

DRAFT
FOR DISCUSSION ONLY

COLLABORATIVE LAW ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

**REPORTER'S FOURTH DRAFT FOR COMMENT
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February 20, 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 without the intervention of a
6 tribunal under the:

7 (A) terms and conditions of a collaborative law participation agreement; and

8 (B) the requirement that, if a collaborative law process terminates, the
9 collaborative lawyers are disqualified from representing parties in the matter and substantially
10 related matters.

11 (2) “Collaborative law communication” means a statement, whether oral or in a record or
12 verbal or nonverbal, that occurs between the time the parties sign a collaborative law
13 participation agreement until a collaborative law process terminates or is concluded by
14 negotiated resolution of the matter and is made for the purposes of conducting, participating in,
15 continuing, or reconvening collaborative law.

16 (3) “Collaborative law participation agreement” means an agreement by persons to
17 participate in collaborative law meeting the requirements of this act.

18 (4) “Collaborative lawyer” means a lawyer identified in a collaborative law participation
19 agreement who is engaged to represent a party in collaborative law.

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

23 (6) “Matter” means a dispute, transaction, claim, problem or issue described in a

1 collaborative law participation agreement. A matter may, but need not, be a claim, issue or
2 dispute in a proceeding.

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

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

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

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

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

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

18 (13) “Substantially related ” means involves the same transaction or occurrence, nucleus
19 of operative fact, claim, issue or dispute as a matter or proceeding.

20 (14) “Tribunal” means a court, an arbitrator in a binding arbitration proceeding, or a
21 legislative body, administrative agency, or other body acting in an adjudicative capacity. A
22 legislative body, administrative agency, or other body acts in an adjudicative capacity when a
23 neutral official, after presentation of evidence or legal argument by a party or parties, will render

1 a binding legal judgment directly affecting a party's interests in a particular matter.

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

3 (a) Persons who sign a collaborative law participation agreement which meets the
4 requirements of this act are authorized to participate as parties in collaborative law.

5 (b) A collaborative law participation agreement must:

6 (1) be in a record;

7 (2) be signed by the parties;

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

9 (4) state the parties' intention to attempt to resolve the matter in collaborative law;

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

12 (6) contain a signed acknowledgment by each identified collaborative lawyer that
13 the lawyer has been engaged to represent the party in collaborative law.

14 (c) Persons cannot agree to waive or rescind the provisions of this section and participate
15 in collaborative law.

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

18 (e) A collaborative law participation agreement's failure to comply with the requirements
19 of this section in whole or in part shall not preclude a tribunal in a proceeding from:

20 (1) enforcing an agreement reached in collaborative law, or

21 (2) applying the disqualification provisions of section 7 and the evidentiary
22 privilege of section 10 of this act.

1 **SECTION 4. PROVISIONS OF A COLLABORATIVE LAW PARTICIPATION**
2 **AGREEMENT.**

3 (a) A party to a collaborative law participation agreement agrees as a matter of law that:

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

7 (A) for protective proceedings involving a threat to the safety of a party or
8 a party's dependent when no successor lawyer is immediately available; or

9 (B) to seek tribunal approval of any settlement agreement and sign orders
10 to effectuate the agreement of the parties.

11 (2) a party will 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 has an
13 obligation to promptly update information previously provided in which there has been a
14 material change.

15 (3) all parties have the right to unilaterally terminate the collaborative law process
16 at any time for any or no reason.

17 (b) Parties cannot agree to waive or rescind the provisions of this section and participate
18 in collaborative law.

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

21 **SECTION 5. COMMENCING AND TERMINATING THE COLLABORATIVE**
22 **LAW PROCESS.**

23 (a) A collaborative law process commences when a collaborative law participation

1 agreement which meets the requirements of section 3 is fully executed.

2 (b) The collaborative law process terminates when a party discharges a collaborative
3 lawyer or a collaborative lawyer withdraws from further representation of a party.

4 (1) The party who is no longer represented and the former collaborative lawyer
5 shall provide written notice to all parties and collaborative lawyers as soon as possible after
6 discharge or withdrawal.

7 (2) The written notice need not specify a reason for the discharge or withdrawal.

8 (c) Notwithstanding the discharge or withdrawal of a collaborative lawyer, the
9 collaborative law process may continue if within thirty days of the date of the written notice
10 described in subparagraph (b):

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

12 (2) all parties consent to continuation of the collaborative law process by
13 reaffirming the collaborative law participation agreement in a signed record;

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

16 (4) the successor collaborative lawyer acknowledges that the lawyer has been
17 engaged to represent the party in the collaborative law process in a signed record.

