

DRAFT
FOR DISCUSSION ONLY

COLLABORATIVE LAW ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For October 2007 Drafting Committee Meeting

WITH PREFATORY NOTE AND COMMENTS

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August 28, 2007

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COLLABORATIVE LAW ACT

PREFATORY NOTE

[*Note to Drafting Committee:* Please identify other subjects or additional research that you believe should be included in the Prefatory Note, which is modeled on the Prefatory Note to the Uniform Mediation Act.]

The Nature of Collaborative Law

Collaborative Law is a voluntary dispute resolution process for parties represented by counsel. Like mediation, Collaborative Law helps parties resolve their dispute themselves rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of Collaborative Law is that parties are represented by counsel during the negotiations that make up the Collaborative Law Process. Collaborative Law counsel act as advocates and counselors for their clients and bring their expertise in substantive law to the process. They encourage joint planning and problem solving rather than presenting the case in an adversarial framework to a judge or arbitrator. Neutrals such as mediators (generally experts in conflict management and resolution, not substantive law) are involved in Collaborative Law only if the parties agree to their participation.

The core of Collaborative Law is a written agreement (“Collaborative Law Participation Agreement”) by parties to a dispute in which they agree not to seek court resolution of a dispute during the Collaborative Law Process. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319 (2004). If a party seeks judicial intervention, the Agreement requires that counsel for all parties must withdraw from further representation in legal proceedings or matters substantially related to the subject matter of the dispute. *Id.* at 319-20; *see also* DivorceNet - Collaborative Law Participation Agreement, http://www.divorcenet.com/Members/squane/clp_agreement.pdf (last visited Aug. 1, 2007). This disqualification trigger distinctly separates the planning and counseling functions of counsel in Collaborative Law from counsel in litigation, and encourages parties and counsel to focus on problem solving rather than positional negotiations. *See generally* ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991).

The Collaborative Law Participation Agreement also incorporates a number of features to encourage problem-solving negotiations. *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003). These include voluntary disclosure of relevant data requested by another party and joint retention of neutral experts. Negotiations typically take place in four-way meetings in which counsel and parties focus on their underlying interests, share information and “brainstorm” solutions to problems. Typically, in order to promote productive negotiations, Collaborative Law Participation Agreements provide that communications during the Collaborative Law Process are confidential and privileged from admission into evidence in later legal proceedings. *See* DivorceNet - Collaborative Law Participation Agreement, *supra*.

The Growth and Development of Collaborative Law

The concept of Collaborative Law was first formally articulated by Minnesota lawyer, Stu Webb, approximately eighteen years ago. Stu Webb, *Collaborative Law: An Alternative For Attorneys Suffering 'Family Law Burnout,'* 18 MATRIM. STRATEGIST 7 (2000). Since then, Collaborative Law has matured and emerged as a viable option for parties to a dispute. Examples of its growth and development include:

- Thousands of lawyers have been trained in the Collaborative Law Process. Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 83 at n.65 (2005) (citing Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11);
- Collaborative Law has been used to resolve thousands of cases in the United States, Canada, and elsewhere. David A. Hoffman, *Collaborative Law: A Practitioner's Perspective*, 12 DISP. RESOL. MAG. 25 (Fall 2005);
- Collaborative Law practice associations and groups have been organized in virtually every state in the nation and in several foreign jurisdictions. *See id* at 28; *see also* Int'l Acad. Collaborative Prof'ls., <http://www.collaborativepractice.com> (follow "Find a Collaborative Professional" hyperlink) (last visited Aug. 1, 2007);
- A number of states have enacted statutes of varying length and complexity which recognize and authorize the Collaborative Law Process. *See, e.g.*, CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006);
- A number of courts have taken similar action through enactment of court rules. *See, e.g.*, CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS tit. IV, § 3 (2005); UTAH CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June 25, 2007);
- Many professionals from other disciplines, especially financial planning and psychology, have been trained to participate in the Collaborative Law Process. *See* Tesler, *supra* at 5;
- Numerous articles have been written about Collaborative Law in scholarly journals, *See, e.g.*, Gay G. Cox & Robert J. Matlock, *Problem Solving Process: Peacemakers and the Law: The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003); Joshua Issacs, *Current Developments, A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004); James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Sherri

Goren Slovin, *The Basics of Collaborative Family Law – A Divorce Paradigm Shift*, 18 AM. J. FAM. L. 2 (Summer 2004) available at <http://www.mediate.com/articles/slovinS2.cfm>; Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004); Elizabeth K. Strickland, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979 (2006); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, PSYCHOL. PUB. POL’Y. & L. 967 (1999) and the popular press. See, e.g., Hoffman, *supra* at 6; Mary Flood, *Collaborative Law Can Make Divorces Cheaper, Civilized*, HOUS. CHRON., June 05, 2007; Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11; Janet Kidd Stewart, *Collaboration is Critical: Couples Find That Breaking Up Doesn’t Have to Mean Breaking the Bank*, CHI. TRIB., Feb. 9, 2005 at 3;

- The first empirical research on the subject found generally high levels of client satisfaction with the Collaborative Law Process. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (June 2005)(Can.), available at <http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf> (last visited Aug. 1, 2007);
- The American Bar Association Dispute Resolution Section has organized a Committee on Collaborative Law. Section of Dispute Resolution: Collaborative Law Committee, available at, <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited Aug. 1, 2007);
- The founders of Collaborative Law have received awards from the organized bar. IACP Ethics Task Force, *The Ethics of the Collaborative Participation Agreement: A Critique of Colorado’s Maverick Ethics Opinion*, available at <http://www.collaborativepractice.com/documents/IACPethicsTaskForcearticle.pdf> (last visited Aug. 1, 2007) (highlighting the ABA awarding Stu Webb and Pauline Tesler the first *Lawyer as Problem Solver Award* in 2002).

The Benefits to Parties and Society of Collaborative Law

Public policy supports the growth and development of Collaborative Law as a dispute resolution option. The greater the number of responsible dispute resolution options available to parties, the better. See generally Report of the Ad Hoc Panel on Disp. Resol. & Pub. Pol’y, Nat’l Inst. of Disp. Resol., *Paths to Justice: Major Public Policy Issues of Dispute Resolution* (1983), reprinted in LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 3-4 (2d ed. 1997); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998). A greater range of dispute resolution options increases the likelihood that disputes will be resolved earlier in their life cycle and at less economic and emotional cost to parties. Society at large benefits when conflicts are resolved earlier and with greater participant satisfaction. Earlier settlements can reduce the disruption that a dispute can cause in the lives of others affected by the dispute. See JEFFREY RUBIN, DEAN PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT* 68-116 (2d ed. 1994) (discussing reasons for and consequences of conflict escalation). When settlement is reached earlier, personal and societal resources dedicated to resolving disputes can be invested in more productive ways. Earlier settlement also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. TEX. CIV. PRAC. & REM.

CODE ANN. § 154.002 (Vernon 2005) (“It is the policy of this state to encourage the peaceable resolution of disputes... and the early settlement of pending litigation through voluntary settlement procedures.”); *See also* Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 S. TEX. L. REV. 849, 850 (Summer 2006); and *see generally* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (discussing the causes for the decline of civic engagement and ways of ameliorating the situation).

No one doubts that, in appropriate cases, litigation and judicial determinations that result from it serve vital social purposes and that not all disputes can or should be resolved through negotiation and compromise. Courts articulate and apply principals of law necessary to provide order to social life and resolve factual conflicts. They provide a measure of predictability in outcome by application of precedent and procedures rooted in due process. They can require discovery of information that one side wants to keep from the other. They protect the vulnerable and weak against the manipulative and powerful by orders that can be enforced with sanctions. *See* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

Recognizing that some disputes should be litigated and decided by a court, however, does not mean all of them --or even most-- should be. Litigation can emotionally and economically draining for parties, and creates strains in our social fabric. Judge Learned Hand, in his customarily succinct style, summarized the consequences of full fledged adversary litigation for many by stating that “[a]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.” Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926). Parents in divorce and family disputes have particularly negative reactions to litigation as a method of resolving problems. ANDREW I. SCHEPARD, *CHILDREN COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* 42-44 (Cambridge University Press 2004)

The overall question for social policy is not how to eliminate litigation. Rather it is how to create multiple options for dispute resolution and mechanisms to match those options to appropriate disputes. Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) (Reporter for the ABA’s 1976 Pound Conference articulating a vision of a dispute resolution system where a court is as not simply “a courthouse but a dispute resolution center where the grievant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case”). The greater the range of dispute resolution options for “fitting the forum to the fuss,” John Lande & Gregg Herman, *supra* at 7, - the better.

