

DRAFT  
FOR DISCUSSION ONLY

## COLLABORATIVE LAW ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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Draft for Committee on Style Meeting, May 15-18, 2008

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April 14, 2008

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# COLLABORATIVE LAW ACT

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1 **COLLABORATIVE LAW ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Collaborative Law Act.

3 **SECTION 2. DEFINITIONS.** In this [act]:

4 (1) “Collaborative law” or a “collaborative law process” means a process in which parties  
5 represented by collaborative lawyers attempt to resolve a matter under a collaborative law  
6 participation agreement without the intervention of a tribunal.

7 (2) “Collaborative law communication” means a statement, whether oral or in a record or  
8 verbal or nonverbal, that:

9 (A) occurs between the time the parties enter into a collaborative law participation  
10 agreement and the time the collaborative law process terminates or is concluded by negotiated  
11 resolution of the matter; and

12 (B) is made for the purposes of conducting, participating in, continuing, or  
13 reconvening collaborative law.

14 (3) “Collaborative law participation agreement” means an agreement by persons meeting  
15 the requirements and incorporating the terms of section 3 to participate in collaborative law to  
16 attempt to resolve a matter.

17 (4) “Collaborative lawyer” means a lawyer identified in a collaborative law participation  
18 agreement as having been engaged to represent a party in collaborative law and who is  
19 disqualified from representing parties in the matter and substantially related matters under  
20 section 6 if collaborative law terminates.

21 (5) “Law firm” means a lawyer or lawyers in a law partnership, professional corporation,  
22 sole proprietorship or other association authorized to practice law, or lawyers employed or in a  
23 legal services organization or the legal department of a corporation or other organization.

1           (6) “Matter” means a dispute, transaction, claim, problem or issue for resolution  
2 described in a collaborative law participation agreement. A matter may, but need not be, a claim,  
3 issue or dispute in a proceeding.

4           (7) “Nonparty participant” means a person, other than a party, that participates in a  
5 collaborative law process.

6           (8) “Party” means a person that enters into a collaborative law participation agreement  
7 and whose consent is necessary to resolve the matter.

8           (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,  
9 limited liability company, association, joint venture, public corporation, government or  
10 governmental subdivision, agency, or instrumentality; or any other legal or commercial entity.

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

14           (11) “Prospective party” means a person who discusses the possibility of entering into a  
15 collaborative law participation agreement with a potential collaborative lawyer.

16           (12) “Record” means information that is inscribed on a tangible medium or that is stored  
17 in an electronic or other medium and is retrievable in perceivable form.

18           (13) “Sign” means, with present intent to authenticate or adopt a record:

19                   (A) to execute or adopt a tangible symbol; or

20                   (B) to attach to or logically associate with the record an electronic symbol, sound  
21 or process.

22           (14) “Substantially related” means involves the same transaction or occurrence, nucleus  
23 of operative fact, claim, issue or dispute as another matter or proceeding.

1           (15) “Tribunal” means a court, an arbitrator, or a legislative body, administrative agency,  
2 or other body acting in an adjudicative capacity. A legislative body, administrative agency, or  
3 other body acts in an adjudicative capacity if a neutral official, after presentation of evidence or  
4 legal argument by a party or parties, will render a binding legal judgment directly affecting a  
5 party’s interests in a particular matter.

6           **SECTION 3. COLLABORATIVE LAW PARTICIPATION AGREEMENT**  
7 **REQUIREMENTS.**

8           (a) A collaborative law participation agreement must:

9                   (1) be in a record;

10                   (2) be signed by the parties;

11                   (3) describe the nature and scope of the matter;

12                   (4) state the parties’ intention to attempt to resolve the matter through  
13 collaborative law;

14                   (5) identify the collaborative lawyer engaged by each party to represent the party  
15 in collaborative law; and

16                   (6) contain a signed acknowledgment by each party’s collaborative lawyer  
17 confirming the lawyer’s engagement.

18           (b) Parties to a collaborative law participation agreement agree:

19                   (1) that if collaborative law terminates, a collaborative lawyer and any law firm  
20 with which the collaborative lawyer is affiliated, is disqualified from representing a party in the  
21 matter and substantially related matters or proceedings, except for an emergency protective  
22 proceedings involving a threat to the safety of a party or a party’s dependent if no successor  
23 lawyer is immediately available. In those circumstances, the disqualification of a collaborative

1 lawyer and the collaborative lawyer's law firm begins when the party retains a successor lawyer  
2 or reasonable measures are taken to adequately protect the safety of the party or the party's  
3 dependent.

