

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1397 Florida Uniform Collaborative Law Act

**SPONSOR(S):** Civil Justice Subcommittee; La Rosa

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1190

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N, As CS	Cary	Bond
2) Judiciary Committee			

### SUMMARY ANALYSIS

The Uniform Law Commission (ULC) provides model statutes that are designed to be consistent from state to state. The ULC develops model statutes in many different areas of law to create uniformity in the law between jurisdictions. One such model statute is the Uniform Collaborative Law Act of 2009 (amended in 2010), which regulates the use of collaborative law, a form of alternative dispute resolution.

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law is only to be used in the collaborative law process. Should litigation ensue because the collaborative law process partially or completely failed to resolve the issues, the parties are required to retain different attorneys for litigation. The process is intended to promote full and open disclosure. The concept requires extensive confidentiality and privileges to be created by statute, while the courts must develop rules of practice and procedure to conform.

The bill creates the Florida Uniform Collaborative Law Act. The bill does not actually create a collaborative law process in Florida. Rather, it provides a framework that will become effective should the Supreme Court of Florida promulgate rules to enact a collaborative law process in Florida. The bill primarily serves to provide the grounds for beginning and concluding a collaborative law process and to provide the necessary statutory privileges and confidentiality of communications required for the collaborative law process.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

The Uniform Law Commission (ULC) provides model statutes that are designed to be consistent from state to state. Florida's commissioners to the ULC are appointed to 4-year terms by the Governor and confirmed by the Senate.<sup>1</sup> The ULC develops model statutes in many different areas of law to create uniformity in the law between jurisdictions.

One such model statute is the Uniform Collaborative Law Act of 2009 (amended in 2010), which regulates the use of collaborative law, a form of alternative dispute resolution. According to the ULC:

At its core Collaborative Law is a voluntary dispute-resolution process in which clients agree that, with respect to a particular matter in dispute, their named counsel will represent them solely for purposes of negotiation, and, if the matter is not settled out of court that new counsel will be retained for purposes of litigation. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. The process is intended to promote full and open disclosure, and, as is the case in mediation, information disclosed in a collaborative process is privileged against use in any subsequent litigation.

Collaborative Law is currently being practiced in all American jurisdictions as well as in a number of foreign countries. In the U.S., Collaborative Law is governed by a patchwork of state laws, state Supreme Court rules, local rules, and ethic opinions. The Uniform Collaborative Law Rules/Act ("UCLR/A") is intended to create a uniform national framework for the use of Collaborative Law—one which includes important consumer protections and enforceable privilege provisions. Collaborative Law under the UCLR/A is strictly voluntary. Attorneys are not required to offer collaborative services, and parties cannot be compelled to participate.<sup>2</sup>

Seven states<sup>3</sup> plus Washington, D.C., have enacted the Uniform Collaborative Law Act, while bills are pending in six other states.<sup>4</sup>

Florida currently recognizes forms of alternative dispute resolution and is considered a leader among states in that regard.<sup>5</sup> Florida public policy favors arbitration<sup>6</sup> and "mediation and settlement of family law disputes is highly favored in Florida law."<sup>7</sup>

Collaborative law is a non-adversarial alternative dispute resolution concept similar to mediation, to promote problem-solving and solutions in lieu of litigation. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law is only to be used in the collaborative law process. Should litigation ensue because the collaborative law process partially or completely failed to resolve the issues, the parties are required to retain different attorneys for litigation. The process is intended to

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<sup>1</sup> Section 11.249, F.S.

<sup>2</sup> Uniform Law Commission, Uniform Collaborative Law Rules/Act Short Summary. Found at [http://www.uniformlaws.org/Shared/Docs/Collaborative\\_Law/UCLA%20Short%20Summary.pdf](http://www.uniformlaws.org/Shared/Docs/Collaborative_Law/UCLA%20Short%20Summary.pdf) (last viewed March 20, 2014).

<sup>3</sup> Washington, Nevada, Utah, Texas, Hawaii, Alabama, and Ohio.

<sup>4</sup> Illinois, Massachusetts, Michigan, New Jersey, Oklahoma, and South Carolina.

<sup>5</sup> Fran L. Tetunic, *Demystifying Florida Mediator Ethics: the Good, the Bad, and the Unseemly*, 32 Nova L. Rev. 205, 244 (Fall, 2007).