Collaborative Law, like other voluntary dispute resolution processes that responsibly promote settlement, encourages parties, with the expertise and support of their counsel, to reach agreements that are tailored to their interests and needs. *See generally* Slovin, *supra* at 7. Many parties to a dispute want the advice and support of counsel in helping them negotiate a settlement that Collaborative Law offers, while simultaneously reducing the prospect of an emotionally and economically expensive litigation process by agreement on ground rules for the negotiation process that increase the likelihood of settlement. The participation of counsel in Collaborative

Law helps assure that parties enter the process with informed consent, that they have expert advice during the negotiation process and a measure of protection against improvident agreements. As in mediation, parties experience greater voice in the process of settlement through Collaborative Law than in a judicial resolution. The parties' participation in the process and control over the result contribute to greater satisfaction on their part. As in mediation, disputing parties can anticipate reaching settlement earlier in Collaborative Law than in litigation because of the controlled expression of emotions and voluntary exchange of information that occur as part of the Collaborative Law Process. *See* Chris Guthrie & James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998).

Collaborative Law and Divorce and Family Disputes

Collaborative Law has seen its greatest growth in divorce and family law disputes, as problem-solving approaches to dispute resolution are especially appropriate in these sensitive and important matters. Dissolution and reorganization of intimate relationships can generate intense anger, stress and anxiety, emotions which can be exacerbated by litigation. The emotional and economic futures of children and parents are at stake in family and divorce disputes – interests which are generally best satisfied by collaborative planning for the future with expert help. Parents are, after all, more knowledgeable about their children's needs and schedules than are judges or outside experts. *See generally*, SCHEPARD, *supra* at 50; Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation Research and Reflections*, 43 FAM. CT. REV. 22, 34 (Jan. 2005). The needs of children are particularly implicated in divorce cases, as children exposed to high levels of inter-parental conflict "are at [a higher] risk for developing a range of emotional and behavioral problems, both during childhood and later in life . . ." John H. Grych, *Interpersonal Conflict as A Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005); and *see generally* INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH AND APPLICATIONS (John H. Grych & Frank D. Fincham eds., 2001); J. B. Kelly, *Children's Adjustment in Conflicted Marriages & Divorce: A Decade Review of Research*, J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, 39, 963-973 (2000). The lower the conflict level between parents, the more the child benefits from contact with the non-custodial parent and the more regularly child support is paid. *See* SCHEPARD, *supra* at 35.

Parties in divorce and family disputes value the expertise of counsel in helping reorganize their lives. Indeed, the divorce bar has recognized that divorce and family disputes are particularly appropriate for the problem-solving orientation to client representation that Collaborative Law encourages. *Bounds of Advocacy*, a supplementary code of standards of professional responsibility for divorce law specialists who are members of the American Academy of Matrimonial Lawyers (AAML), states: "[a]s a counselor, the lawyer encourages problem solving in the client The client's best interests include the well-being of children, family peace and economic stability." AM. ACAD. OF MATRIMONIAL LAW, BOUNDS OF ADVOCACY (2000). *Bounds of Advocacy* further states that "the emphasis on zealous representation [used] in criminal cases and some civil cases is not always appropriate in family law matters" and that "[p]ublic opinion [increasingly supports] other models of lawyering and goals of conflict resolution in appropriate cases." *Id.* at § 2. Furthermore, *Bounds of Advocacy*

states that a divorce lawyer should “consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.” *Id.* at § 6.1.

Collaborative Law and the Legal Profession

The growth and development of Collaborative Law has significant benefits for the legal profession. It enables lawyers to work productively with other professions (particularly with mental health experts and financial planners). Instead of using these professionals in an adversarial framework as expert witnesses or consultants to further their case, lawyers in the Collaborative Law Process draw on their expertise to help shape all parties shape creative settlements.

Collaborative Law also increases the range of options for services that lawyers can provide to clients, potentially reducing costs and increasing client satisfaction. In this respect, Collaborative Law is part of the movement towards delivery of “unbundled” or “discreet task” legal representation, as it separates representation in settlement-oriented processes from representation in pretrial litigation and the courtroom. The organized bar has recognized unbundled services as a useful part of the lawyer’s representational options. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002); FOREST S. MOSTEN, UNBUNDLED LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (Am. Bar Ass’n 2000); *see generally* Symposium, *A National Conference on Unbundled Legal Services October 2000*, 40 FAM. CT. REV. 26 (Jan. 2002); Franklin R. Garfield, 40 FAM. CT. REV. 76, *Unbundling Legal Services in Mediation* (Jan. 2002); Robert E. Hirshon, *Unbundled Legal Services and Unrepresented Family Litigants, Papers from the National Conference on Unbundling*, 40 FAM. CT. REV. 13 (Jan. 2002); Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10 (Jan. 2002); Andrew Schepard, *Editorial Notes*, 40 FAM. CT. REV. 5 (Jan. 2002).

More broadly, Collaborative Law emphasizes the lawyer’s sometimes overlooked role as a problem solver and client advisor as contrasted to a litigator and adversary. That role has a rich and venerable tradition within the legal profession well-articulated by Abraham Lincoln in 1850 in his *Notes for a Law Lecture*:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough. ABRAHAM LINCOLN, LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Philip V. D. Stern ed., 1940).

As discussed above, the divorce bar has recognized the importance of the problem-solving and counseling roles to clients and their children in *Bounds of Advocacy*. Those roles are recognized more broadly in the *Model Rules of Professional Conduct*, which provides that “[a] lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so A lawyer should advise the client of the possible effect of each legal alternative” R. 1.4 (2002).

The Uniform Collaborative Law Act defines and regulates a dispute resolution process whose central feature is representation of parties by counsel in problem solving, interest-based negotiations. The Act does not, however, regulate the professional responsibility obligations of counsel. Those obligations are established by the rules of professional responsibility enacted in each jurisdiction and by the institutions that regulate the conduct of lawyers, such as the judiciary and bar association ethics committees. With one exception (Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2006); but *see* IACP Ethics Task Force, *supra* p. 7, and John Lande, *Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115* (April 2007), available at <http://www.mediate.com/articles/landej3.cfm>), bar association ethics committees that have examined Collaborative Law have concluded that it is consistent with the codes of professional conduct that govern the conduct of lawyers. ABA Comm. On Prof. Ethics and Grievances, Formal Op. 291 (1956); ABA Comm. On Prof. Ethics and Grievances, Informal Op. 85-1512 (1985); Colo. Bar Ass'n, Formal Op. 101 (1998); Colo. Bar Ass'n, Formal Op. 106 (1999); N.J. Advisory Comm. on Prof'l Ethics, Op. 699 (2005); Ky. Bar Ass'n Ethics Comm., Op. E-425 (2005); Colo. Bar Ass'n Ethics Comm. Abstract 98/99-10.

[*Note to Drafting Committee*: Should the next draft include more commentary on the professional responsibility issues? About what?]

The Relationship Between the Uniform Collaborative Law Act and the Uniform Mediation Act

Before presenting the goals and provisions of the Uniform Collaborative Law Act, its Drafting Committee gratefully acknowledges a major debt to the drafters of the Uniform Mediation Act. The drafting of the Uniform Mediation Act required the Conference of Commissioners on Uniform State Laws to comprehensively examine a dispute resolution process serving many of the same goals as Collaborative Law, and ask what a statute could do to facilitate the growth and development of that process. Many of the issues involved in the drafting of the Uniform Collaborative Law Act, particularly those involving the scope of confidentiality and evidentiary privilege, are identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions and the commentary in this Act are taken verbatim from the Uniform Mediation Act. To reduce confusion, those provisions are presented here without quotation marks or citations, and edited for brevity and with insertions to make them applicable to Collaborative Law.

