

DRAFT
FOR DISCUSSION ONLY

COLLABORATIVE LAW ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For January 18-19, 2008 Drafting Committee Meeting

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January 2, 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 enter into a collaborative law participation agreement
6 which states their intention to negotiate the resolution of a dispute without judicial intervention.

7 (2) “Collaborative law participation agreement” means a written agreement meeting the
8 requirements of section 3 which is signed by the parties and their collaborative lawyers stating
9 the parties’ intent to participate in collaborative law to attempt to resolve a dispute.

10 (3) “Party” means a person who enters into a collaborative law participation agreement to
11 attempt to negotiate resolution of a dispute.

12 (4) “Collaborative lawyer” means a lawyer retained by a party to represent that party in
13 collaborative law.

14 (5) “Dispute” means issues and matters described in a collaborative law participation
15 agreement that the parties will attempt to resolve through collaborative law process.

16 (6) “Collaborative law communication” means a statement, whether oral or in a record or
17 verbal or nonverbal, that occurs between the time a collaborative law participation agreement is
18 signed until collaborative law terminates or the process is concluded by resolution of the dispute
19 and is made for the purposes of conducting, participating in, initiating, continuing, or
20 reconvening collaborative law.

21 (7) “Nonparty participant” means a person, other than a party or collaborative lawyer,
22 who participates in a collaborative law process. A nonparty participant includes, but is not
23 limited to, the following:

- 1 (a) a mediator jointly retained by the parties;
- 2 (b) a mental health professional, a health care professional, a financial
3 professional, an appraiser or other expert jointly retained by the parties;
- 4 (c) a professional or person retained or serving as an advisor to a party in the
5 collaborative law process.

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

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

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

13 (11) “Sign” or “signed” means to execute or adopt a tangible symbol with the present
14 intent to authenticate a record; or to attach or logically associate an electronic symbol, sound, or
15 process to or with a record with the present intent to authenticate a record.

16 **SECTION 3. COLLABORATIVE LAW PARTICIPATION AGREEMENT.**

17 (a) A collaborative law participation agreement must be in writing and be signed by the
18 parties and their collaborative lawyers.

19 (b) A collaborative law participation agreement must contain following terms:

20 (1) a party will not seek judicial intervention in the dispute until the collaborative
21 law process terminates, except:

22 (A) in an emergency involving a credible threat to the life or physical well
23 being of a party or a party’s child or

1 (B) to seek court approval of any settlement agreement, and sign orders
2 required by law to effectuate the agreement of the parties as the court determines to be
3 appropriate.

4 (2) a party will make timely, full, candid and informal disclosure of information
5 regarding the subject matter of the dispute and has an obligation to promptly update information
6 previously provided in which there has been a material change.

7 (3) parties will only retain jointly hired neutral experts.

8 (4) a neutral expert retained for purposes of participating in the collaborative law
9 process is disqualified from testifying as a witness in any proceeding substantially related to the
10 dispute.

11 (5) a party has the right to unilaterally terminate the collaborative law process at
12 any time.

13 (6) a party authorizes a collaborative lawyer to terminate the collaborative law
14 process on a party's behalf.

15 (7) if the collaborative law process terminates, a collaborative lawyer and any
16 lawyer associated in the practice of law with that collaborative lawyer:

17 (A) must withdraw from representing any party in any proceeding or
18 matter substantially related to the dispute, except in an emergency involving a credible threat to
19 the life or physical well being of a party or a party's child and no successor counsel is available
20 to represent the party;

21 (B) is disqualified from representing any party in any future proceeding or
22 matter substantially related to the dispute.

23 (8) a collaborative law process terminates when an event described in section 4

1 occurs.

2 (9) a collaborative law communication is privileged from admissibility into
3 evidence as provided in section 7.

4 (c) A collaborative law participation agreement must contain:

5 (1) an agreement by the parties to participate in collaborative law to attempt to
6 resolve the dispute;

7 (2) a description of the nature and scope of the dispute the parties seek to resolve
8 through the collaborative law process.

