Memorandum

To: Drafting Committee for the Uniform Collaborative Law Act

CC: Observers and Dennis Cooper, Style Committee liaison

From: Andrew Schepard

Re: Revised Draft of the UCLA Incorporating November 2008 Meeting Changes

Date: December 8, 2008

Enclosed is a complete redraft of the Uniform Collaborative Law Act which incorporates the changes the Committee agreed to at its November meeting in Portland. I have had Yishai's indispensible help in preparing it.

Yishai previously circulated a memo listing the changes that are incorporated into this draft. I will not repeat that memorandum here. We also received some comments on Yishai's memo, which we took into account in creating the enclosed draft.

I would appreciate your comments on the draft but need them expeditiously. Please feel free to circulate the draft to anyone you want who might be able to provide feedback. I would like the next revision (to be created on the schedule below) to be as close to final as possible so that I can begin redrafting the preface and comments with some certainty as to what the statute will say and what the order of the sections will be.

Timing for your comments:

A number of you have asked for the revised draft to be completed before the end of the year so that you can present the most current version of the UCLA to the board of potentially supportive organizations for consideration at upcoming meetings early in 2009. To accommodate this request, I would appreciate your sending any suggestions for revision to the enclosed draft to me and Yishai by 5:00 p.m. EDT on Friday, December 19th, 2008. We will review them immediately and send a revised draft to NCCUSL as soon thereafter as possible, but before December 31st, 2008.

After the text of the statute is stabilized, and with my students' help, I will begin revising the preface and section by section commentary. That revised commentary will include any agreements for material to be placed in commentary at the November meeting.

Please note that my goal is to circulate the revised preface and commentary to you by the middle of February or beginning of March.

Here is what I would like you to do:

As before, I ask you to place your comments on the enclosed draft into one of the following categories:

Category 1- Typo, technical or drafting suggestion that I have discretion to make or not.

Category 2- Important change that must be incorporated for you or your organization to support the UCLA. I obviously hope that, after the number of previous drafts, the extensive discussions and decisions at the November meeting, and at this late date in the drafting process, the number of suggested changes in this category will be zero. If, however, something arises I will discuss all changes in this category with Peter and Harry to decide how best to proceed.

Sections to especially focus your attention on:

My sense is that the changes that the Committee agreed to in November make the statute simpler and more coherent. I hope you agree.

In the course of incorporating the changes agreed to at the November meeting, I also made a number of changes that I thought improved the draft or were made necessary by changes already agreed to. I do not think that I changed anything of substance, but, of course, will fully understand if others have a different view.

Note that, as the Committee directed at the November meeting, several sections have been added and many sections renumbered in the enclosed draft as compared to the previous draft (the First Read Draft).

What follows is a list of sections in the enclosed draft that I think have been changed enough to be worthy of special scrutiny by you:

(1) Section 2(1) - I changed the definition of "collaborative law process" to try to get around the problem of defining it as "a process" as it was defined in section 2(1) of the First Read Draft. I thought it was embarrassing to start the UCLA with a section raising an obvious drafting question by defining a term with the same term.

(2) Section 5- As directed by the Committee, I made an attempt to change "contested versus uncontested" proceedings and motions to those that are "agreed to or not agreed" to by all parties throughout the revised statute. The most important section to look at for these changes is this one.

(3) Section 5(d)- This is the first section where the revised "emergency" exception appears. The same language is repeated throughout the Act.

(4) Section 6- I rewrote the disqualification provision of the First Read Draft in light of the Committee's decision not to disqualify "affiliated" law firms. I used Model Rule of Professional Conduct 1.10 (a) as a model, and

disqualified *the lawyers* in any law firm that the collaborative lawyer is "*associated*" with from representing a party in a matter or substantially related matter if collaborative law terminates.

The Model Rules make no attempt to define "associated" and I don't think we should either.

We have adopted the Model Rules definition of "law firm" in UCLA section 2(5). The comment to the ABA Model Rules on this definitions states that:

> "Whether two or more lawyers constitute a firm …can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another." Comment to Model Rule 1.0 [2].

If the Committee approves the redrafted version of Section 6, I will incorporate the substance of this comment into the Comment to the UCLA's definition of "law firm."

