F I S C A L I M P A C T R E P O R T

SPONSOR McSorley **ORIGINAL DATE** 02/18/13 **LAST UPDATED** **HB**

SHORT TITLE Uniform Collaborative Law Act **SB** 401

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	Minimal*	Minimal*	Minimal*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Human Services Department (HSD)

SUMMARY

Synopsis of Bill

Senate Bill 401 (SB 401) enacts the Uniform Collaborative Law Act (UCLA) to regulate the use of collaborative law, a form of dispute resolution.

Specifically, the Uniform Collaborative Law Act:

- limits a "collaborative matter" to one that arises pursuant to the family or domestic relations law of New Mexico (Section 2);
- applies only to collaborative law participation agreements that meet the requirements of the act to insure that parties do not inadvertently enter into a collaborative law process (Section 3);
- establishes minimum requirements for collaborative law participation agreements, including written agreements that state the parties' intent to resolve their matter (collaborative matter) through a collaborative law process under the act, include a description of the matter submitted to a collaborative law process, and designate collaborative lawyers (Section 4);
- emphasizes that party participation in collaborative law is voluntary by prohibiting tribunals from ordering a party into a collaborative law process over that party's objection (Section 5 (b));
- specifies when and how a collaborative law process begins and is concluded (Section 5);

- creates a stay of proceedings when parties sign a participation agreement to attempt to resolve a matter related to a proceeding pending before a tribunal while allowing the tribunal to ask for periodic status reports (Section 6);
- makes an exception to the stay of proceedings for emergency orders to protect health, safety, welfare or interests of a party, a family member or a dependent (Section 7);
- authorizes tribunals to approve settlements arising out of a collaborative law process (Section 8);
- permits the Supreme Court to determine the disqualification requirement for collaborative lawyers once a collaborative law process concludes (Section 9);
- permits the Supreme Court to define the scope of the disqualification requirement to include both the collaborative matter and a related matter which involve the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter (Section 9);
- permits the Supreme Court to extend the disqualification requirement beyond the individual collaborative lawyer to lawyers in a law firm with which the collaborative lawyer is associated (imputed disqualification) (Section 9(B));
- permits the Supreme Court to relax imputed disqualification if the firm represents low-income parties for no fee, the parties agree to the exception in advance in a collaborative law participation agreement, and the original collaborative lawyer is isolated from further participation in the matter or related matters ((Section 10(B));
- permits the Supreme Court to create an similar exception to imputed disqualification for a lawyer representing a government agency (Section 11(B));
- requires parties to voluntarily disclose relevant information during the collaborative law process without formal discovery requests and update information previously disclosed that has materially changed. The parties may also agree on the scope of disclosure required during a collaborative law process if that scope is not inconsistent with other law (Section 12);
- provides that, except as otherwise provided in the rules of the Supreme Court, standards of professional responsibility and child abuse reporting for lawyers and other professionals are not changed by their participation in a collaborative law process (Section 13);
- requires that lawyers disclose and discuss the material risks and benefits of a collaborative law process as compared to other dispute resolution processes such as litigation, mediation, and arbitration to help insure parties enter into collaborative law participation agreements with informed consent (Section 14(2));
- creates an obligation on collaborative lawyers to screen clients for domestic violence (defined as a “coercive or violent relationship”) and, if present, to participate in a collaborative law process only if the victim consents and the lawyer reasonably believes that the victim will be safe (Section 15);
- authorizes parties to reach an agreement on the scope of confidentiality of their collaborative law communications (Section 16);
- provides that except as otherwise provided in the rules of the Supreme Court, an evidentiary privilege is created for collaborative law communications which are sought to be introduced into evidence before a tribunal (Section 17);
- except as otherwise provided in the rules of Supreme Court, provides for possibility of waiver of and limited exceptions to the evidentiary privilege based on important countervailing public policies (such as the protection of bodily integrity and crime prevention) similar to those recognized for mediation communications in the Uniform Mediation Act (Sections 18-19) ; and

- authorizes tribunal discretion to enforce agreements that result from a collaborative law process, the disqualification requirement and the evidentiary privilege provisions of the act, despite the lawyers' mistakes in required disclosures before collaborative law participation agreements are executed and in the written participation agreements themselves (Section 20).

SB 401 provides that the UCLA applies to a collaborative law participation agreement that meets the requirements of that Act signed on or after January 1, 2014. The bill contains a severability clause, and contains an effective date of January 1, 2014.

FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC) anticipates minimal administrative costs for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and challenges to the law. In general, new laws, amendments to existing laws and new hearings, have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase

SIGNIFICANT ISSUES

The AOC opposes the enactment of provisions of the UCLA related to the courts. It provides this background as to the implementation of alternative dispute resolution in New Mexico, and its recommendation that the courts be eliminated from any application of the Act in the proposed legislation:

> On May 4, 2011, the Supreme Court unanimously decided to begin implementing the recommendations in the National Center for State Courts (NCSC) report titled "Advancing Alternative Dispute Resolution in the New Mexico Judiciary," dated April 15, 2011.
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> On August 1, 2011, the Supreme Court appointed twenty members to the Supreme Court Statewide ADR Commission to develop, organize, and monitor court-connected alternative dispute resolution (ADR) programs in New Mexico state courts. The Commission is co-chaired by Justice Edward Chávez and David Levin, Chair of the State Bar of New Mexico ADR Committee.
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> Although the existing New Mexico ADR programs provide a strong foundation for moving forward with ADR, the Commission agrees that statewide coordination of court-connected ADR is necessary to implement programs where none exist and to improve and monitor the quality of court-connected ADR throughout New Mexico. Therefore, any enactment of the UCLA related to the courts must go through the Statewide ADR Commission, and recommendations for the same submitted to the Supreme Court for consideration.
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> The mission of the Statewide ADR Commission is related principally to court-annexed ADR, and this legislation interferes with its processes and may limit the work of the Commission, as mandated by the Supreme Court.

The AOC has suggested amendments to SB 401 to remove courts from the Act. See Amendments below.

Additionally, the AOC provides this additional information and commentary on the model uniform act:

1. In the Prefatory Note to the 2010 Model Act, the National Conference of Commissioners on Uniform State Laws explains that:

> The overall goal of the Uniform Collaborative Law Rules and Act is to encourage the continued development and growth of collaborative law as a voluntary dispute resolution option. Collaborative law has thus far largely been practiced under the auspices of private collaborative law 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.
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> The Uniform Collaborative Law Rules and Act aims to standardize the most important features of collaborative law participation agreements, both to protect consumers and to facilitate party entry into a collaborative law process. It mandates essential elements of a process of disclosure and discussion between prospective collaborative lawyers and prospective parties to better insure that parties who sign participation agreements do so with informed consent. It requires collaborative lawyers to make reasonable inquiries and take steps to protect parties against the trauma of domestic violence. The rules/act also makes collaborative law's key features—especially the disqualification provision and voluntary disclosure of information provision—mandated provisions of participation agreements that seek the benefits of the rights and obligations of the rules/act. Finally, the rules/act creates an evidentiary privilege for collaborative law communications to facilitate candid discussions during the collaborative law process.

See the commission's lengthy and detailed Prefatory Note at
http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul10.pdf

2. The commission leaves up to each state the option of whether to adopt the act through legislation, as SB 401 does, or through judicial rules. (The commission sets out the model uniform act in rules format as well as in statutory sections at that website.) At times SB 401 seems to operate as a hybrid, with its basic legislative approach that also permits the Supreme Court to determine certain matters, such as disqualification issues, related to attorneys. (The model legislation addresses disqualification and other matters concerning attorneys and the practice of law directly, rather than making those issues subject to the determination or rules of the Supreme Court.) Under the SB 401 approach, there may still be questions as to whether the legislation impinges upon the territory of the judiciary to regulate its practices and the attorneys it licenses to practice in New Mexico, thus raising separation of powers concerns.

3. Section 9 of SB 401 permits the Supreme Court to determine whether a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to a collaborative matter. Section 9 within the model uniform act provides that, "[e]xcept as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter." The

commissioners, in a comment following the model act's Section 9, state that:

> The disqualification requirement for collaborative lawyers after collaborative law concludes is a fundamental defining characteristic of collaborative law. As previously discussed in the Prefatory Note, this section extends the disqualification provision to "matters related to the collaborative matter" in addition to the matter described in the collaborative law participation agreement. *See supra*. It also extends the disqualification provision to lawyers in a law firm with which the collaborative lawyer is associated in addition to the collaborative lawyer him or herself, so called "imputed disqualification." Appropriate exceptions to the disqualification requirement are made for representation to seek emergency orders for a limited time (see Section 7) and to allow collaborative lawyers to present agreements to a tribunal for approval (Section 5(f) and 8).

Since the Supreme Court is provided with the discretion to disqualify or not, SB 401 appears to strip away what the commissioners label "a fundamental defining characteristic of collaborative law."

4. The model uniform act has been enacted by the District of Columbia, Hawaii, Nevada, Ohio, Texas and Utah, and has been introduced in Illinois, Massachusetts, New Mexico and Washington.

AMENDMENTS

The AOC proposes these amendments:

1. On page 3, line 22, strike "judicial" from the "proceeding" definition.
2. On page 4, line 19, strike "court" from the "tribunal" definition.

MD/svb