<sup>6</sup> *Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456 (Fla. 2011).

<sup>7</sup> *Griffith v. Griffith*, 860 So.2d 1069, 1073 (Fla. 1st DCA 2003).

promote full and open disclosure, so extensive confidentiality and privileges are created by statute, while the courts develop rules of practice and procedure.<sup>8</sup>

## Effect of the Bill

The bill redesignates ch. 44, F.S., as “Alternatives to Judicial Action and creates Part II of ch. 44, F.S., the Florida Uniform Collaborative Law Act and s. 44.52, F.S., to provide definitions. The bill does not actually create a collaborative law process in Florida. Rather, it provides a framework that will become effective should the Supreme Court of Florida promulgate rules to enact a collaborative law process. More specifically, the bill becomes effective 30 days after the Supreme Court approves and publishes Rules of Professional Conduct, governing:

- The mandatory disqualification of a collaborative attorney and other attorneys in the same firm from appearing before a tribunal in a proceeding relating to the same matter as the collaborative law matter; and
- Limited exemptions to mandatory disqualification to seek emergency orders in certain limited circumstances.

and approves and publishes Family Law Rules of Procedure, governing:

- Required elements of a collaborative law participation agreement defining the commencement, procedures, and termination of the collaborative law process; and
- The stay of ongoing proceedings upon referral to a collaborative law process and related status reports.

The Legislature may not create rules or procedures relating to litigation, as this would violate the separation of powers and the Court’s exclusive right to “adopt rules for the practice and procedure in all courts . . .”<sup>9</sup> However, should the Court decide to promulgate rules consistent with this bill and the uniform act, this bill provides substantive privileges and confidentiality for parties and nonparties involved in a collaborative law process. See the Constitutional Issues section below for a more detailed discussion.

## Beginning and Concluding a Collaborative Law Process

The bill creates s. 44.53, F.S., to provide conditions upon which a collaborative law process begins and concludes. The bill provides that a tribunal may not order a party to participate in a collaborative law process over that party’s objection and a party may terminate the collaborative law process with or without cause. The process begins when the parties enter into a collaborative participation agreement. If a legal proceeding is pending, the proceeding is put on hold while the collaborative law process is ongoing.

A collaborative law process is concluded in one of four ways. First, the parties may provide for a method by agreement. Second, the parties may sign a record providing a resolution of the matter. Third, the parties may sign a record indicating resolution of certain matters while leaving other matters unresolved. Fourth, the process is concluded by a termination of the process, evidenced when a party:

- Gives notice to other parties that the process is ended;
- Begins a legal proceeding related to a collaborative law matter without the agreement of all the parties;
- Initiates a pleading, motion, order to show cause, or request for a conference with a tribunal in a pending proceeding related to the matter;
- Requests that the proceeding be put on the tribunal’s active calendar in a pending proceeding related to the matter or takes a similar action requiring notice to be sent to the parties; or

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<sup>8</sup> See the Uniform Law Commission Collaborative Law Summary website for more information at [http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative Law Act](http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative+Law+Act) (last viewed March 20, 2014).

<sup>9</sup> Art. V, s. 2, FLA. CONST.  
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- Discharges a collaborative lawyer or a collaborative lawyer withdraws.

A party's collaborative lawyer must give prompt notice to all other parties in a record of a discharge or withdrawal.

Under certain conditions, a collaborative law process may survive the discharge or withdrawal of a collaborative lawyer:

- The unrepresented party engages a successor collaborative lawyer;
- The parties consent in a signed record to continue the process;
- The agreement is amended to identify the successor collaborative lawyer; and
- The successor collaborative lawyer confirms representation in a signed record.

### Confidentiality of Collaborative Law Communication

The bill creates s. 44.54, F.S., to provide that a collaborative law communication is confidential to the extent agreed upon by the parties in a signed record or as otherwise provided by law, with limitations as discussed below.