18 (d) The collaborative law process also terminates when a party:

19 (1) gives written notice of termination to other parties;

20 (2) commences a proceeding substantially related to the matter;

21 (3) initiates a contested pleading, motion, order to show cause, request for a
22 conference with the tribunal, request that the proceeding be put on a tribunal's active calendar or
23 takes similar action in a pending proceeding substantially related to the matter.

1 (e) A party who terminates a collaborative law process shall promptly provide written
2 notice to other parties and collaborative lawyers that termination is effective as of a specified
3 date. The notice need not specify a reason for terminating the collaborative law process.

4 (f) A collaborative law participation agreement may provide additional methods of
5 terminating collaborative law.

6 **SECTION 6. COLLABORATIVE LAW IN A PENDING PROCEEDING.**

7 (a) Persons who are parties to a pending proceeding are authorized to engage in
8 collaborative law by executing a collaborative law participation agreement satisfying the
9 requirements of section 3.

10 (b) Parties shall promptly file a notice of collaborative law with the tribunal in which the
11 proceeding is pending after a collaborative law participation agreement is signed.

12 (c) After collaborative law commences a collaborative lawyer may not appear before a
13 tribunal to represent a party in a pending proceeding substantially related to a matter, except:

14 (1) in protective proceedings involving a threat to the safety of a party or a party's
15 dependent when no successor lawyer is immediately available;

16 (2) to seek tribunal approval of a settlement agreement and sign orders to
17 effectuate the agreement.

18 (d) Upon the filing of a notice of collaborative law, the tribunal shall suspend case
19 management and supervision of the pending proceeding until it receives written notice that the
20 collaborative law process is terminated.

21 (e) Notwithstanding section (d), a tribunal may:

22 (1) issue emergency orders to protect the safety of a party or a party's dependent;

23 (2) approve a settlement agreement, and sign orders to effectuate the settlement.

1 (f) Parties shall promptly notify the tribunal in writing if the collaborative law process is
2 terminated. A tribunal shall thereafter resume case management and enter appropriate orders as
3 the interests of justice require.

4 (g) A tribunal shall not dismiss a pending proceeding in which a notice of collaborative
5 law is filed based on failure to prosecute or delay without providing parties and collaborative
6 lawyers appropriate notice and an opportunity to be heard.

7 *Legislative Note: In states where judicial procedures for management of pending proceedings*
8 *can be prescribed only by court rule or administrative guideline and not by legislative act, the*
9 *duties of courts and other tribunals listed in this section should be adopted by the appropriate*
10 *measure.*
11

12 **SECTION 7. DISQUALIFICATION OF A COLLABORATIVE LAWYER.**

13 (a) If the collaborative law process is terminated a collaborative lawyer, and any law firm
14 with which the collaborative lawyer is affiliated, is disqualified from representing a party in the
15 matter and substantially related matters or proceedings.

16 (b) Notwithstanding the provisions of section (a), a collaborative lawyer and any law firm
17 with which the collaborative lawyer is affiliated is not disqualified from representing a party:

18 (1) in protective proceedings involving a threat to the safety of a party or a party's
19 dependent when no successor lawyer is immediately available;

20 (2) to seek tribunal approval of a settlement agreement and sign orders to
21 effectuate the agreement.

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

1 **SECTION 8. DISCLOSURES CONCERNING AND APPROPRIATENESS OF**
2 **COLLABORATIVE LAW.**

3 (a) Prior to a client’s signing a collaborative law participation agreement, a lawyer shall:

4 (1) provide the client with adequate information about the material benefits and
5 risks of collaborative law as compared to the material benefits and risks of other reasonably
6 available alternatives such as litigation, mediation, arbitration, or expert evaluation sufficient for
7 the client to make an informed decision about whether to enter into collaborative law to attempt
8 to resolve the matter;

9 (2) advise the client that:

10 (A) any party has the right to unilaterally terminate a collaborative law
11 process at any time for any reason or no reason;

12 (B) if the collaborative law process terminates a collaborative lawyer:

13 (i) must withdraw from further representation of the party in the
14 matter and any substantially related matter or proceeding; and

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

17 (3) inquire about and discuss with the client factors relevant to whether the
18 collaborative law process is appropriate for the client’s matter.

