more professionals will, for example, cost parties more than one which does not. The available research has not as yet identified a particular public policy reason a statute should prefer one model of collaborative practice over another, as opposed to promoting the development of collaborative law generally as a dispute resolution option. It will be up to the marketplace to determine what model of practice best meets party needs.

Collaborative Law, Subject Matter Limitations and Divorce and Family Disputes

The collaborative law process has seen its greatest growth and development in dissolution and family law disputes, as problem-solving approaches to potential settlement are especially appropriate in these sensitive and important matters. Dissolution and reorganization of intimate relationships can generate intense anger, stress and anxiety, emotions which can be exacerbated by adversary litigation. The emotional and economic futures of children and parents, who often have limited resources, are at stake in family and divorce disputes. The well being of many parents and children may be better protected and satisfied by collaborative planning for the future with expert help. See generally, SCHEPARD, supra at 50; Robert E. Emery, David Sbarra, & Tara Grover, Divorce Mediation Research and Reflections, 43 FAM. CT. REV. 22, 34 (Jan. 2005). The needs of children are particularly implicated in dissolution cases, as children exposed to high levels of inter-parental conflict "are at [a higher] risk for developing a range of emotional and behavioral problems, both during childhood and later in life . . . ." John H. Grych, Interpersonal Conflict as A Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs, 43 FAM. CT. REV. 97, 97 (2005); and see generally INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH AND APPLICATIONS (John H. Grynch & Frank D. Fincham eds., 2001); J. B. Kelly, Children's Adjustment in Conflicted Marriages & Divorce: A Decade Review of Research, J. OF THE AM.

ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, 39, 963-973 (2000). The lower the conflict level between parents, the more the child benefits and the more regularly child support is paid. See SCHEPARD, supra at 35.

The dissolution bar recognizes that dissolution and family disputes are particularly appropriate for the problem-solving orientation to client representation that the collaborative process encourages. Bounds of Advocacy, a supplementary code of standards of professional responsibility for dissolution law specialists who are members of the American Academy of Matrimonial Lawyers (AAML), echoes Lincoln and Gandhi in stating that: "[a]s a counselor, the lawyer encourages problem solving in the client . . . . The client's best interests include the well-being of children, family peace and economic stability." AM. ACAD. OF MATRIMONIAL LAW, BOUNDS OF ADVOCACY (2000) Bounds of Advocacy further states that "the emphasis on zealous representation [used] in criminal cases and some civil cases is not always appropriate in family law matters" and that "[p]ublic opinion [increasingly supports] other models of lawyering and goals of conflict resolution in appropriate cases." Id. at § 2. Furthermore, the Bounds of Advocacy states that a dissolution lawyer should "consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children." Id. at § 6.1.

Collaborative Process in Pending Cases

The purpose of the collaborative process is to encourage parties with the assistance of their counsel to resolve a matter without judicial intervention, and that purpose is furthered if parties choose the collaborative process even after a case is commenced in court. Every pending case that is settled without a trial conserves party and public resources for other matters.

The proposed statutes and rule thus authorizes a collaborative process in pending proceedings and abate proceedings while a collaborative law process is ongoing. Parties are required to notify the court when collaborative process begins and terminates. In addition, the act authorizes courts to approve settlements entered into as a result of a collaborative process if presented in by agreement of the parties in uncontested proceedings and motions. See CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases (June 25, 2007) MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

Scope of Disqualification Provision

Collaborative law is a commitment by parties to promote settlement by limiting the lawyer's role to that activity and isolating the lawyer from the adversarial and judicial process. The disqualification requirement is the enforcement mechanism for that commitment. The Act attempts to protect against manipulation of the disqualification provision by narrow construction.

Collaborative Law Communications and Evidentiary Privilege

A major contribution of the Act is to provide a privilege for collaborative process communications in legal proceedings. The act thus recognizes an evidentiary privilege for communications made in the collaborative process similar to the privilege provided to communications during mediation by Chapter 44 of the Florida Statutes.

Protection for confidentiality of communications is central to the collaborative process. Without assurances that communications made during the collaborative process will not be used to their detriment later, parties, collaborative lawyers and non party participants such as mental health and financial professionals will be reluctant to speak frankly, test out ideas and proposals, or freely exchange information.

The drafters believe that a statute is required only to assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. Parties uniformly expect that aspect of confidentiality to be enforced by the courts, and a statute is required to ensure that it is. Parties' expectations of additional confidentiality need clarification by mutual agreement.

The Need for a Uniform Collaborative Law Act

It is foreseeable that collaborative participation agreements and sessions will cross jurisdictional boundaries as parties relocate, and as a collaborative process is carried on through conference calls between collaborative lawyers and parties in different counties.