Goals of the Uniform Collaborative Law Act

The Uniform Collaborative Law Act has three goals. It:

1. establishes minimum terms and conditions for Collaborative Law Participation Agreements designed to help ensure that parties considering participating in Collaborative Law enter into the Process with informed consent;
2. describes the appropriate relationship of Collaborative Law with the justice system; and

3. meets the reasonable expectations of parties and counsel for confidentiality of communications during the Collaborative Law Process by incorporating evidentiary privilege provisions based on those provided for mediation communications in the Uniform Mediation Act.

The Appropriate Balance Between Regulation and Promoting Diversity and Innovation in the Development of Collaborative Law

There are different models for the Collaborative Law Process. For example, in some models, Collaborative Law involves many professionals (e.g., mental health and financial planners) from other disciplines (*See* EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS tit. IV, § 3 (2005); in others, it does not (*See* CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007)).

Rather than enshrine a particular model of Collaborative Law Practice into statute, the Uniform Collaborative Law Act aims to establish a platform for the recognition and future development of Collaborative Law. It thus does not regulate in detail how Collaborative Law should be conducted. The Act draws this balance to promote the autonomy of the parties by leaving to them and their counsel those matters that can be set by agreement and need not be set inflexibly by statute. Furthermore, the Act anticipates the future growth and development of Collaborative Law by authorizing the judicial branch to promulgate supplemental regulations that are consistent with its provisions.

The primary guarantees of fairness of Collaborative Law are the same as for mediation and other alternative dispute resolution processes – informed client consent upon entering into it, and the quality and integrity of the process itself and those who practice it. An argument can be made that the statutory recognition for Collaborative Law created by enactment of the Uniform Collaborative Law Act should be accompanied by regulations to ensure delivery of high quality services and fairness in the process.

For example, an argument can be made that counsel in the Collaborative Law Process should have an obligation to screen a client to ascertain if she has been a victim of domestic violence and take the fact that a client has been abused into account in structuring the client's representation. A client's decision to enter into the Collaborative Law Process and the validity of any agreement that results from it depends on the client having the capacity to give informed consent. Victims of domestic violence, many argue, cannot give such informed consent if a batterer is engaged in a pattern of behavior that includes physical force aimed at controlling the victim's life and free will. Indeed, some have argued that a lawyer commits malpractice when he or she fails to recognize when a client or opposing party is or has been abused by a partner and fails to consider that factor in providing legal representation to the client. Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7 (2005). On the other hand, incidents and allegations of violence short of battering are common in divorce and family disputes and in some circumstances, victims want and may be able to participate in processes of alternative dispute resolution. *See* Nancy Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003).

An argument can thus be made that a statute recognizing Collaborative Law should require counsel and experts who participate in the Collaborative Law Process to receive special training on the incidence and impact of domestic violence (and child abuse) in marital dissolutions and in how to address the problems family violence raises during the Collaborative Law Process. This argument is further supported by the provision of the Uniform Collaborative Law Act that exempts parties from participating in court mandated mediation and education programs where they could be screened or get information about domestic violence. *See* Section 6 (c)(4) *infra*. By analogy, the *Model Standards of Practice for Family and Divorce Mediation* require mediators have special training in recognizing and addressing domestic violence and child abuse and neglect before undertaking any mediation in which those elements are present. MODEL FAM. & DIVORCE MEDIATION STANDARDS II A (2) (overall training and qualification standard), IX (B) (child abuse and neglect standard) X (A) (domestic violence standard).

Nonetheless, for fear of inflexibly regulating a still-developing dispute resolution process, training and qualifications for counsel and other professionals who participate in the Collaborative Law Process are not prescribed by this Act. The Act also takes this position to minimize the risk of raising separation of powers concerns between the judicial branch and the legislature in prescribing the conditions under which attorneys may practice law. *State ex rel. Fiedler v. Wisconsin Senate*, 155 Wis.2d 94, 454 N.W.2d 770 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice); *Attorney General v. Waldron*, 289 Md. 683, 688, 426 A.2d 929,932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation").

The decision of the Drafting Committee against prescribing qualifications and training for practitioners in the Uniform Collaborative Law Act should not be interpreted as a disregard for their importance. Qualifications and training are important, but they need not be uniform. The Act thus recognizes that some general standards are often better applied through those who administer ethical standards or local rules, where an advisory opinion might be sought to guide persons faced with immediate uncertainty. It seeks to respect local customs and practices by using the Act to establish a floor rather than a ceiling for some protections. The Act anticipates that the judicial branch of government will monitor the development of Collaborative Law in each jurisdiction and promulgate appropriate regulations in light of experience. It is not the intent of the Act to preclude later regulation from requiring that counsel and experts who participate in the Collaborative Law Process have a particular background, profession or course of training; those decisions are best made by individual states and courts, and parties in the drafting of their Collaborative Law Participation Agreements.

Furthermore, nothing in the Act prevents counsel and affiliated interdisciplinary experts from participating in voluntary associations of collaborative professionals who can prescribe standards of practice for Collaborative Law to supplement the provisions of this Act. Many such private associations already exist and their future growth and development is foreseeable and to be encouraged.

The Scope of Protection for Confidentiality of Communications

Confidentiality of communications is central to the Collaborative Law Process. Without assurances that communications made during the Collaborative Law Process will not be used to their detriment later, parties, their counsel and experts will be reluctant to speak frankly, test out ideas and proposals, or freely exchange information.

The Uniform Collaborative Law Act thus recognizes an evidentiary privilege for communications made in the Collaborative Law Process similar to the privilege provided to communications during mediation under the Uniform Mediation Act. The evidentiary privilege granted by the Act assures party expectations of the confidentiality of communications during the Collaborative Law Process against disclosures in subsequent legal proceedings.

It is also possible for Collaborative Law Communications to be disclosed outside of legal proceedings, for example, to family members, friends, business associates and the general public. Like the Uniform Mediation Act, however, the Uniform Collaborative Law Act limits statutory protections for confidentiality to legal proceedings. It does not prohibit disclosure of Collaborative Law Communications to third parties outside of legal proceedings. That issue is left to the agreement of the parties in their Collaborative Law Participation Agreements and to the ethical standards of the professions involved in Collaborative Law. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (stating that an attorney is required to keep in confidence "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation ..." or under a few exceptions, including, among others, when it is necessary to prevent reasonably certain death or substantial bodily harm or to comply with a court order or law).

The drafters believe that a statute is required only to assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. Parties uniformly expect that aspect of confidentiality to be enforced by the courts, and a statute is required to ensure that it is. Parties' expectations of additional confidentiality need clarification by mutual agreement. Do they want, for example, to be able to reveal Collaborative Law Communications regarding a potential divorce settlement agreement concerning children to friends and family members for the purposes of seeking advice and emotional comfort?

Parties can expect enforcement of their agreement to keep communications confidential through contract damages and, sometimes, specific enforcement. The courts have also enforced court orders or rules regarding nondisclosure through orders to strike pleadings and fine lawyers. *See* UNIF. MEDIATION ACT § 8 (amended 2003); *see also Parazino v. Barnett Bank of South Florida*, 690 So.2d 725 (Fla. Dist. Ct. App. 1997); *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995).

Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. Assurance with respect to this aspect of confidentiality has rarely been accorded by common law. For example, under the *Federal Rules of Evidence*, and similar state rules of evidence, a settlement offer and its accompanying negotiations may not be admitted into evidence in order to prove liability or

invalidity of a claim or its amount, but may be admissible for a variety of other purposes. FED. R. EVID. 408; *see also* 32 C.J.S. *Evidence* § 380 (2007) (citing relevant examples of case law in thirteen states). By contrast, the Uniform Collaborative Law Act provides for a broader prohibition on disclosure of communications within the Collaborative Law Process. For example, the privilege in the Uniform Collaborative Law Act applies to an array of communications, not limited to those produced in a formal four-way session such as communications before the session begins and in preparation for the session. In addition, the privilege allows parties to block not only their own testimony from future disclosure, but also communications by any other participant in the Collaborative Law Process such as jointly retained experts. Thus, a major contribution of the Uniform Collaborative Law Act is to provide a privilege for Collaborative Law Communications in legal proceedings, where it would otherwise either not be available or not be available in a uniform way across the states.

