

HOUSE BILL REPORT

HB 2196

As Reported by House Committee On:
Judiciary

Title: An act relating to collaborative law.

Brief Description: Adopting the uniform collaborative law act.

Sponsors: Representatives Eddy, Rodne, Pedersen, Nealey, Goodman, Jinkins, Kelley and Uptegrove; by request of Uniform Laws Commission.

Brief History:

Committee Activity:

Judiciary: 1/9/12, 1/12/12 [DPS].

<p>Brief Summary of Substitute Bill</p> <ul style="list-style-type: none">• Adopts the Uniform Collaborative Law Act.
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HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Shea, Assistant Ranking Minority Member; Chandler, Eddy, Hansen, Kirby, Klippert, Nealey, Orwall, Rivers and Roberts.

Staff: Trudes Tango (786-7384).

Background:

There are various alternative dispute resolution processes, such as mediation and collaborative law, allowing parties to resolve all or part of a dispute outside of court. Collaborative law is currently more commonly used in family law cases, but may be used to reach settlement in a variety of disputes. In collaborative law, the parties voluntarily participate and sign a collaborative participation agreement describing the scope of the matter to be resolved. One significant difference between collaborative law and mediation is that parties in collaborative law must be represented by attorneys throughout the process.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

There are no statewide court rules regulating collaborative law. Some local court rules require the parties in a family law action to notify the court if they enter into a collaborative law participation agreement. In addition, there are rules adopted by the Washington Supreme Court regulating the conduct of lawyers and specifying a lawyer's responsibilities to the client.

The Uniform Collaborative Law Rules and Act of 2010 was drafted by the Uniform Law Commission. To date, three states have adopted the act.

Summary of Substitute Bill:

The Uniform Collaborative Law Act (UCLA) is adopted and applies to collaborative law participation agreements signed on or after the effective date of the legislation.

Collaborative Participation Agreement.

A collaborative participation agreement ("agreement") must, among other things, describe the nature and scope of the matter intended to be resolved, identify the collaborative lawyers representing the parties, and contain a statement by each lawyer confirming the lawyer's representation of a party in the process. The agreement may contain additional provisions that are not inconsistent with the UCLA, including provisions on how the collaborative law process can be concluded.

Authority of Tribunal during Collaborative Law Process.

Parties in a pending proceeding, such as a court action, arbitration, or administrative action, may enter an agreement to attempt to resolve a matter related to the proceeding. The notice to the tribunal of the agreement acts as an application for a stay of the proceeding. The stay is lifted when the parties file notice that the collaborative law process has concluded. The tribunal may require the parties to provide a status report on whether the collaborative law process is ongoing or concluded. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or a family or household member.

Concluding a Collaborative Law Process.

A collaborative law process is concluded by either a resolution of all or part of the collaborative matter or by termination of the process.

A collaborative law process may be terminated, with or without cause, when: (1) a party notifies other parties that the process is ended; (2) a party begins a proceeding related to a collaborative matter without agreement of all parties or, if there is a pending proceeding, the party initiates an action in the tribunal that would require notice to be sent to the parties; or (3) a party discharges his or her collaborative lawyer or the lawyer withdraws. However, the process may continue even when a collaborative lawyer is discharged or withdraws if the unrepresented party engages a new collaborative lawyer and all parties agree to continue.

Responsibilities of Collaborative Lawyers.

Before a party signs a collaborative law participation agreement, the lawyer must: (1) assess with the party factors the lawyer reasonably believes relate to whether the process is appropriate for the matter; (2) provide information the lawyer reasonably believes is sufficient for the party to make an informed decision; and (3) advise the party that the process is voluntary, can be terminated if the party initiates proceedings in a tribunal, and requires disqualification of the lawyer once the process is concluded.

Before a party signs an agreement and throughout the collaborative law process, the lawyer must make a reasonable inquiry and assessment of whether the party has a history of a coercive or violent relationship with another prospective party. If the lawyer believes the party he or she represents has a history of a coercive or violent relationship with another party, the lawyer may not begin or continue a collaborative laws process unless the party requests the process and the lawyer reasonably believes that the party's safety can be adequately protected.

Disqualification of Collaborative Lawyers.