This Act will help bring order and understanding of the collaborative process across county lines, and encourage the growth and development of collaborative law in a number of ways. It will ensure that collaborative participation agreements meet its minimum requirements. Without statutory guidance, there can be no firm assurance in any state that a privilege for communications during a collaborative process will be recognized. Uniformity will add certainty on these issues, and thus will encourage better-informed party self-determination about whether to participate in the collaborative process.

Proposal of the Collaborative Sub-Committees of the Rules and Forms Committee and Legislative Committees

PART III

COLLABORATIVE PROCESS

61.601 Short Title.- - This part may be cited as the "Collaborative Process Act."

61.602 Purposes of Part. - - The general purpose of this part is to create a uniform system of practice of the collaborative process in the State of Florida. It is the policy of the State of Florida to encourage the peaceful resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. The collaborative process is a unique non-adversarial method which preserves a working relationship between the parties and reduces the emotional and financial toll of litigation.

61.603 Definitions. - - As used in this part, the term:

(1) "Collaborative attorney" means an attorney licensed to practice law in the State of Florida by the Florida Supreme Court who satisfies any training and other requirements mandated by the Florida Supreme Court to enable the attorney to represent clients in the collaborative process.

(2) "Collaborative communication" means any oral or written statement or a non-verbal act, that is made:

(a) following the execution by the parties' of a collaborative participation agreement until the time the collaborative process terminates or final agreement is reached; and

(b) for the purposes of conducting, participating in, continuing or otherwise furthering the collaborative process.

(3) "Collaborative participant" means the parties, collaborative attorneys, and nonparty participants in the collaborative process.

(4) "Collaborative participation agreement" means a written contract entered into pursuant to this Act and the requirements promulgated by the Florida Supreme Court pertaining to the collaborative process.

(5) "Collaborative process" means a process in which parties, represented by collaborative attorneys, attempt to resolve a matter pursuant to a collaborative participation agreement without court intervention.

(6) “Court” means a tribunal of competent jurisdiction acting in an adjudicative capacity in which a judicial officer, after presentation of evidence, testimony and legal argument, renders a binding decision affecting a party’s interests in a matter.

(7) “Matter” means a dispute, transaction, claim, problem or issue for resolution described in a collaborative participation agreement.

(8) “Nonparty participant” means a person, other than a party or collaborative attorney, who is retained or serves as an advisor to a party in the collaborative process.

(9) “Party” means a person who enters into a collaborative participation agreement and whose consent is necessary to resolve the matter.

(10) “Person” means an individual, corporation, partnership, association, governmental subdivision, agency, or any other legal or commercial entity.

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

61.604 Commencement of Collaborative Process. - - The collaborative process shall commence, whether or not a proceeding is pending, when the parties enter into a collaborative participation agreement.

61.605 Tolling of Statutes of Limitations. - - The execution of a collaborative participation agreement shall toll all legal time periods applicable to legal rights and issues under law between the parties for the amount of time the collaborative participation agreement remains in effect. This section applies to all applicable statutes of limitations, filing deadlines, and other time limitations imposed by law.

61.606 Confidentiality; privilege; exceptions.--

(1) Except as provided in this section and unless the parties agree other otherwise in writing, all collaborative process communications shall be confidential. A collaborative participant shall not disclose a collaborative process communication to a person other than another collaborative participant. A violation of this section during the collaborative process may be sanctioned as agreed to by the parties or a party may terminate the collaborative process. A violation of this section once the collaborative process has terminated may be sanctioned as provided by s. 61.607.

(2) A collaborative party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding collaborative process communications.

(3) (a) Notwithstanding subsections (1) and (2), there shall be no confidentiality or privilege attached to a signed written agreement reached during a collaborative process, unless the parties agree otherwise in writing, or for any collaborative communication:

1. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

2. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

3. Offered to report, prove, or disprove professional malpractice or misconduct occurring during the collaborative process, solely for the purpose of the professional malpractice, misconduct or ethics proceeding; or

4. Offered for the limited purpose of establishing or refuting enforceability of an agreement reached during the collaborative process.

(b) A collaborative process communication disclosed under any provision of subparagraph (3)(a)2., subparagraph (a)3., subparagraph (a)4., remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(4) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in a collaborative process.

(5) A party that discloses or makes a representation about a privileged collaborative communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

61.607 Confidentiality; sanctions.--

(1) Once the collaborative process has terminated, if a collaborative participant that knowingly and willfully disclose a collaborative communication in violation of s. 61.606, such person shall be subject to the following:

(a) Equitable relief.

(b) Compensatory damages.

(c) Attorney's fees and costs incurred during the collaborative process

(d) Reasonable attorney's fees and costs incurred by the application for remedies under this section.

(2) Notwithstanding any other law, an application for relief filed under this section may not be commenced later than 2 years after the date on which the party had a reasonable opportunity to discover the breach of confidentiality, but in no case more than 4 years after the date of the breach.

(3) Any collaborative participant shall not be subject to a civil action under this section for lawful compliance with the provisions of s. 119.07.

