

DRAFT
FOR DISCUSSION ONLY

COLLABORATIVE LAW ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Interim Draft for Committee Review

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ON UNIFORM STATE LAWS

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June 4, 2008

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COLLABORATIVE LAW ACT

TABLE OF CONTENTS

SECTION 1. SHORT TITLE	1
SECTION 2. DEFINITIONS.....	1
SECTION 3. COLLABORATIVE LAW PARTICIPATION AGREEMENT REQUIREMENTS.....	3
SECTION 4. BEGINNING AND TERMINATING A COLLABORATIVE LAW PROCESS..	4
SECTION 5. COLLABORATIVE LAW PROCESS AND PROCEEDINGS.	6
SECTION 6. DISQUALIFICATION OF COLLABORATIVE LAWYER.	7
SECTION 7. DISCLOSURES CONCERNING AND APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.....	8
SECTION 8. COLLABORATIVE LAW PROCESS AND LOW INCOME PARTIES	10
SECTION 9. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATIONS; ADMISSIBILITY; DISCOVERY.....	10
SECTION 10. WAIVER AND PRECLUSION OF PRIVILEGE.....	11
SECTION 11. EXCEPTIONS TO PRIVILEGE.	11
SECTION 12. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION ...	13
SECTION 13. ENFORCMENT OF COLLABORATIVE LAW PARTICIPATION AGREEMENTS NOT MEETING REQUIREMENTS	13
SECTION 14. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING AND COLLABORATIVE LAW PROCESS	13
SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	14
SECTION 16. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	14
[SECTION 17. SEVERABILITY CLAUSE].....	14
SECTION 18. APPLICATION TO EXISTING AGREEMENTS.....	14
SECTION 19. EFFECTIVE DATE.....	14

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) A “collaborative law process” means a process in which parties represented by
5 collaborative lawyers attempt to resolve a matter under a collaborative law participation
6 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 a collaborative law process terminates or is concluded by negotiated
11 resolution of a matter; and

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

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 a collaborative law
16 process to attempt to resolve a matter.

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

21 (5) “Law firm” means lawyers who practice together in a partnership, professional
22 corporation, sole proprietorship, limited liability corporation, legal services organization or the
23 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. The term includes a claim, issue, or
3 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 a matter.

1 (15) “Tribunal” means a court, an arbitrator, or a legislative body, administrative agency,
2 or other body acting in an adjudicative capacity in which a neutral official, after presentation of
3 evidence or legal argument, renders a binding decision directly affecting a party’s interests in a
4 matter.

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

7 (a) A collaborative law participation agreement must:

8 (1) be in a record;

9 (2) be signed by the parties;

10 (3) describe the nature and scope of a matter;

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

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

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

17 (b) A party to a collaborative law participation agreement agrees to the following:

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

1 or reasonable measures are taken to adequately protect the safety of the party or the party's
2 dependent.

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

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

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

11 (3) A party shall make timely, full, candid, and informal disclosure of
12 information reasonably related to the matter upon request of a party, but without formal
13 discovery, and shall promptly update information which has materially changed; and

14 (4) A party may unilaterally terminate a collaborative law process with or without
15 cause before a binding negotiated resolution or settlement of a matter is agreed upon.

16 (c) Parties to a collaborative law participation agreement under this [act] may agree to
17 include additional provisions not inconsistent with the provisions of this Section.

18 (d) Parties to a collaborative law process under this [act] may not agree to waive or vary
19 the effect of the requirements of this Section.

20 **SECTION 4. BEGINNING AND TERMINATING A COLLABORATIVE LAW**
21 **PROCESS.**

22 (a) A collaborative law process begins when parties sign a collaborative law participation
23 agreement that meets the requirements of Section 3.

1 (b) A party may unilaterally terminate a collaborative law process with or without cause
2 before a binding negotiated resolution or settlement of a matter is agreed upon.

3 (c) Except as otherwise provided in subsection (e), a collaborative law process terminates
4 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; or

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

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

17 (1) must state that the collaborative law process is terminated as of a specific date;

18 and

19 (2) need not specify a reason for terminating the process.

20 (e) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a
21 collaborative law process continues if within 30 days of the date specified in the written notice of
22 termination:

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

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

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

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

7 (f) A party that begins an uncontested proceeding or files a motion under Section 5(a)
8 does not terminate a collaborative law process.

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

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

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

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

23 (c) Upon filing of a notice of collaborative law process in a contested proceeding, a

1 tribunal shall stay the proceeding until it receives written notice from the parties and
2 collaborative lawyers that the process is terminated.

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

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

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

10 (2) with the agreement of all parties, to ask the tribunal to approve a settlement
11 agreement or sign orders to effectuate a settlement agreement resulting from the process.

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

14 (g) Parties and collaborative lawyers shall promptly notify the tribunal in writing when a
15 collaborative law process terminates. The notice of termination must specify the date on which
16 the collaborative law terminates, but may not specify any reason for the termination. Upon filing
17 of the notice of termination, the tribunal shall lift the stay.