As with the privilege for mediation communications, the privilege for Collaborative Law Communications must have limits and exceptions, primarily to give appropriate weight to other valid justice system values, such as the protections of bodily integrity and to prosecute and protect against serious crime. They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.

The Need for a Uniform Collaborative Law Act

It is foreseeable that Collaborative Law Participation Agreements and sessions will cross jurisdictional boundaries as parties relocate, and as the Collaborative Law Process is carried on through conference calls between counsel and parties in different states and even over the Internet. Because it is unclear which state's laws apply, the parties cannot be assured of the reach of their home state's provisions on the enforceability of Collaborative Law Participation Agreements and confidentiality protections.

A Uniform Collaborative Law Act will help bring order and understanding of the Collaborative Law Process across state lines, and encourage the growth and development of Collaborative Law in a number of ways. It will ensure that Collaborative Law Agreements entered into in one state are enforceable in another state if one of the parties moves or relocates. Enactment of the Uniform Collaborative Law Act will also ensure more predictable results if a communication made in the Collaborative Law Process in one state is sought in litigation or other legal processes in another state. Parties to the Collaborative Law Process cannot always know where the later litigation or administrative process may occur. Without uniformity, there can be no firm assurance in any state that a privilege for communications during the Collaborative Law Process will be recognized. Uniformity will add certainty on these issues, and thus will encourage better-informed party self-determination about whether to participate in Collaborative Law.

1 **COLLABORATIVE LAW ACT**

2
3 [Note to Drafting Committee: Please identify areas where you think more commentary should be
4 included].

5
6 **SECTION 1. SHORT TITLE.** This Act may be cited as the Collaborative Law Act.

7 **Comment**

8
9 A number of states and foreign countries have enacted statutes to regulate the
10 Collaborative Law Process. See, e.g., CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-
11 70 -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); S.A. 2003, c. F-4.5, s. 5 (Alberta,
12 Can. 2005). In other states, the Collaborative Law Process is defined and regulated by a court
13 rule enacted under the power of the judicial branch to regulate the practice of law and the
14 management of cases and disputes. See, e.g., CONTRA COSTA, CA., LOCAL CT. RULE 12.5
15 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF
16 CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON
17 ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch.
18 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re*
19 *Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June
20 25, 2007). The provisions of this Uniform Collaborative Law Act can be adapted to a court rule
21 for jurisdictions which choose to do so.

22
23 [Note to Drafting Committee: Should we elaborate on what provisions of the Act can be enacted
24 by court rule alone? It is unlikely, for example, that a court rule can suspend a statute of
25 limitations.]

26
27 **SECTION 2. DEFINITIONS.**

28 (a) “Party” means a person in a Dispute who signs a Collaborative Law Participation

29 Agreement and a Collaborative Law Retainer Agreement.

30
31 **Comment**

32
33 The Act’s definition of Party is central to determining who has rights and obligations in
34 Collaborative Law, especially its evidentiary privilege. Fortunately, for the purposes of
35 Collaborative Law parties are easy to identify – they are signatories to a Collaborative Law
36 Participation Agreement and a Collaborative Law Retainer Agreement with counsel.

37
38 Participants in the Collaborative Law Process who do not meet the definition of “Party,”
39 such as an expert retained jointly by the Parties to provide input into the Collaborative Law
40 Process, do not have the substantial rights under additional sections that are provided to parties.
41 Rather, these non-party participants are granted a more limited evidentiary privilege under
42 Section 7. Parties seeking to apply restrictions on disclosures by such participants should
43 consider drafting such a confidentiality obligation into a valid and binding agreement that the

1 participant signs as a condition of participation in the Collaborative Law Process.

2
3 (b) “Collaborative Law” means a dispute resolution process in which Parties to a Dispute
4 and their Counsel sign:

5 *[Note to Drafting Committee: It is an established and valued practice in Collaborative Law for*
6 *both Parties to the Dispute and their Counsel to sign the Collaborative Law Participation*
7 *Agreement. This Act has been drafted on the assumption that this practice will continue. The*
8 *practice of counsel signing the Participation Agreement was, however, the subject of much*
9 *discussion at the Committee’s first meeting. While the provision that counsel sign the Agreement*
10 *is consistent with current Collaborative Law Practice, as noted by the Colorado Ethics Opinion,*
11 *it also potentially creates the impression that counsel for one party is assuming a legal or ethical*
12 *duty to the other party. This issue will have to be resolved at our next meeting. If the Committee*
13 *decides that counsel should not sign the Participation Agreement, a number of changes will have*
14 *to be made to the Prefatory Note and the Act. If the Committee decides that counsel should sign*
15 *the Participation Agreement, we might consider adding a note stating that counsel’s signing the*
16 *Agreement is symbolic and does not create enforceable obligations by an adversary party. That*
17 *note could also reinforce that counsel in the Collaborative Law Process represents the interests of*
18 *his or her client under traditional contractual and ethical standards of the profession regardless of*
19 *whether counsel signs the Participation Agreement.]*

20
21 (1) a Collaborative Law Participation Agreement with other Parties to a Dispute
22 that meets the requirements of Section 3 and, at a minimum, provides that:

23 (A) A Party has the right to unilaterally terminate the Collaborative Law
24 Process at any time and for any cause or reason or no cause or reason by written notice as
25 provided in Section 5;

26 (B) Counsel for all Parties must withdraw from further representation if
27 the Collaborative Law Process is terminated as provided in Section 5;

28 (C) Counsel and any lawyer associated in the practice of law with counsel
29 who represented a Party in the Collaborative Law Process is disqualified from representing any
30 Party in any proceeding or matter substantially related to the Dispute;

31 (D) Parties will make timely, full, candid and informal disclosure of
32 information reasonably related to the Dispute and have an obligation to promptly update

1 information previously provided in which there has been a material change;

2 (E) Parties will jointly retain neutral experts who are disqualified from
3 testifying as witnesses in any proceeding substantially related to the Dispute;

4 (F) Court intervention in the Dispute is suspended until the Collaborative
5 Law Process is terminated as provided for in Section 5;

6 (G) Statutes of limitations applicable to the Dispute are tolled until the
7 Collaborative Law Process is terminated as provided for in Section 4;

8 (H) Collaborative Law Communications are privileged from admissibility
9 into evidence in a Proceeding as provided in Section 7.

10 **Comment**

11
12 This definition of what must be included in a Collaborative Law Participation Agreement
13 pulls together its commonly accepted elements. CAL. FAM. CODE § 2013 (2007) (defining
14 collaborative law as a process in which the parties and professionals assisting them agree in
15 writing to use their best efforts and to make a good faith determination to resolve disputes related
16 to family law matters); N.C. GEN. STAT. §§ 50-70 -79 (2006) (defining collaborative law as a
17 procedure in which separated parties seeking a divorce, or are contemplating separation and
18 divorce, and their attorneys agree to use their best efforts and make a good faith attempt to
19 resolve their disputes); TEX. FAM. CODE §§ 6.603, 153.0072 (2006) (defining collaborative law
20 as a procedure in which the parties and their counsel agree in writing to use their best efforts and
21 make a good faith attempt to resolve the suit without resorting to judicial intervention); UTAH,
22 CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006) (defining collaborative law as a process in
23 which the parties and their counsel agree in writing to use their best efforts and make a good
24 faith effort to resolve their divorce, paternity, or annulment action by agreement without
25 resorting to judicial intervention). This Section set forth a minimum floor for a Collaborative
26 Law Participation Agreement. Parties are free to supplement the provisions contained in their
27 own particular Agreements with additional terms that are not inconsistent with the provisions of
28 this Section. For example, they may by contract provide broader protection for the
29 confidentiality of Collaborative Law Communications than the privilege against disclosure in
30 legal proceedings provided in Section 7. See Prefatory Note at (I).

31
32 (2) A Collaborative Law Retainer Agreement with counsel meeting the
33 requirements of Section 3 in which counsel agree to represent the Party in the Collaborative Law
34 Process.

1 [Note to Drafting Committee: Whether or not counsel signs the Collaborative Law Participation
2 Agreement, this Section of the Act requires counsel to have a separate written retainer agreement
3 with the Party that counsel represents.]
4

5 (c) “Dispute” means a dispute between the Parties to a Collaborative Law Participation
6 Agreement described in that Agreement.