9 (d) A collaborative law participation agreement must contain a signed acknowledgment
10 by each party that the party:

11 (1) understands the terms and conditions of the collaborative law participation
12 agreement;

13 (2) enters into the collaborative law participation agreement voluntarily;

14 (3) has been provided with adequate information and explanation about the
15 material benefits and risks to make an informed decision whether to enter into collaborative law
16 as compared to other reasonably available alternatives for attempting to resolve the dispute such
17 as negotiation, litigation, arbitration, mediation or evaluation;

18 (4) recognizes that by signing a collaborative law participation agreement that the
19 party waives certain legal rights, such as formal discovery and judicial intervention in the dispute
20 until the collaborative law process terminates;

21 (5) recognizes that the party is retaining a lawyer for the limited purpose of
22 representing the party in the collaborative law process;

23 (6) recognizes that a collaborative lawyer for another party represents the interests

1 of only that party in collaborative law;

2 (7) acknowledges that by signing a collaborative law participation agreement, the
3 party authorizes his or her collaborative lawyer to terminate collaborative law on the party's
4 behalf;

5 (8) acknowledges that a collaborative lawyer will withdraw from further
6 representation of the party in any matter substantially related to the dispute if the collaborative
7 law process terminates, except in an emergency involving a credible threat to the life or physical
8 well being of a party or a party's child and no successor counsel is available to represent the
9 party;

10 (9) acknowledges that the collaborative lawyer for the party and any lawyer
11 associated in the practice of law with that collaborative lawyer, is disqualified from representing
12 the party in any proceeding substantially related to the dispute if collaborative law terminates,
13 except in an emergency involving a credible threat to the life or physical well being of a party or
14 a party's child arises and no successor counsel is available to represent the party.

15 (e) Parties cannot agree to waive the provisions of this section and participate in
16 collaborative law.

17 (f) Parties can agree to include additional terms and provisions in a collaborative law
18 participation agreement not inconsistent with the provisions of this section.

19 **SECTION 4. COMMENCING AND TERMINATING A COLLABORATIVE**
20 **LAW PROCESS.**

21 (a) A collaborative law process commences when parties and their collaborative lawyers
22 sign a collaborative law participation agreement which meets the requirements of section 3.

23 (b) A party or that party's collaborative lawyer may terminate a collaborative law process

1 at any time after it commences, for any reason or no reason, with or without cause.

2 (c) The collaborative law process terminates when:

3 (1) a party discharges a collaborative lawyer or a collaborative lawyer withdraws
4 from further representation of a party, unless the party retains a successor collaborative lawyer
5 within thirty days after termination of the lawyer-client relationship;

6 (2) a party commences a proceeding substantially related to the dispute against
7 another party;

8 (3) a party initiates a contested pleading, motion, order to show cause, request for
9 a conference with the court, request that a case be put on the court's trial calendar or takes
10 similar action in a pending proceeding substantially related to the dispute;

11 (d) A party or collaborative lawyer who terminates the collaborative law process shall
12 promptly provide written notice to other parties and collaborative lawyers that collaborative law
13 is terminated as of a specified date. The notice need not specify a reason for terminating the
14 collaborative law process.

15 **SECTION 5. INTERPRETATION AND ENFORCMENT OF AGREEMENTS**

16 **CONCERNING COLLABORATIVE LAW.** A collaborative law participation agreement and
17 any agreement or contract between parties resulting from the collaborative law process that
18 resolves a dispute in whole or in part shall be interpreted and enforced in the same manner as any
19 other agreement or contract.

20 **SECTION 6. DISQUALIFICATION OF A COLLABORATIVE LAWYER.** A

21 collaborative lawyer and any lawyer associated in the practice of law with the collaborative
22 lawyer is disqualified from representing any party to collaborative law in any proceeding or other
23 matter substantially related to the dispute if a collaborative law process terminates, except if the

1 proceeding arises from an emergency involving a credible threat to the life or physical well being
2 of a party or a party's child and no successor counsel is available to represent the party.