4 (2) they may not initiate a proceeding or seek tribunal intervention in a pending  
5 proceeding substantially related to the matter until the collaborative law process terminates,  
6 except:

7 (A) for emergency protective proceedings involving a threat to the safety  
8 of a party or a party's dependent; or

9 (B) with the agreement of all parties, to seek tribunal approval of any  
10 settlement agreement or sign orders to effectuate any agreement resulting from collaborative law.

11 (3) they shall make timely, full, candid and informal disclosure of information  
12 reasonably related to the matter upon request of a party, but without formal discovery, and shall  
13 promptly update information provided with respect to which there has been a material change;  
14 and

15 (4) any party may unilaterally terminate the collaborative law process at any time  
16 for any or no reason before a binding negotiated resolution or settlement of a matter is agreed  
17 upon.

18 (c) Parties to a collaborative law participation agreement under this [act] may agree to  
19 include additional terms and provisions not inconsistent with the provisions of this section.

20 (d) Parties that wish to participate in collaborative law under this [act] cannot agree to  
21 waive or vary the effect of the requirements of this section.

22 **SECTION 4. BEGINNING AND TERMINATING COLLABORATIVE LAW.**

23 (a) Collaborative law begins when parties sign a collaborative law participation

1 agreement that meets the requirements of section 3.

2 (b) A party may unilaterally terminate collaborative law for any reason or no reason at  
3 any time before a binding negotiated resolution or settlement of a matter is agreed upon.

4 (c) Except as provided in subsection (e), collaborative law terminates when:

5 (1) a party:

6 (A) gives written notice of termination to other parties and collaborative  
7 lawyers;

8 (B) begins a contested proceeding substantially related to the matter;

9 (C) begins a contested pleading, motion, order to show cause, request for a  
10 conference with the tribunal, request that the proceeding be put on a tribunal's active calendar or  
11 takes similar action in a pending proceeding substantially related to the matter; or

12 (D) discharges a collaborative lawyer.

13 (2) a collaborative lawyer withdraws from further representation of a party.

14 (d) The party that terminates collaborative law and that party's present or former  
15 collaborative lawyer shall provide prompt written notice of the termination of collaborative law  
16 to all other parties and collaborative lawyers. The notice:

17 (1) shall state that collaborative law is terminated as of a specific date.

18 (2) need not specify a reason for terminating collaborative law.

19 (e) Notwithstanding the discharge or withdrawal of a collaborative lawyer, the  
20 collaborative law process continues if within thirty days of the date specified in the written  
21 notice of termination:

22 (1) the unrepresented party engages a successor collaborative lawyer;

23 (2) all parties consent to continuation of the collaborative law process by

1 reaffirming the collaborative law participation agreement in a signed record;

2 (3) the collaborative law participation agreement is amended to identify the  
3 successor collaborative lawyer in a signed record; and

4 (4) the successor collaborative lawyer acknowledges the engagement in a signed  
5 record.

6 (f) A party who begins a uncontested proceeding or motion in a pending proceeding with  
7 the agreement of all other parties to ask the tribunal to approve or sign orders to effectuate a  
8 settlement agreement resulting from collaborative law does not terminate collaborative law.

9 (g) A collaborative law participation agreement may provide additional methods of  
10 terminating collaborative law.

11 **SECTION 5. COLLABORATIVE LAW AND PROCEEDINGS.**

12 (a) Parties to collaborative law may begin an uncontested proceeding with the agreement  
13 of all parties to ask a tribunal to approve a settlement agreement or sign orders to effectuate a  
14 settlement agreement resulting from collaborative law. The party beginning the proceeding shall  
15 file a notice of collaborative law signed by all parties and collaborative lawyers with the tribunal  
16 at the time the proceeding begins.

17 (b) Parties to a pending contested proceeding may sign a collaborative law participation  
18 agreement meeting the requirements of section 3 to resolve any matter substantially related to the  
19 proceeding. They shall file a notice of collaborative law signed by all parties and collaborative  
20 lawyers promptly with the tribunal after the collaborative law participation agreement is signed.

21 (c) Upon filing of a notice of collaborative law in a contested proceeding, a tribunal shall  
22 suspend case management and supervision of the proceeding until it receives written notice from  
23 the parties and collaborative lawyers that the collaborative law process is terminated.