### Privilege Against Disclosure for Collaborative Law Communications

The bill creates s. 44.54(1), F.S., to provide a privilege against disclosure for collaborative law communications, within limits provided in the bill. A collaborative law communication is not subject to discovery or admissible in evidence in a proceeding before a tribunal. Each party (including a party's attorney during the collaborative law process) has a privilege to refuse to disclose a collaborative law communication, and to prevent any other person from disclosing a communication. A nonparty to the collaborative law process (which is anybody other than the party or the party's attorney, in this context) may also refuse to disclose any communication or may prevent any other person from disclosing the nonparty's communication. Therefore, a party has an absolute privilege as to all communications, while the nonparty has a privilege for his or her own communications. However, evidence that would otherwise be admissible does not become inadmissible or protected from discovery solely because it may have been a communication during a collaborative law process. The privilege does not apply if the parties agree in advance in a signed record or if all parties agree in a proceeding that all or part of a collaborative law process is not privileged, as long as the parties had actual notice before the communication was made.

### Waiver and Preclusion of Privilege

The bill creates s. 44.54(2), F.S., to provide that a privilege may be expressly waived either orally or in writing during a proceeding if all the parties agree. If a nonparty has a privilege, the nonparty must also agree to waive the privilege. However, if a person makes a disclosure or representation about a collaborative law communication that prejudices another person during a proceeding before a tribunal, that person may not assert a privilege to the extent that it is necessary for the prejudiced person to respond.

### Limits of Privilege

The bill creates s. 44.54(3), F.S., to provide that a privilege does not apply to a collaborative law communication that is:

- Available to the public under Florida's Public Records statutes in ch. 119, F.S.;
- Made during a collaborative law session that is open to the public or required by law to be open to the public;
- A threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- Intentionally used to plan or commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

- In an agreement resulting from the collaborative process if there is a record memorializing the agreement, signed by all of the parties.

A privilege does not apply to the extent that the communication is 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
- Abuse, neglect, abandonment, or exploitation of a child or adult, unless the Florida Department of Children and Families is a party or otherwise participates in the collaborative law process.

Only the portion of the communication needed for proof or disproof may be disclosed or admitted.

There are other limited circumstances where a privilege does not apply that requires the discretion of the judge or tribunal (hereinafter, judge). A party seeking discovery or a proponent of certain evidence may show that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the communication is either in a court proceeding involving a felony or a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or where a defense is asserted to avoid liability on the contract. Only the portion of the communication needed for evidence may be disclosed or admitted.

The bill includes cross reference amendments to reflect the creation of a new Part of ch. 44, F.S.

#### B. SECTION DIRECTORY:

Section 1 contains legislative findings and declarations.

Section 2 creates the "Collaborative Law Act" within ss. 44.51-44.54, F.S.

Section 3 directs the Division of Law Revision and Information redesignate ch. 44 as "Alternatives to Judicial Action" and to divide ch. 44, F.S., into parts.

Section 4 creates s. 44.51, F.S., relating to purpose of the Act.

Section 5 creates s. 44.52, F.S., relating to definitions.

Section 6 creates s. 44.53, F.S., relating to beginning and concluding a collaborative law process.

Section 7 creates s. 44.54, F.S., relating to confidentiality of a collaborative law communication.

Section 8 directs that the portions of the bill containing privileges is not effective until 30 days after approval and publication of rules by the Supreme Court.

Section 9 amends s. 39.4075, F.S., relating to referral of a dependency case to mediation.

Section 10 amends s. 44.1011, F.S., relating to definitions.

Section 11 amends s. 44.102, F.S., relating to court-ordered mediation.

Section 12 amends s. 44.106, F.S., relating to standards and procedures for mediators and arbitrators and fees.

Section 13 amends s. 718.401, F.S., relating to leaseholds.

Section 14 amends s. 984.18, F.S., relating to referral of child-in-need-of-services cases to mediation.

Section 15 contains an effective date of July 1, 2014, except as otherwise expressly provided in the Act.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

Article V, s. 2 of the Florida Constitution provides the Supreme Court with rulemaking authority for practice and procedure in all courts. This bill appears to present the Court with the opportunity to make rules to carry out the purpose of the bill. The bill does not direct the Court to make rules. The privileges and confidentiality portions of the bill appear to be substantive as they create rights that do not currently exist in the law.

### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority, as rulemaking authority is an inherent power of the Supreme Court of Florida under art. V, s. 2 of the Florida Constitution. However, the bill does appear to "invite" the court to create rules to carry out the purpose of the bill by enacting a collaborative law process.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 25, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment moves the Act from ch. 90, F.S. to ch. 44, F.S., and provides standards for beginning and concluding a collaborative law process. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.