3 **SECTION 7. EVIDENTIARY PRIVILEGE FOR COLLABORATIVE LAW**
4 **COMMUNICATIONS.**

5 (a) Except as otherwise provided in subsections (g) through (i), a collaborative law
6 communication is privileged as provided in subsection (b) and is not subject to discovery or
7 admissible in evidence in a proceeding unless waived or precluded as provided by subsections
8 (d) through (f).

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

10 (1) a party may refuse to disclose, and may prevent any other person from
11 disclosing, a collaborative law communication;

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

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

17 (d) A privilege under this section may be waived in a record or orally during a
18 proceeding if it is expressly waived by all parties to a collaborative law participation agreement
19 and, in the case of the privilege of a nonparty participant, it is also expressly waived by the
20 nonparty participant.

21 (e) A person who discloses or makes a representation about a collaborative law
22 communication which prejudices another person in a proceeding is precluded from asserting a
23 privilege under this section, but only to the extent necessary for the person prejudiced to respond

1 to the representation or disclosure.

2 (f) A person who intentionally uses a collaborative law process to plan, attempt to
3 commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity, is
4 precluded from asserting a privilege under this section.

5 (g) There is no privilege under this section for a collaborative law communication that is:

6 (1) waived in an agreement evidenced by a record signed by all parties to a
7 collaborative law participation agreement;

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

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

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

14 (5) sought or offered to prove or disprove abuse, neglect, abandonment, or
15 exploitation in a proceeding in which the abuse or neglect of a child or a vulnerable adult as
16 defined by state law is an issue.

17 (h) There is no privilege under this section if a court, administrative agency, or arbitrator
18 finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence
19 has shown that the evidence is not otherwise available, that there is a need for the evidence that
20 substantially outweighs the interest in protecting confidentiality, and that the collaborative law
21 communication is sought or offered in:

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

23 (2) a proceeding to prove a claim to rescind or reform or a defense to avoid

1 liability on a contract arising out of the collaborative law process.

2 (i) If a collaborative law communication is not privileged under subsection (g) or (h),
3 only the portion of the communication necessary for the application of the exception from
4 nondisclosure may be admitted.

5 (j) Admission of evidence under subsection (g) or (h) does not render the evidence, or
6 any other collaborative law communication, discoverable or admissible for any other purpose.

7 (k) If the parties agree in advance in a signed record, or a record of proceeding reflects
8 agreement by the parties, that all or part of the collaborative law process is not privileged, the
9 privileges under subsections (a) through (j) do not apply to the collaborative law process or part
10 agreed upon. However, subsections (a) through (j) apply to a collaborative law communication
11 made by a person that has not received actual notice of the agreement before the communication
12 is made.

13 **SECTION 8. CONFIDENTIALITY OF COLLABORATIVE LAW**

14 **COMMUNICATIONS.** Collaborative law communications are confidential to the extent
15 agreed by the parties in a signed agreement or as provided by other law or rule of this state.

16 **SECTION 9. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND**
17 **MANDATORY REPORTING FOR COLLABORATIVE LAWYERS AND**
18 **NONPARTIES WHO PARTICIPATE IN A COLLABORATIVE LAW PROCESS.**

19 (a) The professional responsibility obligations or standards of collaborative lawyers are
20 not changed, modified, or limited by reason of such representation.

21 (b) The professional responsibility obligations or standards applicable to any licensed
22 professional who serves as a nonparty participant in a collaborative law process are not changed,
23 modified or limited by reason of such engagement.

1 (c) The obligation of any person to report child abuse or neglect or the abuse or neglect of
2 a vulnerable adult as required by the laws of this State are not changed, modified or limited by
3 that person's participation in a collaborative law process.