1 (d) Notwithstanding filing of a notice of collaborative law, a tribunal may issue  
2 emergency orders to protect the safety of a party or a party's dependent.

3 (e) After a notice of collaborative law is filed, a collaborative lawyer and the  
4 collaborative lawyer's law firm may not appear before the tribunal to represent a party in a  
5 proceeding or a substantially related proceeding except:

6 (1) in an emergency protective proceeding involving a threat to the safety of a  
7 party or a party's dependent; or

8 (2) with the agreement of all parties, to ask the tribunal to approve a settlement  
9 agreement or sign orders to effectuate a settlement agreement resulting from collaborative law.

10 (f) Upon request of all parties, a tribunal may approve a settlement agreement and sign  
11 orders to effectuate a settlement agreement resulting from collaborative law.

12 (g) Parties and collaborative lawyers shall promptly notify the tribunal in writing when  
13 collaborative law terminates as provided in section 4.

14 (1) The notice of termination shall specify the date on which collaborative law is  
15 terminated, but shall not specify any reason for the termination.

16 (2) Upon filing of the notice of termination, the tribunal shall resume case  
17 management and enter appropriate orders in a pending proceeding as the interests of justice  
18 require.

19 (h) A tribunal shall not dismiss a proceeding in which a notice of collaborative law is  
20 filed based on failure to prosecute or delay without providing parties and collaborative lawyers  
21 appropriate notice and an opportunity to be heard.

22 **Legislative Note:** *In states where judicial procedures for management of proceedings can be*  
23 *prescribed only by court rule or administrative guideline and not by legislative act, the duties of*  
24 *courts and other tribunals listed in this section should be adopted by the appropriate measure.*  
25

1           **SECTION 6. DISQUALIFICATION OF COLLABORATIVE LAWYER.**

2           (a) If collaborative law terminates, a collaborative lawyer, and any law firm with which  
3 the collaborative lawyer is affiliated, is disqualified from representing a party in the matter and  
4 substantially related matters or proceedings.

5           (b) Notwithstanding subsection (a), a collaborative lawyer and any law firm with which  
6 the collaborative lawyer is affiliated is not disqualified from representing a party in an  
7 emergency protective proceeding involving a threat to the safety of a party or a party's  
8 dependent when no successor lawyer is immediately available. In such circumstances, the  
9 collaborative lawyer and any law firm with which the collaborative lawyer is disqualified  
10 pursuant to subsection (a) when the party engages a successor lawyer or reasonable measures are  
11 taken to adequately protect the safety of the party or the party's dependent.

12           (c) A tribunal may enforce the provisions of this section through entry of appropriate  
13 orders as the interests of justice require.

14           **SECTION 7. DISCLOSURES CONCERNING AND APPROPRIATENESS OF**  
15 **COLLABORATIVE LAW.**

16           (a) Before a prospective party executes a collaborative law participation agreement, a  
17 prospective collaborative lawyer shall:

18                   (1) provide the prospective party with adequate information about the material  
19 benefits and risks of collaborative law as compared to the material benefits and risks of other  
20 reasonably available alternatives for resolving the matter such as litigation, mediation,  
21 arbitration, or expert evaluation sufficient for the prospective party to make an informed decision  
22 about whether to enter into collaborative law;

23                   (2) advise the prospective party:

1 (A) that any party has the right to unilaterally terminate collaborative law  
2 at any time for any or no reason;

3 (B) that if collaborative law terminates a collaborative lawyer and the  
4 collaborative lawyer's law firm:

5 (i) must withdraw from further representation of the party in the  
6 matter and any substantially related matter or proceeding, except in an emergency protective  
7 proceeding involving a threat to the safety of a party or a party's dependent. In those  
8 circumstances, the disqualification of a collaborative lawyer and the collaborative lawyer's law  
9 firm begins when the party retains a successor lawyer or reasonable measures are taken to  
10 adequately protect the safety of the party or the party's dependent.

11 (ii) is disqualified from representing the party in any future  
12 substantially related matter or proceeding.

13 (3) inquire about and discuss with the prospective party factors relevant to  
14 whether collaborative law is appropriate for the prospective party's matter.

15 (b) A collaborative lawyer shall make reasonable efforts to determine whether a  
16 prospective party has a history of domestic violence with other prospective parties before a  
17 prospective party signs a collaborative law participation agreement and shall continue throughout  
18 the collaborative law process to assess for the presence of domestic violence.