A collaborative lawyer may not represent a party before a tribunal in a proceeding related to the collaborative matter, except to ask the tribunal to approve an agreement resulting from the collaborative law process or to seek or defend an emergency order. In the case of an emergency order, the collaborative lawyer may represent a party or 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.

This disqualification applies to lawyers in the collaborative lawyer's law firm except for firms representing low income parties without a fee and firms representing governmental entities. In both cases, another lawyer in the firm may represent a party, but the collaborative lawyer must be isolated from any participation in the matter.

Confidentiality and Privileges of Collaborative Law Communications.

Provisions for confidentiality and privilege are created for parties and nonparties in the collaborative law process. A collaborative law communication is confidential to the extent agreed to by the parties or required by other state law.

With certain exceptions, a collaborative law communication is privileged, is not subject to discovery, and is not admissible in evidence. Generally, a party may refuse to disclose and may prevent others from disclosing a collaborative law communication. However, information that is otherwise admissible or discoverable does not become inadmissible or protected from discovery solely because of its use in a collaborative law process.

Exemptions to privilege include communications that would be public under the Public Records Act or that pertain to certain criminal activity. In addition, the privilege does not apply when the communication is sought in a claim of professional misconduct or malpractice arising from the process or to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the protective services agency is a party to the process.

There is also no privilege if the tribunal finds that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and

the communication is sought in a criminal proceeding or a proceeding related to avoiding liability on, rescinding, or reforming a contract arising out of the collaborative law process.

Standards of Professional Responsibility.

The UCLA does not affect the professional responsibility obligations and standards that apply to a lawyer or other licensed professional or to the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult.

Substitute Bill Compared to Original Bill:

The substitute bill adds provisions to: (1) make it explicit that the collaborative law process applies only to civil matters and not criminal cases; and (2) specify that the exception to privileged communications applies to communications used to prove stalking and cyber stalking of a party or child.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Collaborative law is a dispute resolution process that is nonadversarial compared to litigation. When disputes are settled through the collaborative law process, it results in fewer cases going to court. The process was first used in the family law context, but it is available in any area of the law. It is currently practiced in all states and it is based on contract between the parties. Uniformity in the law establishes a national framework across the states regarding the enforceability of the agreements created from collaborative law. Commissioners in every state have put this uniform law before their legislatures for consideration. It would replace a patchwork of rules. Different collaborative law organizations have their own practices and processes that can differ in various counties. The Uniform Collaborative Law Act (UCLA) includes an evidentiary privilege that mirrors the privilege in the Uniform Mediation Act. The UCLA provides definition to the process to protect the consumer. Collaborative law is generally based purely on contracts, but the UCLA provides clarity and definition and an understanding of what collaborative law is. It provides for consumer protection, not just from lawyers but from other professionals, such as mental health professionals and financial professionals, involved in the collaborative law process. Court rules cannot regulate other professionals. The UCLA does not necessarily regulate the profession of lawyers. The Uniform Mediation Act and Arbitration Act do not raise separation of powers of issue.

(In support with concerns) Courts do not always recognize stalking as abuse. The exceptions to the privilege should include communications about stalking, not just abuse.

(Opposed) Many of the UCLA provisions regulate the practice of law and conflict with existing rules of professional conduct. The Washington Supreme Court regulates the practice of law and the provisions attempting to regulate lawyers are a violation of the separation of powers. There is a difference between collaborative law and mediation and arbitration. The UCLA affects a lawyer's obligation to clients and changes some aspects of conflict of interest rules that apply to lawyers and lawyer disqualification. Those provisions are covered by the rules of professional conduct. A lawyer may not be able to comply with both the court rules and the act if they are different. The Uniform Law Commission drafted proposed court rules and recommended certain parts of the UCLA be adopted by court rule. It would be best if the UCLA were implemented by court rules and statutes. Because of possible conflict with court rules, the court rules should be adopted first.

Persons Testifying: (In support) Representative Eddy, prime sponsor; Dennis Cooper, Uniform Law Commission; Michael Fancher, Collaborative Professionals of Washington; and Mark Weiss and Mary Sakaguchi, King County Collaborative Law.

(In support with concerns) Grace Huang, Washington State Coalition Against Domestic Violence.

(Opposed) Kathryn Leathers and Jean McElroy, Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.