4 **SECTION 10. COLLABORATIVE LAW AND THE JUDICIAL PROCESS**
5 **AFTER COMMENCEMENT OF A PROCEEDING.**

6 (a) Parties and their collaborative lawyers may engage in collaborative law after
7 commencement of a proceeding.

8 (b) A collaborative lawyer shall file a notice of collaborative law with the court promptly
9 after a collaborative law participation agreement is signed when a proceeding substantially
10 related to the dispute is pending at that time.

11 (c) A collaborative lawyer may not appear in court to represent a party for a hearing in a
12 proceeding substantially related to a dispute after a collaborative law process commences,
13 except:

14 (1) in an emergency involving a credible threat to the life or physical well being
15 of a party or a party's child and no successor counsel is available to represent the party; or

16 (2) to have the court approve any settlement agreement, and sign orders required
17 by law to effectuate the agreement of the parties as the court determines to be appropriate.

18 (d) A collaborative lawyer shall promptly notify the court in writing if a collaborative law
19 process is terminated in any proceeding in which a notice of collaborative law has been filed
20 with the court.

21 **SECTION 11. JUDICIAL RULE MAKING REGULATING COLLABORATIVE**
22 **LAW.**

23 (a) The [rule making body of the judicial system of the State]:

1 (1) shall prescribe rules of practice and procedure that:

2 (A) suspend case management and judicial supervision of proceedings in
3 civil cases when a notice of collaborative law is filed with a court until a court receives written
4 notice that a collaborative law process is terminated or for other reasonable time;

5 (B) authorize parties to make applications to the court for emergency
6 orders to protect the life or bodily integrity of a party or a child of a party;

7 (C) authorize parties to make application to have the court approve any
8 settlement agreement, and sign orders required by law to effectuate the agreement of the parties
9 as the court determines to be appropriate;

10 (D) provide for resumption of case management and entry of appropriate
11 orders when a court is notified that a collaborative law process is terminated in a pending
12 proceeding;

13 (E) provide that the court shall not dismiss a pending proceeding in which
14 a notice of collaborative law is filed based on failure to prosecute or delay without providing
15 collaborative lawyers and the parties appropriate notice and an opportunity to be heard.

16 (2) may promulgate additional rules of practice and procedure regulating
17 collaborative law not inconsistent with the provisions of this act which promote the better
18 administration of justice;

19 (3) may promulgate standard forms for a collaborative law participation
20 agreement, notice of collaborative law, termination of collaborative law and other aspects of
21 collaborative law that promotes the better administration of justice.

22 (b) The [rule making body of the judicial system of the State] may create a committee of
23 members of the bar, the bench, other professions and lay persons to recommend proposed rules

1 regulating collaborative law.

2 (c) A rule prescribed under the authority of this act shall be prescribed only after giving
3 appropriate public notice and an opportunity for comment. The notice shall include the text of
4 proposed rule, an explanatory note describing its provisions, and a written report describing the
5 reasons for the proposed rule, and arguments for and against.

6 **SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
7 **NATIONAL COMMERCE ACT.** This act modifies, limits, and supersedes the federal
8 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq.,
9 but does not modify, limit or supercede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or
10 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
11 U.S.C. Section 7003(b).

12 **SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
13 applying and construing this [act], consideration should be given to the need to promote
14 uniformity of the law with respect to its subject matter among states that enact it.

15 **SECTION 14. SEVERABILITY CLAUSE.** If any provision of this [act] or its
16 application to any person or circumstance is held invalid, the invalidity does not affect other
17 provisions or applications of this [act] which can be given effect without the invalid provision or
18 application, and to this end the provisions of this [act] are severable.

19 **SECTION 15. EFFECTIVE DATE.** This [act] takes effect

20 **SECTION 16. APPLICATION TO EXISTING AGREEMENTS.**

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

23 (b) On or after [a delayed date], this [act] governs a collaborative law participation

1 agreement whenever made.