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

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

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

1 (a) Except as otherwise provided in subsection (b), if a collaborative law process
2 terminates, a collaborative lawyer and any law firm with which the collaborative lawyer is
3 affiliated are disqualified from representing a party in the matter or any substantially related
4 matter.

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

11 (c) A tribunal may enforce this section through entry of appropriate orders.

12 **SECTION 7. DISCLOSURES CONCERNING AND APPROPRIATENESS OF**
13 **COLLABORATIVE LAW PROCESS.**

14 (a) Before a prospective party executes a collaborative law participation agreement, a
15 prospective collaborative lawyer shall:

16 (1) provide the prospective party with sufficient information to make an informed
17 decision about the material benefits and risks of a collaborative law process as compared to the
18 material benefits and risks of other reasonably available alternatives for resolving the matter such
19 as litigation, mediation, arbitration, or expert evaluation;

20 (2) advise the prospective party that:

21 (A) any party has the right to unilaterally terminate a collaborative law
22 process with or without cause;

23 (B) if a collaborative law process terminates a collaborative lawyer and

1 the collaborative lawyer's law firm:

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

8 (ii) are disqualified from representing the party in any future
9 substantially related matter or proceeding; and

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

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

16 (c) If a collaborative lawyer reasonably believes that a prospective party or party has a
17 history of domestic violence with another prospective party, the collaborative lawyer shall not
18 begin or continue a collaborative law process unless:

19 (1) the prospective party or party requests beginning or continuing a collaborative
20 law process;

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

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

1 **SECTION 8. COLLABORATIVE LAW PROCESS AND LOW INCOME**

2 **PARTIES.**

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

7 (b) If a party engages a collaborative lawyer described in subsection (a), a collaborative
8 law participation agreement may provide that the law firm, legal aid office, law school clinic,
9 court sponsored program or not-for-profit organization that employs the lawyer or with which
10 the lawyer is affiliated is not disqualified by Section 6 from continuing to represent the party
11 after a collaborative law process terminates, if:

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

14 (2) all parties consent to the continued representation of the party by the law firm,
15 legal aid office, law school clinic, court sponsored program or not-for-profit organization; and

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

19 (c) A tribunal may enforce this section through entry of appropriate orders.

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

22 (a) Except as otherwise provided in section 11, a collaborative law communication is
23 privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence

1 in a proceeding unless the privilege is waived or precluded as provided by section 10.

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

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

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

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

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

11 (a) A privilege under Section 9 may be waived in a record or orally during a proceeding
12 if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it
13 is also expressly waived by the nonparty participant.

14 (b) A person that discloses or makes a representation about a collaborative law
15 communication that prejudices another person in a proceeding is precluded from asserting a
16 privilege under Section 9, but only to the extent necessary for the person prejudiced to respond to
17 the representation or disclosure.

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

21 **SECTION 11. EXCEPTIONS TO PRIVILEGE.**

22 (a) There is no privilege under Section 9 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
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 is an
9 issue.

10 (b) There is no privilege under Section 9 if a tribunal finds, after a hearing in camera,
11 that: the party seeking discovery or the proponent of the evidence has shown the evidence is not
12 otherwise available, the need for the evidence substantially outweighs the interest in protecting
13 confidentiality, and the collaborative law communication is sought or offered in:

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

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

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

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

22 (e) If the parties agree in advance in a signed record, or if a record of a proceeding
23 reflects agreement by the parties, that all or part of a collaborative law process is not privileged,

1 the privileges under section 9 do not apply to the collaborative law process or the part thereof to
2 which the agreement to waive the privilege applies. However, section 9 applies to a
3 collaborative law communication made by a person that has not received actual notice of the
4 agreement before the communication is made.

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

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

8 **SECTION 13. ENFORCEMENT OF COLLABORATIVE LAW PARTICIPATION**

9 **AGREEMENTS NOT MEETING REQUIREMENTS.** Notwithstanding the failure of a
10 collaborative law participation agreement to meet the requirements of Section 3, or a lawyer's
11 failure to comply with the requirements of Section 7, if a tribunal finds that parties reasonably
12 believed they were participating in a collaborative law process, the tribunal, if the interests of
13 justice require, may:

- 14 (1) enforce an agreement resulting from the process in which the parties participated;
15 (2) apply the disqualification provisions of Section 6; or
16 (3) apply the evidentiary privilege of Section 9.

17 **SECTION 14. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND**
18 **MANDATORY REPORTING AND COLLABORATIVE LAW PROCESS.**

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

22 (b) The professional responsibility obligations and standards applicable to any licensed
23 professional who participates in a collaborative law process as a nonparty participant are not

1 changed because of that participation.

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

5 **SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
6 applying and construing this Uniform Act, consideration must be given to the need to promote
7 uniformity of the law with respect to its subject matter among states that enact it.

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

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

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

19 (a) This [act] governs a collaborative law participation agreement signed after [the
20 effective date of this [act]].

21 (b) After [a delayed date], this [act] governs a collaborative law participation agreement
22 whenever made.

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

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