Memorandum

To: NCCUSL Drafting Committee for the Collaborative Law Act

CC: Dennis Cooper, Style Committee liaison and Observers

From: Andrew Schepard

Re: Draft for First Reading of the Uniform Collaborative Law Act

Date: June 4, 2008

Timing

We have to have our completed work product to NCCUSL by June 9th so that it can be distributed with the materials for the Annual Meeting. Please send me any suggestions for revision to the enclosed draft by 5:00 p.m. EDT on Friday, June 6th. I will review them immediately and send the finished materials to NCCUSL by June 9th.

I apologize for the short time frame, but do not know what else I can do and still meet the deadlines for the Annual Meeting.

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 suggestion that I have discretion to make or not.

Category 2- Important change that must be incorporated for me to support the UCLA. I will discuss all changes in this category with Peter to decide how best to proceed.

I do not intend to make any substantive changes to the Act's Prefatory Note or section by section commentary.

Background to Enclosed Draft

I have reviewed the Style Committee's comments and questions on Draft # 6 (April 2008) and discussed them with Dennis Cooper our Style Committee liaison. The Style Committee conducted a thorough review of the Act, and made numerous suggestions to improve it. It also raised a number of important substantive questions. I expressed our collective thanks for their valuable input.

Enclosed is a redraft of the Act incorporating those changes recommended by the Style Committee which I do not believe raise substantive policy issues. Note, however, that the Style Committee recommended that we use the term "collaborative law process" throughout the Act rather than "collaborative law." I adopted this suggestion because we used the terms interchangeably in previous drafts.

Substantive Queries From the Style Committee

I now list what I regard as the significant substantive law/policy questions raised by the Style Committee with some brief comments of my own on them. Dennis emphasized that the Style Committee's goal in raising these issues was to insure that the Committee considered them rather than to suggest how the issues should be resolved.

At Peter's suggestion, I list these questions *not* for our discussion and resolution now. Rather, they are included because:

- They may be raised at the Act's first reading

- They will be discussed at our next meeting on November 21st and 22nd along with other issues raised at first read.

References below are references to Draft #6 (April 2008) of the Act. I think, however, the relevance of the questions to the Committee's continuing deliberations will be obvious.

(1) Query to Reporter [relating to Section 2 of Draft #6- Definitions]: Does your act apply to civil matters only? COS [Committee on Style] believes that government lawyers are excluded, except for legal services organizations?

Reporter's comment: I noted that to date almost all of the matters for collaborative law have been family law related, but that the Committee decided not to limit the use of collaborative law by subject matter. I told Dennis that I nonetheless suspected the Committee believed that the Act should be limited to civil matters but that Committee had not discussed this issue in depth. I also told him that the Committee had not addressed the question of collaborative law for government lawyers in depth, but that government agencies often mandate use of ADR processes in resolving disputes.

(2) Query to Reporter [relating to Section 3(b)(1) which includes the "emergency" exception to the disqualification provision]: On line 22, What about a threat to "health" or "welfare" [section 3(b)(1) exempts only threats to "safety" from the disqualification provision]?On line 22, does the term 'dependent' include spouse?

Reporter's comment: Dennis advised me that the terms "health" and "welfare" are usually used in combination with "safety" in legislation of this type. I noted that the scope of the emergency exception was much discussed by the Committee and the language balanced

the interests of the collaborative law community in not participating in the adversarial process and the domestic violence community in insuring continued representation for victims of domestic violence until a successor lawyer is engaged. I thus did not feel that I could "health" and "welfare" to the exception without Committee consensus. I also advised him that I thought "dependent (which is not a defined term in the Act) should be interpreted to include "spouse."

(3) Query to Reporter [generally referring to Section 6: Disqualification of Collaborative Lawyer]: Is it necessary to disqualify collaborative lawyers on termination of process? Might this lead to delay, inefficiency, or even chicanery?

Reporter's comment: I told Dennis that this query went to the heart of the public policy behind the Act, and that the Committee debated this subject at great length. I also told him that the Commentary would extensively address the public policy issues that the query raises in the Prefatory Note for the Act.

(4) Query to Reporter [referring to Section 6 (b) which terminates emergency representation by a collaborative lawyer when "reasonable measures" are taken to "adequately protect the safety of the party or the party's dependent"] - Who determines when "reasonable measures" are taken?

Reporter's comment: I told Dennis that malpractice suits were the likely vehicle for making that determination. I also said that the issue would be addressed in collaborative law training programs.

(5) Query to Reporter [referring to Section 6 c which authorizes a court to enforce the disqualification provision "through entry of appropriate orders"] - Is subsection c necessary? A truism? The Style Committee made the same query concerning section 8(d) which contains the same provision relating to the disqualification provision for collaborative lawyers for low income parties.

Reporter's comment: I told Dennis that I seemed to remember a division of opinion in the Committee on this subject but that I resolved it in favor of specifically articulating a power in the court to enforce the disqualification provisions. I did, however, shorten the language of these Sections in the enclosed draft, but left in the core provision.

(6) The Style Committee made several queries relating to Sections 9, 10, 11, and 12 which define the evidentiary privilege for collaborative law communications and its exceptions. I group them all here.

Reporter's comment: I told Dennis that the Committee agreed to incorporate the language of the Uniform Mediation Act in the Collaborative Law Act as close to verbatim as possible and that the Style Committee's queries raised the question of whether that policy should be continued. He was not aware of that decision by the Committee. I told him it would be explained in the Prefatory Note. I also told Dennis that I did not think I should even make stylistic changes to these sections without consultation with the Committee.

(a) Query to Reporter- Is subsection 10(c) [precluding a person who uses a collaborative law process to plan, commit or conceal a crime from asserting the privilege] necessary (line 7-8)? Covered by paragraph 11(a)(3) [no privilege for approximately the same types of communication]?

Reporter's comment: These sections do duplicate each other to some extent. Section 10© precludes a malefactor from asserting the privilege because of conduct- a kind of estoppel- while section 11(a)(3) says that the privilege does not apply to the same types of communication. The result in the court should be the same no matter which rationale is chosen. However, the duplicative sections are in the UMA.

(b) Query to Reporter: Does Section 12 [stating that parties can agree to confidentiality of collaborative law communications "in a signed record or as provided by law or rule of this state other than this [act]"] conflict with subsection 9(c) ["[e]vidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a collaborative law process"]?

Reporter's comment: I don't think these sections conflict. Both are in the UMA. Section 12 provides that parties can reach agreement on confidentiality, not evidentiary privilege. Evidentiary privilege regulates what can be admitted in evidence in a proceeding – a subset of confidentiality but not the complete concept.

Thank you for all of your help, advice and encouragement. I hope and expect that we will be able to present a well thought out work product to the Conference in July and I look forward to seeing you all again in Big Sky.