

MEMORANDUM

To: Susan Evans Grabe, Director of Public Affairs
CC: Amber Hollister, General Counsel
From: Mark Johnson Roberts, Deputy General Counsel
Re: Uniform Collaborative Law Act (UCLA)
Date: August 11, 2016

The Uniform Collaborative Law Rules/Act is a product of the Uniform Law Commission (ULC). It is a proposed statute, or a court rule, designed to implement a system of “collaborative law” as an alternative form of dispute resolution. In collaborative law, the parties agree not to seek a judicial resolution, but instead to rely on negotiation alone as a means of resolving their dispute. Either party can terminate the collaborative process at any time, but the cost of doing so is high. If the collaborative process does not succeed, the parties must begin the process of dispute resolution anew in a traditional context. Neither the lawyers nor any of the knowledge obtained during the collaborative process can be used in any subsequent litigation.

Procedural History of the UCLA before the ABA House of Delegates

The UCLA began life in a series of conferences held by a ULC drafting committee starting in February 2007. The commission approved it in its initial form in July 2009. It was first presented to the ABA House of Delegates as Report 111C at its midyear meeting in February 2010. It was supported by the Section of Dispute Resolution, the Section of Family Law, and the Section of Individual Rights and Responsibilities (now the Section on Civil Rights and Social Justice). The Section of Litigation opposed it, as did the Young Lawyers Division and the Judicial Division. On the floor of the house, the resolution that would have approved the UCLA was withdrawn by the sponsors and did not proceed to a vote.

Following the 2010 ABA midyear meeting, the ULC drafting committee prepared amendments to the Act, and a proposed model court rule, and the

Commission approved those in June 2010. The entire package was submitted to the ABA House as Report 109F at its midyear meeting in February 2011. On the floor, the sponsors once again withdrew it from consideration rather than allowing it to go to a vote. This time, it was done at the request of the Section of Family Law, which wanted more time to study it.

Finally, the revised package was presented to the ABA House as Report 110B at its annual meeting in August 2011. The House rejected it on a vote of 154–298, 10 votes short of a two-to-one margin. The ULC subsequently submitted it to the Board of Governors of the American Academy of Matrimonial Lawyers in November 2011, where it was likewise rejected.

Adapting the ULCA for Use in Oregon

Central to the practice of collaborative law is the signing of a “participation agreement” between the parties that sets forth the parameters for their negotiation. Based on the proposed law, parties to a collaborative participation agreement could—and, under the preferred collaborative model, would—agree to disqualification of their lawyers and law firms in the event that negotiation proved fruitless, and to confidentiality of all the information exchanged during the collaborative process. These provisions create an artificial barrier for either party to terminating the negotiations. If negotiation fails, both parties must incur a penalty in the form of hiring new counsel and “rediscovering” all of the information exchanged during collaboration.

That such an agreement might be signed raises a couple of concerns for lawyers under Oregon’s Rules of Professional Conduct (RPCs). First, there is a lawyer self-interest conflict under RPC 1.7(a)(2), in that a lawyer advising a client in a collaborative law process is undertaking a responsibility, favoring the opponent, to withdraw from representation under circumstances where, by definition, withdrawal will not be in the client’s best interest. Second, the nature

of a collaborative law agreement is to limit the lawyer's ability to represent a client as a part of settling that client's case, implicating RPC 5.6(b).¹

The ULC's answer to these concerns was to draft a set of court rules that was identical in virtually all respects to its proposed legislation. Whatever may be the merits of such an approach in other jurisdictions, in Oregon, we need a two-pronged approach. Under the theory of collaborative law, in which the participation agreement is defined to be in the client's best interest because it is what the client wants, the RPC 1.7 conflict is waivable based upon informed consent. But the RPC 5.6 concern must be addressed by an amendment if collaborative law is to be practiced ethically in our state. Passing a statute that purported to authorize lawyer conduct prohibited by the RPCs would violate the separation of powers by intruding upon the exclusive province of the judiciary to regulate lawyer conduct.

¹ Interestingly, the formal ethics opinion of the American Bar Association, widely cited as approving the practice of collaborative law, defined the RPC 1.7 concern out of existence and ignored the RPC 5.6 issue. *Ethical Considerations in Collaborative Law Practice*, ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op 07-447 (2007). It did this by ignoring the language of RPC 1.7 and concluding that a participation agreement created no conflict of interest, simply because it was what the client wanted.