7 (1) A Dispute must involve one or more of the following:

8 (A) Custody, parenting time, visitation and decision-making for children;

9 (B) Dissolution of marriage, including divorce, annulment, and property
10 distribution;

11 (C) Alimony, spousal support, and child support including health care
12 expenses;

13 (D) Establishment and termination of the parent-child relationship,
14 including paternity, adoption, emancipation and guardianship of minors and disabled persons.

15 [Note to Drafting Committee: The Committee discussed at great length whether to limit the Act
16 to divorce and family disputes and instructed the Reporter to draft an alternative provision for
17 this purpose. Section (c) (1) (A)-(D) is an attempt to respond to those instructions. In creating
18 this provision, the Reporter discovered the problem with limiting the Act to divorce and family
19 disputes is one of over- and under-inclusion. It may be impossible to define the kind of family
20 related disputes which should be eligible for Collaborative Law without excluding some kinds of
21 appropriate matters. Should the Act, for example, explicitly refer to disputes arising from civil
22 unions? Premarital agreements? Assisted reproductive technologies? Child abuse and neglect?
23 More generally, Collaborative Law is a voluntary dispute resolution option for parties
24 represented by counsel. No one is compelled to enter into Collaborative Law. It is thus hard to
25 discern a principled policy reason that Collaborative Law should be limited to a particular type
26 of dispute when other alternative dispute resolution processes such as mediation and arbitration
27 do not have such substantive law based limitations. Section (C) (1) (A)-(D) is not necessary if
28 the Committee decides not to limit Collaborative Law to family law disputes. The Committee
29 could also decide to include it as an “Alternative” for legislatures considering the Act.]
30

31 (d) “Termination of the Collaborative Law Process” or “Termination” means that the
32 Collaborative Law Process that begins with the signing of the Collaborative Law Participation
33 Agreement has ended as provided in Section 5.

1 (e) “Collaborative Law Communication” means a statement, whether oral or in a record
2 or verbal or nonverbal, that occurs during the Collaborative Law Process or is made for purposes
3 of considering, conducting, participating in, initiating, continuing, or reconvening the
4 Collaborative Law Process or retaining counsel to represent a Party in the Collaborative Law
5 Process.

6 **Comment**
7

8 This definition of “Collaborative Law Communication” parallels the definition of
9 “mediation communication” in the Uniform Mediation Act § 2(2). Collaborative Law
10 communications are statements that are made orally, through conduct, or in writing or other
11 recorded activity. It is similar to the general rule, as reflected in Uniform Rule of Evidence 801,
12 which defines a “statement” as “an oral or written assertion or nonverbal conduct of an
13 individual who intends it as an assertion.” UNIF. R. EVID. 801.
14

15 The definition of “Collaborative Law Communication” includes some communications
16 that are not made during the course of the Collaborative Law Process, such as those made for
17 purposes of convening or continuing a negotiation session. It also includes “briefs” and other
18 reports that are prepared by the parties for the Collaborative Law Process.
19

20 Whether the document is prepared for the Collaborative Law Process is a crucial issue.
21 For example, a tax return brought to a Collaborative Law Process negotiation session for a
22 divorce settlement would not be a “Collaborative Law Communication” because it was not a
23 “statement made as part of the Collaborative Law Process,” even though it may have been used
24 extensively in the Process. However, a note written on the tax return to clarify a point for other
25 participants would be a Collaborative Law Communication. Similarly, a memorandum
26 specifically prepared for the Collaborative Law Process by a Party or a Party's counsel
27 explaining the rationale behind certain positions taken on the tax return would be a
28 “Collaborative Law Communication.” Documents prepared for the Collaborative Law Process
29 by experts retained by the parties would also be covered by this definition.
30

31 (f) “Nonparty participant” means a person, other than a Party or counsel, who
32 participates in the Collaborative Law Process.

33 **Comment**
34

35 This definition parallels the definition of “nonparty participant” in the Uniform
36 Mediation Act § 2(4). It covers experts, friends, support persons, potential Parties, and others
37 who participate in the Collaborative Law Process.
38

39 (g) “Person” means an individual, corporation, business trust, estate, trust, partnership,

1 limited liability company, association, joint venture, government; governmental subdivision,
2 agency, or instrumentality; public corporation, or any other legal or commercial entity.

3 **Comment**
4

5 Section 2(g) adopts the standard language recommended by the National Conference of
6 Commissioners of Uniform State Laws for the drafting of statutory language, and the term
7 should be interpreted in a manner consistent with that usage.
8

9 (h) “Proceeding” means:

10 (1) a judicial, administrative, arbitral, or other adjudicative process, including
11 related pre-hearing and post-hearing motions, conferences, and discovery; or

12 (2) a legislative hearing or similar process.

13 **Comment**
14

15 The definition of “proceeding” is drawn from Section 2(7) of the Uniform Mediation Act.
16 Its purpose is to define the proceedings to which the Act applies, and should be read broadly to
17 effectuate the intent of the Act. It was added to allow the Drafters to delete repetitive language
18 throughout the Act, such as “judicial, administrative, arbitral, or other adjudicative processes,
19 including related pre-hearing and post-hearing motions, conferences, and discovery, or
20 legislative hearings or similar processes.”
21

22 (i) “Record” means information that is inscribed on a tangible medium or that is stored in
23 an electronic or other medium and is retrievable in perceivable form.

24 (j) “Sign” means:

25 (1) to execute or adopt a tangible symbol with the present intent to authenticate a
26 record; or

27 (2) to attach or logically associate an electronic symbol, sound, or process to or
28 with a record with the present intent to authenticate a record.

29 **Comment**
30

31 The definitions of “record” and “sign” adopt standard language approved by the Uniform
32 Law Conference intended to conform Uniform Acts with the Uniform Electronic Transactions
33 Act (UETA) and its federal counterpart, Electronic Signatures in Global and National Commerce

1 Act (E-Sign). 15 U.S.C § 7001, etc seq. (2000). Both UETA and E-Sign were written in
2 response to broad recognition of the commercial and other uses of electronic technologies for
3 communications and contracting, and the consensus that the choice of medium should not control
4 the enforceability of transactions. These Sections are consistent with both UETA and E-Sign.
5 UETA has been adopted by the Conference and received the approval of the American Bar
6 Association House of Delegates. As of December 2001, it had been enacted in more than 35
7 states. See also Section 11, Relation to Electronic Signatures in Global and National Commerce
8 Act.
9

10 The practical effect of these definitions is to make clear that electronic signatures and
11 documents have the same authority as written ones for purposes of establishing the validity of a
12 Collaborative Law Participation Agreement and Collaborative Law Retainer Agreement, under
13 Section 3, Party opt-out of the Collaborative Law Communication privilege under Section 7(k),
14 and Party waiver of the Collaborative Law Communication privilege under Section 7(d).
15

16 SECTION 3. COLLABORATIVE LAW PARTICIPATION AND RETAINER

17 AGREEMENTS.

18 (a) At a minimum, a Collaborative Law Participation Agreement must:

19 (1) be in writing;

20 (2) describe in reasonable detail the Dispute that is the subject of the
21 Collaborative Law Process;

22 (3) describe the elements of the Collaborative Law Process set forth in Section
23 2(b) (1);

24 (4) describe how written notice terminating the Collaborative Law Process
25 pursuant to section 5 shall be delivered to Parties and counsel;

26 (5) be signed by Parties to the Dispute;

27 (6) be signed by counsel for Parties to the Dispute;

28 (7) contain an appropriate statement that Parties acknowledge waiving legal
29 rights, such as discovery and formal court hearings, until the Collaborative Law Process
30 terminates;

31 (8) contain an appropriate acknowledgement that each Party recognizes that

1 counsel for other Parties are advocates for their clients only and not for themselves.

2 (b) At a minimum, a Collaborative Law Retainer Agreement must:

3 (1) be in writing;

4 (2) be signed by counsel and a Party to a Dispute;

5 (3) incorporate or make reference to a Collaborative Law Participation

6 Agreement.

7 [*Note to Drafting Committee:* the final wording of this Section will turn on the Committee’s
8 decision whether counsel for the parties should sign the Participation Agreement as well as the
9 Parties themselves.]

