[*Read this First*]
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**

Date: **March 10, 2009**

Introduction

Enclosed is a redraft of the Uniform Collaborative Law Act in two versions- with and without Preface and Commentary.

This version reflects the excellent suggestions of the Committee on Style. They made the statute tighter and easier to understand. For those who are interested I also enclose a PDF file with the Style Committee comments on it.

While most of Style's suggestions go to form rather than substance, the suggestions were and required revisions throughout the statute. I suggest, however, that you read the entire statute once again to be sure.

I incorporated all of Style' suggestions that I did not think changed the UCLA's substance. There are, however, some policy questions raised by Style that are discussed in a later section of this Memorandum which I think require Committee input.

Timetable and Possible Conference Call for Unresolved Issues

We have to get our next draft to the Chicago Office by Monday, April 6th. Please send me any comments that you have by Wednesday, March 25th at 5:00 p.m. so that they can be incorporated into the next draft. The next draft will be reviewed again by the Committee on Style.

The following communication is from our Chair (with a bit of editing by me):

> "Following the close of the comment period from the Committee on Wednesday, March 25th, I would suggest that you and your students synthesize the comments and we address the need for a possible teleconference amongst the voting members of the Committee on any issues that appear need to be resolved with a vote. We really need to have that resolution teleconference no later than Wednesday, April 1st in order to ensure that any drafting that would be triggered by that teleconference can be concluded, reviewed and be packaged into final

draft by Monday, April 6th to facilitate the publication annual meeting final draft."

My students and I will attempt to follow this suggestion. The Chicago office and Peter will, I am sure, be in touch concerning scheduling a conference call.

Final copy for the second reading of the Act in July is due in Chicago on June 1st. I will circulate a final draft between the one sent to Style in April and the final text for second reading in June if I think there are major matters that the Committee should review.

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, and at this late date in the drafting process, the number of suggested changes in this category will be zero.

Please also review the Preface and Commentary which have been expanded and refined since the last draft. My students and I are still working on the Preface and Commentary by proof reading and additional citations. We welcome any suggestions that you have on what we have drafted so far, including any additional subjects you think we should address or something you think we should cut.

Unresolved Issues Raised by Committee on Style

The Style Committee made some suggestions and inquiries that I did not incorporate into the enclosed draft because of prior Committee decisions. I identify each of these matters below, with my comment and proposed resolution. If you want me to change the resolution, please advise by the deadline dates above.

(1) ***Section (1)(A)-*** [this is the section defining collaborative law] - *Style Committee suggested deleting the word "voluntarily" before the phrase "enter into a collaborative law participation agreement…."*.

Reporter's Comment- As you know, as a matter of drafting, I agree with Style's suggestion because entering into all contracts, including a participation agreement must be "voluntarily." Including the phrase in the statute is thus redundant. However, the Drafting Committee discussed this issue thoroughly and felt that

including the word "voluntary" was important to emphasize the nature of collaborative law. I thus left the word in the current draft.

(2) ***Section 12(b)-*** [this is the section requiring a collaborative lawyer to screen for domestic violence]- *Style makes the following query to the Reporter: "Style feels subsection (b) should be limited to domestic cases. Do you intend to apply it to all cases?"*

Reporter's Comment- Based on prior Committee discussion and decisions, I think the answer is that section (b) should be applied to all cases. The Committee rejected the idea of limiting the need for screening to "domestic" case for two reasons. First, defining "domestic cases" will be very difficult. Second, the Committee felt that domestic violence could exist in other types of disputes, such as business partnerships. It is not a subject of litigation or disputes, but an unfortunate part of the human condition.

(3) ***Section 12(c)(3)-*** [this is the section requiring lawyers to be familiar with specific ABA Standards of Practice to represent a victim of domestic violence in collaborative law] – *Style makes the following query to the Reporter:"Committee on Style feels Section 12(b)[sic- (c)](3) might better describe national standards generally and place specifics in a comment*."

Reporter's Comment: This subject was extensively discussed at the last meeting and the Committee made the decision to specifically mention the ABA Standards currently included in Section 12(c)(3). In addition, the ABA Standards mentioned in the current draft are, in effect, "national" standards. I therefore left the draft in the format that the Committee agreed to.

Should the Committee wish to change my decision, and incorporate the suggestion of the Style Committee it might modify Section 12(c)(3) to read (revised language in italics):

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

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

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

(3) *the lawyer is familiar with nationally accepted standards of practice for representing victims of domestic violence and children and parents in abuse and neglect cases.* "

The Comment to this section would then specifically identify and mention the ABA Standards of Practice for Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases; Standards of

Practice for Lawyers Who Represent Children in Abuse and Neglect Cases; and Standards of Practice for Lawyers Who Represent Parents in Abuse and Neglect Cases.

In considering this issue, the Committee might want to note that research by my students found very few statutes or court rules outside of Texas that incorporate specific standards of practice for lawyers except in the context of appointment of counsel in death penalty cases.

(4) ***Section 15(c) and 16(a)(4)-*** [Section 15(c) is a preclusion of a person's right to assert a privilege for a collaborative law communication if the person "intentionally uses a collaborative law process to commit, or attempt to commit, or to plan a crime, or to conceal an ongoing crime or ongoing criminal activity." Section 16(a)(4) creates an exception to the privilege for collaborative law communications if "intentionally used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity] *Style makes the following query to the Reporter on these Sections: "COS finds Section 15(c) to be redundant with language in Section 16(a)(4). Do you agree?"*

Reporter's Comment: Section 15 lists circumstances under which a person is precluded from raising a claim to a collaborative law communications privilege and Section 16 lists exceptions to privilege. While they overlap, I don't think these concepts are necessarily redundant. The same redundancy appears in the Uniform Mediation Act.

I don't think there would be any great harm in eliminating Section 15(c) and maintaining Section 16(a)(4) but I wanted to raise this issue with members of the Drafting Committee which authored the UMA before agreeing to do so.

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. I look forward to seeing you in Santa Fe in July for the final reading.