Rule 12.745 Collaborative Process Rule

(a) Applicability. This rule governs the use of the collaborative process in family matters and related issues.

(b) Commencement of Collaborative Process. If the parties desire to participate in the collaborative process once a proceeding has been initiated, the parties shall file in the pending matter a joint notice of participation in collaborative process and request for abatement.

(c) Collaborative Participation Agreement. A collaborative participation agreement shall:

(1) be in writing;

(2) describe the nature and scope of the matter;

(3) state the parties' intention to attempt to resolve the matter through the use of the collaborative process;

(4) identify the collaborative attorney engaged by each party to represent their interests in the collaborative process;

(5) contain a signed acknowledgment by each party's collaborative attorney confirming the attorney's engagement; and

(6) contain the following provisions:

(A) That each party must be represented by a collaborative attorney. A collaborative attorney may be discharged by a party or may withdraw from further representation of a party by notifying the client and the collaborative attorney representing the other party, and receiving permission to withdraw from the court if a proceeding is pending.

(B) That if a collaborative attorney is discharged by a party or otherwise withdraws from further representation, the collaborative process is stayed and will terminate 30 days from the date of discharge or withdrawal unless:

(i) the unrepresented party engages a successor collaborative attorney; and

(ii) the successor collaborative attorney files an appropriate notice of representation of a party with the court to the proceeding if a proceeding is pending.

(C) That if the collaborative process terminates without a final agreement being reached, whether nonparty participants will be disqualified from participating or testifying in the matter or a substantially related matter after the collaborative process terminates and if the work product of nonparty participants is inadmissible in the matter or a substantially related matter.

(D) That a party may not initiate a proceeding or seek the intervention of a court in a pending proceeding until the collaborative process terminates, except by agreement of the parties to seek the entry of an order or judgment to ratify an agreement of the parties.

(E) That each party shall make timely, full, candid, and informal financial disclosure, including all information reasonably related to any issue in the matter upon request of the other party and within a reasonable time. The parties shall, at a minimum, comply with the mandatory disclosure requirements pursuant to Rule 12.285 (d) and (e), Florida Family Law Rules of Procedure.

(F) Whether written partial agreements survive the termination of the collaborative process and can be submitted to the court for ratification and enforcement.

(d) Nonmaterial Deficiency: Notwithstanding the provisions of this rule or of the applicable statutes, a resulting written final agreement entered into during the collaborative process may be submitted to the court and the court may enforce the agreement resulting from the collaborative process as provided in (f) below. At the request of a party the court may apply the evidentiary privilege provided in Section 61.606, Florida Statutes.

(e) Abatement of Proceeding: I a proceeding is pending, the parties shall file a request for abatement of the pending proceeding and the court shall abate the matter for ninety (90) days to allow the parties to complete the collaborative process. The abatement shall expire and the collaborative process shall terminate after ninety (90) days unless extended by the court upon stipulation of the parties for additional ninety (90) day periods.

(f) Termination of Collaborative Process.- -

(1) The collaborative process shall terminate:

(A) when a party unilaterally terminates the collaborative process with or without cause before a negotiated resolution or settlement of a matter is entered into by providing written notice to his or her attorney who shall provide written notice to the other collaborative attorney of the party's decision to terminate the collaborative process; or

(B) in a pending proceeding ninety (90) days after the filing of the joint notice of participation in collaborative process unless the parties file a joint notice of continued participation in collaborative process to continue the collaborative process for another ninety (90) days.

(2) Upon termination of the collaborative process, if a proceeding is pending, either party may file a notice of termination of collaborative process which specifies the date on which the collaborative process terminated but shall not specify any reason for the termination.

(f) Agreement, Final Judgment and Enforcement. - - If an agreement is reached, it shall be in writing and signed by the parties and their collaborative attorneys. The agreement and appropriate pleadings shall be filed with the court as required by law and these rules. A final judgment or order ratifying the agreement shall be prepared by one of the collaborative attorneys and submitted to the other collaborative attorney for approval. Upon approval the final judgment or order shall be submitted to the court and, if approved, the court shall enter the judgment or order. Thereafter, the judgment or order may be enforced in the same manner as any other court order.

(g) Alternative Dispute Resolution Permitted. - - Nothing in this part shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternate dispute resolution to reach a settlement on any of the issues included in the collaborative participation agreement.

NOTE: this is an existing ethics rule. Additions are underlined, the one word is stricken.

RULE 4-1.16 DECLINING OR TERMINATING REPRESENTATION

(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged;

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; ~~or~~

(5) the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees

to disclose and rectify the crime or fraud; <u>or</u>

<u>(6) a lawyer is representing a client in the collaborative process pursuant to Part III of Chapter 61 and the collaborative process terminates without a final agreement.</u>

(b) When Withdrawal Is Allowed. Except as stated in subdivision (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client insists upon taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement;

(3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

(c) Compliance With Order of Tribunal. A lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Protection of Client's Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.