(5) Section 7- this is a new section but incorporates section 3(b) (3) of the First Read Draft. As the Committee directed in Portland, this new section makes the duty of voluntary disclosure in collaborative law "positive law," regardless of whether a collaborative law participation agreement contains such a provision.

Note that, as per previous Committee agreements, this section *does not* authorize courts to enforce its provisions through entry of appropriate orders (in contrast, section 6's disqualification provision does). I am sure that we will be asked "why no provision authorizing court enforcement of this section?" Unless the Committee directs otherwise, a comment to this section will state that violations of the duty of voluntary disclosure will be remedied only by termination of the collaborative law process and possibly breach of contract remedies even though this section now makes the duty of voluntary disclosure during collaborative law "positive law." The comment will state that the limitation of remedies is based on the fear that the Committee has previously expressed of provoking enforcement motions and countermotions if a collaborative law process in a pending proceeding breaks down

over alleged violations of the duty to make voluntary disclosure.

(6) Section 8(a)(2)- I have made some changes in the "required disclosures" section to conform to Committee decisions, and with the addition of sections to the Act. It's a bit longer now, but I do not think the substance has changed.

(7) Section 8(b)(c)(3)- as the Committee agreed in Portland, this section requires a collaborative lawyer to be familiar with various relevant ABA Standards of Practice to continue representing a victim of domestic violence. It is a new section and should be reviewed carefully.

(8) Section 9- This is the rewritten section allowing an exception to the rule of imputed disqualification (disqualification of the law firm as well as the collaborative lawyer) for low income parties. As the Committee instructed, it focuses on the nature of the party, not the nature of the entity providing collaborative law representation for the low income client. It has a stringent definition of low income - annual income which does not exceed one hundred and twenty five percent (125%) of the current Federal Poverty Guidelines amounts. A legislative note is included indicating that states should change this definition in accordance with their own decision about income eligibility for free civil legal aid. Also as the Committee instructed, the words "screened" or "screening" do not appear in this section. The substance of the concept is found, however, in section 9 (c) (2).

(9) Section 10-This is the new section allowing an exception to the rule of imputed disqualification for lawyers for government entities. It parallels the exception for low income clients in section 9, but its operation takes a little explaining.

Under Section 2 (9) of the UCLA "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, *public corporation, government or governmental subdivision, agency, or instrumentality*, or any other legal or commercial entity. (emphasis added).

Under Section 2 (8) "Party" means a *person* that enters into a collaborative law participation agreement and whose consent is necessary to resolve the matter. (emphasis added).

Thus, if you read sections 2(9) and 2(8) together, a government entity is a person and can be a party to a collaborative law participation agreement without any amendment to the Act. Subsection (a) of section 10 thus uses the highlighted portion of the language of Section 2(9) to define what kind of parties it is applicable to- "public corporation, government or governmental subdivision, agency, or instrumentality."

Next is the question of how to limit the disqualification requirement to individual collaborative lawyers for the government not the entities that employ them? As discussed above, the revised Section 6 disqualifies the lawyers in the "law firm" with which the collaborative lawyer is associated. The ABA Model Rules include the following comment when defining "law firm":

> "With respect to the law department of an organization, *including the government*, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. Model Rules of Professional Conduct Comment to Rule 1.0 [3] (emphasis added).

Thus, all members of a division of government lawyers constitute a "law firm." I will quote this comment in the comment to this section of the UCLA.

Because all of the lawyers in the law department for the government constitute a single firm, Section 10 of the UCLA uses the same statutory language for limiting the disqualification requirement to the individual collaborative lawyer as does Section 9 which seeks to accomplish the same goal for lawyers in law firms representing low income clients. The same language requiring "screening" for the collaborative lawyer from the other lawyers in the firm without using the word appears in Section 10 as in Section 9.

(10) Section 11- This is the old section 12 on "confidentiality", moved before the newly renumbered evidentiary privilege sections, as per the Committee's direction.

(11) Section 14 (a)(1)-(7)- The enhanced list of exceptions to the evidentiary privilege is taken from the Uniform Mediation Act, as directed by the Committee.

(12) Section 15 is the old Section 13. It has been redrafted slightly from the language agreed to in Portland with input from Byron in light of the elimination of the "mandatory" contract provisions in the former section 3(b).

I look forward to your comments and suggestions on the sections above, or on anything else.

Thank you for your help and support throughout the drafting process.

Best wishes from Hofstra for a happy and healthy holiday season.