19 (b) A lawyer shall make reasonable efforts to determine whether a client has a history of
20 domestic violence within a relationship with other prospective parties to a collaborative law
21 participation agreement prior to a client’s signing a collaborative law participation agreement
22 and shall continue throughout the collaborative law process to assess for the presence of
23 domestic violence.

1 (c) When it appears to a lawyer that the client that the lawyer represents is a victim of
2 domestic violence, the lawyer shall not commence and shall terminate the collaborative law
3 process unless:

4 (1) the client requests commencement or continuation of the collaborative law
5 process;

6 (2) the lawyer reasonably believes that the client's safety can be adequately
7 protected through the collaborative law process; and

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

10 (d) A lawyer's failure to comply with the requirements of this section in whole or in part
11 shall not preclude a tribunal in a proceeding from:

12 (1) enforcing an agreement reached in collaborative law, or

13 (2) applying the disqualification provisions of section 7 and the evidentiary
14 privilege of section 10 of this act.

15 **SECTION 9. SPECIAL PROVISIONS CONCERNING COLLABORATIVE LAW**
16 **AND LOW INCOME PARTIES.**

17 (a) This section is applicable to collaborative law participation agreements when a party
18 is represented by a collaborative lawyer who is an employee of or affiliated with a law firm, legal
19 aid office, law school clinic, court sponsored program, or not for profit organization which
20 provides free or low cost legal services to low income persons.

21 (b) When a party is represented by a collaborative lawyer described in section (a), a
22 collaborative law participation agreement may provide that the law firm, office, clinic, program
23 or organization which employs the lawyer or with which the lawyer is affiliated is not

1 disqualified by section 7 from continuing to represent a party after collaborative law terminates,
2 if:

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

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

7 (3) the disqualified collaborative lawyer is isolated from any participation in the
8 matter or any substantially related matter or proceeding, except as necessary to transfer
9 responsibility for the matter to successor counsel.

10 (c) If a collaborative law participation agreement contains the provisions authorized by
11 section (b) and collaborative law terminates, the law firm, office, clinic, program or organization
12 with which the collaborative lawyer is employed or affiliated is not disqualified by reason of
13 section 7 from continuing to represent a party, if the collaborative lawyer:

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

16 (2) is isolated from any participation in the matter or any substantially related
17 matter or proceeding, except as necessary to transfer responsibility for the matter to successor
18 counsel.

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

21 **SECTION 10. EVIDENTIARY PRIVILEGE FOR COLLABORATIVE LAW**
22 **COMMUNICATIONS.**

23 (a) Except as otherwise provided in subsections (g) through (i), a collaborative law

1 communication is privileged as provided in subsection (b) and is not subject to discovery or
2 admissible in evidence in a proceeding unless waived or precluded as provided by subsections
3 (d) through (f).

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

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

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

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

12 (d) A privilege under this section may be waived in a record or orally during a
13 proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty
14 participant, it is also expressly waived by the nonparty participant.

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

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

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

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

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

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

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

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

10 (h) There is no privilege under this section if a tribunal finds, after a hearing in camera,
11 that the party seeking discovery or the proponent of the evidence has shown that the evidence is
12 not otherwise available, that there is a need for the evidence that substantially outweighs the
13 interest in protecting confidentiality, and that the collaborative law communication is sought or
14 offered in:

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

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

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

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

23 (k) If the parties agree in advance in a signed record, or a record of proceeding reflects

1 agreement by the parties, that all or part of the collaborative law process is not privileged, the
2 privileges under subsections (a) through (j) do not apply to the collaborative law process or part
3 agreed upon. However, subsections (a) through (j) apply to a collaborative law communication
4 made by a person that has not received actual notice of the agreement before the communication
5 is made.

6 **SECTION 11. CONFIDENTIALITY OF COLLABORATIVE LAW**
7 **COMMUNICATIONS.** Collaborative law communications are confidential to the extent
8 agreed by the parties in a signed record or as provided by other law or rule of this state.

9 **SECTION 12. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND**
10 **MANDATORY REPORTING FOR COLLABORATIVE LAWYERS AND**
11 **NONPARTIES.**

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

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

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

20 **SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
21 **NATIONAL COMMERCE ACT.** This act modifies, limits, and supersedes the federal
22 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq.,
23 but does not modify, limit or supercede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or

1 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
2 U.S.C. Section 7003(b).

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

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

10 **SECTION 16. 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.*
13

14 **SECTION 17. APPLICATION TO EXISTING AGREEMENTS.**

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

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