19 (c) If a collaborative lawyer reasonably believes that a prospective party or party has a  
20 history of domestic violence with other prospective parties or parties, the collaborative lawyer  
21 shall not begin or shall terminate collaborative law unless:

22 (1) the party or prospective party requests beginning or continuing the  
23 collaborative law process;

1 (2) the collaborative lawyer reasonably believes that the party or prospective  
2 party's safety can be adequately protected during the collaborative law process; and

3 (3) the collaborative lawyer is competent in representing victims of domestic  
4 violence.

5 **SECTION 8. COLLABORATIVE LAW AND LOW INCOME PARTIES.**

6 (a) This section applies to a collaborative law participation agreement if a party to the  
7 agreement engages a collaborative lawyer who is an employee of or affiliated with a law firm,  
8 legal aid office, law school clinic, court sponsored program, or not-for-profit organization which  
9 provides free or low cost legal services to low income persons.

10 (b) If a party engages a collaborative lawyer described in subsection (a), a collaborative  
11 law participation agreement may provide that the law firm, office, clinic, program or  
12 organization that employs the lawyer or with which the lawyer is affiliated is not disqualified by  
13 section 6 from continuing to represent the party after collaborative law terminates, if:

14 (1) the collaborative lawyer is personally disqualified from continuing to  
15 represent a party in the matter and any substantially related matter or proceeding;

16 (2) all parties consent to the continued representation of the party by the law firm,  
17 office, clinic, program or organization; and

18 (3) the disqualified collaborative lawyer is isolated from any participation in the  
19 matter or any substantially related matter or proceeding, except as necessary to transfer  
20 responsibility for the matter to a successor lawyer.

21 (c) If a collaborative law participation agreement contains the provisions authorized by  
22 section (b) and collaborative law terminates, the law firm, office, clinic, program or organization  
23 with which the collaborative lawyer is employed or affiliated is not disqualified under section 6

1 from continuing to represent a party, if the collaborative lawyer:

2 (1) is personally disqualified from continuing to represent a party in the matter  
3 and substantially related matter or proceeding;

4 (2) is isolated from any participation in the matter or any substantially related  
5 matter or proceeding, except as necessary to transfer responsibility for the matter to a successor  
6 lawyer.

7 (d) A tribunal may enforce the provisions of this section through entry of appropriate  
8 orders as the interests of justice require.

9 **SECTION 9. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE**  
10 **LAW COMMUNICATIONS; ADMISSIBILITY; DISCOVERY.**

11 (a) Except as otherwise provided in section 11, a collaborative law communication is  
12 privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence  
13 in a proceeding unless the privilege is waived or precluded as provided by section 10.

14 (b) In a proceeding, the following privileges apply:

15 (1) a party may refuse to disclose, and may prevent any other person from  
16 disclosing, a collaborative law communication.

17 (2) a nonparty participant may refuse to disclose, and may prevent any other  
18 person from disclosing, a collaborative law communication of the nonparty participant.

19 (c) Evidence or information that is otherwise admissible or subject to discovery does not  
20 become inadmissible or protected from discovery solely by reason of its disclosure or use in a  
21 collaborative law process.

22 **SECTION 10. WAIVER AND PRECLUSION OF PRIVILEGE.**

23 (a) A privilege under section 9 may be waived in a record or orally during a proceeding

1 if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it  
2 is also expressly waived by the nonparty participant.

3 (b) A person that discloses or makes a representation about a collaborative law  
4 communication that prejudices another person in a proceeding is precluded from asserting a  
5 privilege under section 9, but only to the extent necessary for the person prejudiced to respond to  
6 the representation or disclosure.

7 (c) A person that intentionally uses a collaborative law process to commit, or attempt to  
8 commit, or to plan a crime, or to conceal an ongoing crime or ongoing criminal activity is  
9 precluded from asserting a privilege under this section.

10 **SECTION 11. EXCEPTIONS TO PRIVILEGE.**

11 (a) There is no privilege under section 9 for a collaborative law communication that is:

12 (1) waived in an agreement evidenced by a record signed by all parties;

13 (2) a threat or statement of a plan to inflict bodily injury or commit a crime of  
14 violence;

15 (3) intentionally used to plan a crime, attempt to commit or commit a crime, or  
16 conceal an ongoing crime or ongoing criminal activity;

17 (4) sought or offered to prove or disprove a claim or complaint of professional  
18 misconduct or malpractice arising from or related to collaborative law; or

19 (5) sought or offered to prove or disprove abuse, neglect, abandonment, or  
20 exploitation in a proceeding in which the abuse or neglect of a child or a vulnerable adult is an  
21 issue.