10

11

Comment

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Need for Representation

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Parties can sign a Collaborative Law Participation Agreement only if the Party is represented by counsel. The Collaborative Law Process is not an option for self-represented parties.

Informed Consent to Participate in Collaborative Law

Counsel has a responsibility to ensure that a Party who participates in the Collaborative Law Process does so based on informed consent. Informed consent is defined by the American Bar Association’s *Model Rules of Professional Conduct* as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2002). The minimum requirements for the provisions of a Collaborative Law Participation Agreement in Section 3(a) are designed to help ensure that informed client consent is achieved.

Thus, counsel discussing the possibility of entering into a Collaborative Law Participation Agreement with a potential Party should also discuss the costs and benefits of other reasonable alternative options for dispute resolution. *See id.* at R. 1.0(e), 1.2. Depending on the potential Party’s situation, those options could include litigation, cooperative law, mediation, expert evaluation, or arbitration or some combination of these processes. *See* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004).

Voluntary Participation

Counsel representing a Party in the Collaborative Law Process also has a responsibility to

1 ensure that the Party’s agreement to participate is voluntary. Voluntary participation means that
2 a client must have the capacity to consent to a Collaborative Law Participation Agreement and
3 must not be coerced or tricked into doing so. *See Lande, supra.*
4

5 Ensuring that participation in the Collaborative Law Process is voluntary is often
6 challenging in the context of divorce and family law disputes. Parties involved in such disputes
7 are often in emotional turmoil, suffer from depression or other mental illness or engage in
8 substance abuse. *See* CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* 45 (Lexington Books, 1994).
9 Sometimes they are victims or perpetrators of family violence. *See* ELEANOR E. MACCOBY &
10 ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 287
11 (Harvard University Press, 1992). As mentioned in the Preface, an argument can be made that
12 counsel representing Parties in family or divorce disputes in the Collaborative Law Process
13 should receive specialized training in screening and managing the problems of potential
14 incapacity and violence and incorporate that training into their counseling of potential Parties
15 concerning the option of Collaborative Law. The nature of that training is left to local
16 regulation.
17

18
19 *Minimum Requirements*
20

21 The requirements in this Section are minimum conditions for the validity of Collaborative
22 Law Participation and Retainer Agreements. They are necessary, but not sufficient, conditions
23 for their enforceability. The Collaborative Law Participation and Retainer Agreements must also
24 meet requirements set by state law for lawyer-client retainer agreements. *See* N.Y. COMP. CODES
25 R. & REGS. tit. 22, § 202.16(c) (2007) (governing the lawyer-client relationship in matrimonial
26 matters, including requirement of written retainer agreement). Additional requirements may be
27 established pursuant to the rule making powers of the judiciary pursuant to Section 8 of this Act.
28

29 **SECTION 4. TOLLING OF STATUTES OF LIMITATIONS.**

30 (a) The signing of a Collaborative Law Participation Agreement tolls all statutes of
31 limitations applicable to the legal rights, claims and causes of action of one Party against another
32 Party reasonably related to Dispute until Termination of the Collaborative Law Process.

33 (b) The tolling period under subsection (a) ends when the Collaborative Law Process
34 concerning the Dispute terminates pursuant to Section 5.

35 **Comment**
36

37 This provision is adopted from N.C. Gen. Stat. § 50-73 (2006). The imminence of a
38 deadline created by a statute of limitations should not influence a decision to enter into the
39 Collaborative Law Process. Nor should the legal claims of parties be lost by participation in

1 Collaborative Law.
2

3 **SECTION 5. TERMINATION OF THE COLLABORATIVE LAW PROCESS.**

4 (a) A Party may terminate the Collaborative Law Process at any time, for any reason or
5 no reason, with or without cause.

6 (b) The following events terminate the Collaborative Law Process:

7 (1) A Party's termination of the lawyer-client relationship described in the
8 Collaborative Law Retainer Agreement, unless the Party retains successor counsel [in a
9 reasonable time] who signs the Collaborative Law Participation Agreement and with whom the
10 Party enters into a Collaborative Law Retainer Agreement;

11 (2) Counsel's withdrawal from representation of a Party to a Collaborative Law
12 Participation Agreement unless the Party retains successor counsel [in a reasonable time] who
13 signs the Collaborative Law Participation Agreement and with whom the Party enters into a
14 Collaborative Law Retainer Agreement;

15 [*Note to Drafting Committee:* Do we have to set more specific deadlines in subsection (1) and (2)
16 to retain successor counsel – perhaps ten days? Otherwise, the statute could be interpreted to
17 require that Collaborative Law representation continues after termination for a “reasonable
18 time”].

19
20 More broadly, this Section raises the problem of the Collaborative Law counsel's
21 obligations after termination of the representation and before successor counsel is retained, a
22 subject we discussed at our last meeting. Should the statute specify a more definitive standard of
23 what the obligations of the now terminated counsel until the new one is retained? One possibility
24 is that the statute should be silent on this question, leaving the problem to court rules and
25 standards of professional responsibility. Another is to incorporate the professional responsibility
26 standards for withdrawal into the statute. Under Model Rule 1.16 (b)(1) “a lawyer may withdraw
27 from representing a client if ... withdrawal can be accomplished without material adverse effect
28 on the interests of the client. Under Model Rule 1.16 (c) “[a] lawyer must comply with
29 applicable law requiring notice to or permission of a tribunal when terminating a representation.
30 When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding
31 good cause for terminating the representation.” Model Rule 1.16(d) states that: ‘upon termination
32 of representation, a lawyer shall take steps to the extent reasonably practicable to protect a
33 client's interests...’ These rules suggest, for example, that counsel retained for the Collaborative

1 Law Process might have a continuing obligation after withdrawal, for example, to seek
2 emergency protective orders against violence, child abduction or looting of assets.]

3
4 (3) Commencement by a Party of a proceeding reasonably related to the Dispute
5 against another Party;

6 (4) Commencement by a Party of a contested pleading, motion, order to show
7 cause, request for a conference with the court, request that a case be put on the court's trial
8 calendar or other motion in a pending proceeding reasonably related to the Dispute against
9 another Party.

10 (c) A Party who terminates the Collaborative Law Process shall promptly provide
11 written notice of termination to that Party's counsel. Upon receipt of such notice, Counsel shall
12 promptly provide written notice that termination has occurred to other Parties and their counsel
13 in the manner described in the Collaborative Law Participation Agreement. The notice need not
14 specify a reason for terminating the Collaborative Law Process.

15 (d) Counsel who withdraws from representing a Party shall promptly provide written
16 notice to other Parties and their counsel in the manner described in the Collaborative Law
17 Participation Agreement. The notice need not specify a reason for withdrawing from
18 representation.

19 **SECTION 6. JUDICIAL CASE MANAGEMENT OF COLLABORATIVE LAW**
20 **DISPUTES.**

21 (a) Parties may sign a Collaborative Law Participation Agreement and engage in the
22 Collaborative Law Process before a Dispute becomes the subject of a proceeding. If the Parties
23 initiate a proceeding to seek judicial approval of any agreement reached through the
24 Collaborative Law Process they shall promptly file the Collaborative Law Participation
25 Agreement with the court.

1 (b) Counsel shall file the Collaborative Law Participation Agreement with the court or
2 appropriate forum official promptly after it is signed when a proceeding substantially related to
3 the Dispute is pending at the time.

4 (c) The filing of the Collaborative Law Participation Agreement with the court or other
5 forum in a pending proceeding shall:

- 6 (1) exempt the action from required scheduling and case conferences;
- 7 (2) stay any pending motions or contested matters in the proceeding;
- 8 (3) stay scheduling and discovery orders previously entered in the proceeding;
- 9 (4) exempt the Parties from participation in mandated education or mediation

10 programs and the like;

11 [*Note to Drafting Committee:* The Committee instructed the Reporter to exempt the parties from
12 participation in both mediation and parent education. The Committee may wish to revisit this
13 subject. The goals of participation in mediation are largely served by participation in
14 Collaborative Law but the goals of participation in parent education may not be. Parent
15 education programs do not involve parents discussing their dispute or trying to reach an
16 agreement; they only provide generic information about the effect of divorce and separation on
17 children. Participation in parent education programs are likely to further parents' understanding
18 of the harm that can be caused to children by continuing parental conflict and thus further the
19 purposes of Collaborative Law. See SCHEPARD, *supra*, at 68-78.]

