To: PMAA Committee & Style Committee

From: Barbara Atwood, Chair & Brian Bix, Reporter

Re: Current Draft

Date: January 5, 2012

We hope everyone has enjoyed the holiday season and is off to a healthy start for 2012. We're looking forward to the drafting committee meeting in beautiful San Antonio on February 10-11, 2012. Since this is our last face-to-face meeting before our final reading at the July annual meeting, we need to make great use of our time.

Significant Changes Made to the Draft Act Since the November Meeting

Section 2: A definition for "custodial responsibility" (the term preferred to "child custody" in the Uniform Collaborative Law Act) has been added, at the suggestion of Deborah Behr of the Style Committee.

Section 9(c)(3): Deborah Behr also encouraged us to specify *when* a party needs to be represented to invoke the obligation. We've thus explained that the representation must be at the time the agreement is negotiated and signed.

Additional Issues to be Discussed

Section 3 remains a problem that will likely require significant attention at our February meeting. You will recall that at the November meeting we decided to identify the basic agreements that *must* meet the Act's requirements, largely because of concerns that many routine spousal transactions might be construed as "marital agreements" with the attendant requirements of the Act. The solution was to move the "scope" section up front and to give it a new role of identifying the kinds of agreements that are at the core of the Act.

The current draft states that agreements that waive/alter/affirm certain rights and duties are only "valid" if they are premarital/marital agreements consistent with the requirements of this Act. We do not define what is meant by (or what follows from) validity. At the November drafting committee meeting, we had tentatively used the term "effective," but effectiveness raises the same problem as validity.

If validity means enforceability, or presumptive enforceability, then this section should be merged back into section 9 (as Deborah Behr has already suggested). If validity (or effectiveness) means something else (and we have no current suggestions for an alternative meaning), then we need to define it and state clearly what we mean by the term.

Also, by identifying several non-core terms in agreements that are permissively within the scope of the agreement under section 3(b), we've created some real problems of interpretation and application. Section 3 in effect provides that certain kinds of agreements that don't fall under 3(a) can be entered into without the safeguards of the Act, but if they are appended to core agreements that do fall under 3(a), then the full Act applies. If we were to present this to the conference in July, we'd surely get lots of questions and complaints about our having invited lawyers to game the system.

Brian and Barbara have considered an alternative approach, providing that the enforcement standards of this Act only apply to premarital or marital agreements that waive/alter/affirm certain enumerated rights and obligations arising because of marraige. That approach has a certain appeal but it becomes, in essence, another definition section and does not cure the problem, noted above, of agreements of the non-core variety.

Section 9(f) This bracketed subsection gives the standard to be applied by those states that wish to review agreements for fairness relative to the time of enforcement. We did not reach full consensus and closure on the language for this optional provision. The draft currently uses two alternative bracketed terms: undue hardship, and substantial injustice. We need to decide on the appropriate standard at the upcoming drafting committee meeting. The subsection in the current draft reads:

> A court may modify or refuse to enforce a premarital or marital agreement to the extent that enforcement would result in [undue hardship] [substantial injustice] because of circumstances arising since the time of signing.