22 (b) There is no privilege under section 9 if a tribunal finds, after a hearing in camera,  
23 that: the party seeking discovery or the proponent of the evidence has shown the evidence is not

1 otherwise available; the need for the evidence substantially outweighs the interest in protecting  
2 confidentiality; and the collaborative law communication is sought or offered in:

3 (1) a court proceeding involving a felony [or misdemeanor]; or

4 (2) a proceeding to prove a claim to rescind or reform or a defense to avoid  
5 liability on a contract arising out of the collaborative law process.

6 (c) If a collaborative law communication is not privileged under subsection (a) or (b),  
7 only the portion of the communication necessary for the application of the exception from  
8 nondisclosure may be admitted.

9 (d) Admission of evidence under subsection (a) or (b) does not render the evidence, or  
10 any other collaborative law communication, discoverable or admissible for any other purpose.

11 (e) If the parties agree in advance in a signed record, or if a record of a proceeding  
12 reflects agreement by the parties, that all or part of the collaborative law process is not  
13 privileged, the privileges under section 9 do not apply to the collaborative law process or the part  
14 thereof to which the agreement to waive the privilege applies. However, section 9 applies to a  
15 collaborative law communication made by a person that has not received actual notice of the  
16 agreement before the communication is made.

17 **SECTION 12. CONFIDENTIALITY OF COLLABORATIVE LAW**

18 **COMMUNICATIONS.** A collaborative law communication is confidential to the extent agreed  
19 by the parties in a signed record or as provided by law or rule of this state other than this [act].

20 **SECTION 13. ENFORCMENT OF COLLABORATIVE LAW PARTICIPATION**

21 **AGREEMENTS NOT MEETING REQUIREMENTS.** Notwithstanding the failure of a  
22 collaborative law participation agreement to meet the requirements of section 3, or a lawyer's  
23 failure to comply with the requirements of section 7, if a tribunal finds that parties reasonably

1 believed they were participating in collaborative law, the tribunal may, if the interests of justice  
2 require:

- 3 (1) enforce an agreement resulting from the process in which the parties participated;
- 4 (2) apply the disqualification provisions of section 6;
- 5 (3) apply the evidentiary privilege of section 9.

6 **SECTION 14. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND**  
7 **MANDATORY REPORTING AND COLLABORATIVE LAW.**

8 (a) The professional responsibility obligations and standards of a collaborative lawyer  
9 are not changed because of the lawyer's engagement to represent a party in collaborative law.

10 (b) The professional responsibility obligations and standards applicable to any licensed  
11 professional who participates in collaborative law as a nonparty participant are not changed  
12 because of that participation.

13 (c) The obligations of any person to report abuse or neglect of a child or vulnerable adult  
14 under the laws of this state are not changed by a person's participation in collaborative law.

15 **SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
16 applying and construing this [act], consideration should be given to the need to promote  
17 uniformity of the law with respect to its subject matter among states that enact it.

18 **SECTION 16. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**  
19 **NATIONAL COMMERCE ACT.** This act modifies, limits, and supersedes the federal  
20 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq.,  
21 but does not modify, limit or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or  
22 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
23 U.S.C. Section 7003(b).

1           **SECTION 17. SEVERABILITY CLAUSE.** If any provision of this [act] or its  
2 application to any person or circumstance is held invalid, the invalidity does not affect other  
3 provisions or applications of this [act] which can be given effect without the invalid provision or  
4 application, and to this end the provisions of this [act] are severable.

5           **SECTION 18. APPLICATION TO EXISTING AGREEMENTS.**

6           (a) This [act] governs a collaborative law participation agreement signed on or after [the  
7 effective date of this [act]].

8           (b) On or after [a delayed date], this [act] governs a collaborative law participation  
9 agreement whenever made.

10           **SECTION 19. EFFECTIVE DATE.** This [act] takes effect.....

11    *Legislative Note: States should choose an effective date for the act that allows substantial time*  
12    *for notice to the bar and the public of its provisions and for the training of collaborative lawyers.*