20
21 (5) exempt the proceeding from being placed on the court's or forum's trial
22 docket.

23 (d) The court or other forum shall not dismiss a pending proceeding in which a
24 Collaborative Law Participation Agreement is filed based on failure to prosecute or delay
25 without providing counsel and the Parties notice and an opportunity to be heard.

26 (e) Nothing in this section shall be interpreted to prevent the court or other forum from:

27 (1) approving a settlement agreement and signing orders required by law to
28 effectuate the agreement of the Parties;

1 (2) entering emergency orders to protect the life, bodily integrity or financial
2 welfare of a Party or a child of a Party upon proper application;

3 (3) requiring counsel in pending proceedings in which a Collaborative Law
4 Participation Agreement has been filed to provide periodic written status reports.

5 (f) When the Collaborative Law Process is terminated in a pending proceeding, the court
6 or other forum may on its own initiative:

7 (1) schedule a status conference;

8 (2) set a hearing or a trial;

9 (3) impose discovery deadlines;

10 (4) require compliance with scheduling orders;

11 (5) dismiss a pending proceeding;

12 (6) make such order as serves the interests of justice.

13 **Comment**

14
15 The purpose of Collaborative Law is to encourage Parties with the assistance of their
16 counsel to resolve a Dispute without judicial intervention. These sections stay such intervention
17 when a Collaborative Law Participation Agreement is signed and filed with the court. It is based
18 on court rules and statutes recognizing Collaborative Law in a number of jurisdictions. *See* CAL.
19 FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 -79 (2006); TEX. FAM. CODE §§ 6.603,
20 153.0072 (2006); CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT.
21 RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA
22 COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA.
23 DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006);
24 Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re Domestic Relations –*
25 *Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June 25, 2007).
26

27 Some jurisdictions include pending cases in case management statistics that help evaluate
28 court performance. Courts in states enacting the Uniform Collaborative Law Act are encouraged
29 to recognize that while cases in which a Collaborative Law Participation Agreement is filed with
30 the court are technically “pending” they should not be considered under active judicial
31 management for statistical purposes until the Collaborative Law Process is terminated.
32

1 **SECTION 7. CONFIDENTIALITY AND PRIVILEGE.**

2 (a) Except as otherwise provided in subsections (g) through (i), a Collaborative Law
3 Communication is privileged as provided in subsection (b) and is not subject to discovery or
4 admissible in evidence in a proceeding unless waived or precluded as provided by subsections
5 (d) through (f).

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

7 (1) A Party may refuse to disclose, and may prevent any other person from
8 disclosing, a Collaborative Law Communication.

9 (2) A Nonparty participant may refuse to disclose, and may prevent any other
10 person from disclosing, a Collaborative Law Communication of the nonparty participant.

11 (c) Evidence or information that is otherwise admissible or subject to discovery does not
12 become inadmissible or protected from discovery solely by reason of its disclosure or use in the
13 Collaborative Law Process.

14 (d) A privilege under this Section may be waived in a record or orally during a
15 proceeding if it is expressly waived by all Parties to the Collaborative Law Process and, in the
16 case of the privilege of a Nonparty participant, it is also expressly waived by the nonparty
17 participant.

18 [*Note to Drafting Committee:* This provision, drawn from the Uniform Mediation Act, does not
19 permit waiver of the privilege by conduct, a type of waiver which is common for other privileges
20 such as the attorney-client privilege. Subsection (e), which follows, is a preclusion provision to
21 cover situations in which the parties do not expressly waive privilege but engage in conduct
22 inconsistent with it, causing prejudice. The question is whether the Committee wants to
23 eliminate both of these provisions and allow waiver by conduct.]

24
25 (e) A person who discloses or makes a representation about a Collaborative Law
26 Communication which prejudices another person in a proceeding is precluded from asserting a
27 privilege under this Section, but only to the extent necessary for the person prejudiced to respond

1 to the representation or disclosure.

2 (f) A person who intentionally uses a Collaborative Law Proceeding to plan, attempt to
3 commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity, is
4 precluded from asserting a privilege under this Section.

5 (g) There is no privilege under this Section for a Collaborative Law Communication that
6 is:

7 (1) in an agreement evidenced by a record signed by all Parties to a Collaborative
8 Law Participation Agreement;

9 (2) a threat or statement of a plan to inflict bodily injury or commit a crime of
10 violence;

11 (3) intentionally used to plan a crime, attempt to commit or commit a crime, or to
12 conceal an ongoing crime or ongoing criminal activity;

13 (4) sought or offered to prove or disprove a claim or complaint of professional
14 misconduct or malpractice arising from or related to a Collaborative Law Process; or

15 (5) sought or offered to prove or disprove abuse, neglect, abandonment, or
16 exploitation in a proceeding in which a child or adult protective services agency is a Party.

17 [*Note to Drafting Committee:* This provision precludes use of statements of abuse and neglect
18 made during Collaborative Law in later divorce proceedings. A state agency must bring the
19 proceeding for the exception to apply. This provision is taken from the Uniform Mediation Act.
20 It may be that this limitation should be eliminated in the Uniform Collaborative Law Act, which
21 has its greatest applicability in divorce disputes which sometimes involve allegations of child
22 abuse in the context of a custody dispute between private parties.]

23
24 (h) There is no privilege under this Section if a court, administrative agency, or arbitrator
25 finds, after a hearing in camera, that the Party seeking discovery or the proponent of the evidence
26 has shown that the evidence is not otherwise available, that there is a need for the evidence that
27 substantially outweighs the interest in protecting confidentiality, and that the Collaborative Law

1 Communication is sought or offered in:

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

3 [Note to Drafting Committee: The UMA gave states a choice whether to include misdemeanors
4 in this section. The Uniform Collaborative Law Act faces the same issue.]

5
6 (2) a proceeding to prove a claim to rescind or reform or a defense to avoid
7 liability on a contract arising out of the Collaborative Law Process.

8 (i) If a Collaborative Law Communication is not privileged under subsection (g) or (h),
9 only the portion of the communication necessary for the application of the exception from
10 nondisclosure may be admitted.

11 (j) Admission of evidence under subsection (g) or (h) does not render the evidence, or
12 any other Collaborative Law Communication, discoverable or admissible for any other purpose.

13 (k) If the Parties agree in advance in a signed record, or a record of proceeding reflects
14 agreement by the Parties, that all or part of a Collaborative Law Process is not privileged, the
15 privileges under subsections (a) through (j) do not apply to the Collaborative Law Process or part
16 agreed upon. However, subsections (a) through (j) apply to a Collaborative Law Communication
17 made by a person that has not received actual notice of the agreement before the communication
18 is made.

19 (l) Collaborative Law Communications are confidential to the extent agreed by the
20 Parties or provided by other law or rule of this State.

21 **Comment**

22
23 *Overview*

24
25 Section 7 sets forth the Uniform Collaborative Law Act's general structure for protecting
26 the confidentiality of Collaborative Law communications against disclosure in later legal
27 proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary
28 should be consulted for more expansive discussion of the issues raised and resolved in the
29 drafting of the confidentiality provisions of this Act.

1
2 *Holders of the Privilege for Collaborative Law Communications*

3
4 *Parties*

5
6 Parties are holders of the Collaborative Law Communications privilege. The privilege of
7 the Parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in
8 that its paramount justification is to encourage candor by the Parties, just as encouraging the
9 client's candor is the central justification for the attorney-client privilege. Using the attorney-
10 client privilege as a core base for the Collaborative Law Communications privilege is also
11 particularly appropriate since the extensive participation of attorneys is a hallmark of
12 Collaborative Law.

13
14 The analysis for the Parties as holders appears quite different at first examination from
15 traditional communications privileges because Collaborative Law involves parties whose
16 interests appear to be adverse, such as marital partners now seeking a divorce. However, the law
17 of attorney-client privilege has considerable experience with situations in which multiple-client
18 interests may conflict, and those experiences support the analogy of the Collaborative Law
19 Communications privilege to the attorney-client privilege. For example, the attorney-client
20 privilege has been recognized in the context of a joint defense in which interests of the clients
21 may conflict in part and yet one may prevent later disclosure by another. *See Raytheon Co. v.*
22 *Superior Court*, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989); *United States v. McPartlin*,
23 595 F.2d 1321 (7th Cir. 1979); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So.2d 437 (Fla.
24 App. 1987); *but see Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. App. 1985) (refusing to
25 apply the joint defense doctrine to parties who were not directly adverse); *see generally* Patricia
26 Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981).
27 Similarly, the attorney-client privilege applies in the insurance context, in which an insurer
28 generally has the right to control the defense of an action brought against the insured, when the
29 insurer may be liable for some or all of the liability associated with an adverse verdict.
30 *Desriusseaux v. Val-Roc Truck Corp.*, 230 A.D.2d 704 (N.Y. Sup. Ct. 1996); PAUL R. RICE,
31 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, 4:30-4:38 (2d ed. 1999).

32
33 *Nonparty Participants Such as Experts*

34
35 Of particular note is the Act's addition of a privilege for the nonparty participant, though
36 limited to the communications by that individual in the Collaborative Law Process. Joint
37 retention of neutral experts is a major feature of the Collaborative Law Process, and this
38 provision encourages and accommodates it. It seeks to facilitate the candid participation of
39 experts and others who may have information that would facilitate resolution of the Dispute.
40 This provision would also cover statements prepared by such persons for the Collaborative Law
41 Proceeding and submitted as part of it, such as experts' reports. Any party who expects to use
42 such an expert report prepared to submit in a Collaborative Law Proceeding later in a legal
43 proceeding would have to secure permission of all parties and the expert in order to do so. This
44 is consistent with the treatment of reports prepared for a Collaborative Law Proceeding as
45 Collaborative Law Communications. *See* Section 2 (e).

1 *Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable*
2 *Evidence*

3
4 Section 7 (c) concerning evidence otherwise discoverable and admissible makes clear
5 that relevant evidence may not be shielded from discovery or admission at trial merely because it
6 is communicated in a Collaborative Law Proceeding. For purposes of the Collaborative Law
7 Communication privilege, it is the communication that is made in the Collaborative Law
8 Proceeding that is protected by the privilege, not the underlying evidence giving rise to the
9 communication. Evidence that is communicated in a Collaborative Law Proceeding is subject to
10 discovery, just as it would be if the Collaborative Law Proceeding had not taken place. There is
11 no "fruit of the poisonous tree" doctrine in the Collaborative Law Communication privilege. For
12 example, a party who learns about a witness during a Collaborative Law Proceeding is not
13 precluded by the privilege from subpoenaing that witness.

14
15 *Unconditional Exceptions to Privilege*

16
17 The Act articulates specific and exclusive exceptions to the broad grant of privilege
18 provided to Collaborative Law Communications. They are based on limited but vitally important
19 values such as protection against serious bodily injury, crime prevention and the right of
20 someone accused of professional misconduct to respond that outweigh the importance of
21 confidentiality in the Collaborative Law Process. The exceptions are identical to those contained
22 in the Uniform Mediation Act.

23
24 As with other privileges, when it is necessary to consider evidence in order to determine
25 if an exception applies, the Act contemplates that a court will hold an in camera proceeding at
26 which the claim for exemption from the privilege can be confidentially asserted and defended.

27
28 *Exception to Privilege for Written, But Not Oral, Agreements*

29
30 Of particular note is the exception that permits evidence of a signed agreement, such as
31 the Collaborative Law Participation Agreement or, more commonly, written agreements
32 memorializing the Parties' resolution of the Dispute. The exception permits such an agreement
33 to be introduced in a subsequent proceeding convened to determine whether the terms of that
34 settlement agreement had been breached.

35
36 The words "agreement evidenced by a record" and "signed" in this exception refer to
37 written and executed agreements, those recorded by tape recording and ascribed to by the parties
38 on the tape, and other electronic means to record and sign, as defined in Sections 2 (i) and 2 (j).
39 In other words, a Party's notes about an oral agreement would not be a signed agreement. On the
40 other hand, the following situations would be considered a signed agreement: a handwritten
41 agreement that the Parties have signed, an e-mail exchange between the Parties in which they
42 agree to particular provisions, and a tape recording in which they state what constitutes their
43 agreement.

44
45 This exception is noteworthy only for what is not included: oral agreements. The
46 disadvantage of exempting oral settlements is that nearly everything said during a Collaborative

1 Law negotiation session could bear on either whether the parties came to an agreement or the
2 content of the agreement. In other words, an exception for oral agreements has the potential to
3 swallow the rule of privilege. As a result, Parties might be less candid, not knowing whether a
4 controversy later would erupt over an oral agreement.
5

6 Despite the limitation on oral agreements, the Act leaves parties other means to preserve
7 the agreement quickly. For example, parties can agree that the Collaborative Law Proceeding
8 has terminated, state their oral agreement into the tape recorder and record their assent. One
9 would also expect that counsel will incorporate knowledge of a writing requirement into their
10 Collaborative Law representation practices.
11

12 *Case by Case Exceptions* 13

14 The exceptions in Section 7 (g) apply regardless of the need for the evidence because
15 society's interest in the information contained in the Collaborative Law Communications may be
16 said to categorically outweigh its interest in the confidentiality of those communications. In
17 contrast, the exceptions under Section 7 (h) would apply only in situations where the relative
18 strengths of society's interest in a Collaborative Law Communication and a party's interest in
19 confidentiality can only be measured under the facts and circumstances of the particular case.
20 The Act places the burden on the proponent of the evidence to persuade the court in a non-public
21 hearing that the evidence is not otherwise available, that the need for the evidence substantially
22 outweighs the confidentiality interests and that the evidence comes within one of the exceptions
23 listed under Section 7 (h). In other words, the exceptions listed in Section 7 (h) include
24 situations that should remain confidential but for overriding concerns for justice.
25

26 *Limited Preservation of Party Autonomy Regarding Confidentiality* 27

28 Section 7 (k) allows the parties to opt for a non-privileged Collaborative Law Process or
29 session of the Collaborative Law Process by mutual agreement, and thus furthers the Act's policy
30 of party self-determination. If the parties so agree, the privilege sections of the Act do not apply,
31 thus fulfilling the parties reasonable expectations regarding the confidentiality of that session.
32 Parties may use this option if they wish to rely on, and therefore use in evidence, statements
33 made during the Collaborative Law Process. It is the parties and their counsel who make this
34 choice. Even if the parties do not agree in advance, they and all nonparty participants can waive
35 the privilege pursuant to Section 7 (d).
36

37 If the Parties want to opt out, they should inform the nonparty participants of this
38 agreement, because without actual notice, the privileges of the Act still apply to the
39 Collaborative Law Communications of the persons who have not been so informed until such
40 notice is actually received. Thus, for example, if a nonparty participant has not received notice
41 that the opt-out has been invoked, and speaks during the Collaborative Law Process that
42 communication is privileged under the Act. If, however, one of the Parties tells the nonparty
43 participant that the opt-out has been invoked, the privilege no longer attaches to statements made
44 after the actual notice has been provided, even though the earlier statements remain privileged
45 because of the lack of notice.
46

1 (b) On or after [a delayed date], this [Act] governs a Collaborative Law Participation or
2 Collaborative Law Retainer Agreement whenever made.

3 **Comment**
4

5 Section 13 is designed to avert unfair surprise, by setting dates that will make it likely
6 that Parties took the Act into account in deciding to enter into Collaborative Law. Subsection (a)
7 precludes application of the Act to Collaborative Law Proceedings pursuant to pre-effective date
8 referral or agreement on the assumption that most of those making these referrals or agreements
9 did not take into account the changes in law. If Parties to these Collaborative Law Participation
10 or Retainer Agreements seek to be covered by the Act, they can sign a new agreement on or after
11 the effective date of the Act.
12

13 Subsection (b) is based on the assumption that persons involved in Collaborative Law are
14 likely to know about the Act and would therefore be more surprised by the non-application of the
15 Act than the application of the Act after that point. Each legislature can specify a year or another
16 likely period for dissemination of the news among those involved in Collaborative Law.