

DRAFT  
FOR DISCUSSION ONLY

# COLLABORATIVE LAW ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**REPORTER'S FIFTH DRAFT FOR COMMENT  
MARCH 2008  
NOT REVIEWED BY THE DRAFTING COMMITTEE**

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ON UNIFORM STATE LAWS

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March 20, 2008

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# **COLLABORATIVE LAW ACT**

## **TABLE OF CONTENTS**

|                                                                                                                |    |
|----------------------------------------------------------------------------------------------------------------|----|
| SECTION 1. SHORT TITLE .....                                                                                   | 1  |
| SECTION 2. DEFINITIONS.....                                                                                    | 1  |
| SECTION 3. COLLABORATIVE LAW PARTICIPATION AGREEMENT<br>REQUIREMENTS.....                                      | 3  |
| SECTION 4. BEGINNING AND TERMINATING COLLABORATIVE LAW. ....                                                   | 4  |
| SECTION 5. COLLABORATIVE LAW IN PENDING PROCEEDINGS.....                                                       | 5  |
| SECTION 6. DISQUALIFICATION OF COLLABORATIVE LAWYER. ....                                                      | 6  |
| SECTION 7. DISCLOSURES CONCERNING AND APPROPRIATENESS OF<br>COLLABORATIVE LAW.....                             | 7  |
| SECTION 8. COLLABORATIVE LAW AND LOW INCOME PARTIES .....                                                      | 8  |
| SECTION 9. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW<br>COMMUNICATIONS; ADMISSIBILITY; DISCOVERY..... | 9  |
| SECTION 10. WAIVER AND PRECLUSION OF PRIVILEGE.....                                                            | 10 |
| SECTION 11. EXCEPTIONS TO PRIVILEGE .....                                                                      | 10 |
| SECTION 12. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATIONS. ....                                          | 12 |
| SECTION 13. ENFORCMENT OF COLLABORATIVE LAW PARTICIPATION<br>AGREEMENTS NOT MEETING REQUIREMENTS .....         | 12 |
| SECTION 14. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND<br>MANDATORY REPORTING .....                          | 12 |
| SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....                                                    | 13 |
| SECTION 16. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND<br>NATIONAL COMMERCE ACT. ....                     | 13 |
| SECTION 17. SEVERABILITY CLAUSE .....                                                                          | 13 |
| SECTION 18. APPLICATION TO EXISTING AGREEMENTS.....                                                            | 13 |
| SECTION 19. EFFECTIVE DATE.....                                                                                | 13 |

1 **COLLABORATIVE LAW ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Collaborative Law Act.

3 **SECTION 2. DEFINITIONS.** In this [act]:

4 (1) “Collaborative law” or a “collaborative law process” means a process in which parties  
5 represented by collaborative lawyers attempt to resolve a matter without the intervention of a  
6 tribunal under a collaborative law participation agreement.

7 (2) “Collaborative law communication” means a statement, whether oral or in a record or  
8 verbal or nonverbal, that:

9 (A) occurs between the time the parties enter into a collaborative law participation  
10 agreement and the time the collaborative law process terminates or is concluded by negotiated  
11 resolution of the matter; and

12 (B) is made for the purposes of conducting, participating in, continuing, or  
13 reconvening collaborative law.

14 (3) “Collaborative law participation agreement” means an agreement by persons to  
15 participate in collaborative law meeting the requirements of section 3.

16 (4) “Collaborative lawyer” means a lawyer identified in a collaborative law participation  
17 agreement as having been engaged to represent a party in collaborative law and who is  
18 disqualified from representing parties in the matter and substantially related matters if the  
19 collaborative law process terminates.

20 (5) “Law firm” means a lawyer or lawyers in a law partnership, professional corporation,  
21 sole proprietorship or other association authorized to practice law, or lawyers employed or in a  
22 legal services organization or the legal department of a corporation or other organization.

23 (6) “Matter” means a dispute, transaction, claim, problem or issue described in a

1 collaborative law participation agreement. A matter may, but need not be, a claim, issue or  
2 dispute in a proceeding.

3 (7) “Nonparty participant” means a person, other than a party, that participates in a  
4 collaborative law process.

5 (8) “Party” means a person that enters into a collaborative law participation agreement  
6 and whose consent is necessary to resolve the matter.

7 (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,  
8 limited liability company, association, joint venture, public corporation, government or  
9 governmental subdivision, agency, or instrumentality; or any other legal or commercial entity.

10 (10) “Proceeding” means a judicial, administrative, arbitral, or other adjudicative process  
11 before a tribunal, including related pre-hearing and post-hearing motions, conferences, and  
12 discovery.

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

15 (12) “Sign” means, with present intent to authenticate or adopt a record:

16 (A) to execute or adopt a tangible symbol; or

17 (B) to attach to or logically associate with the record an electronic symbol, sound  
18 or process.

19 (13) “Substantially related” means involves the same transaction or occurrence, nucleus  
20 of operative fact, claim, issue or dispute as another matter or proceeding.

21 (14) “Tribunal” means a court, an arbitrator, or a legislative body, administrative agency,  
22 or other body acting in an adjudicative capacity. A legislative body, administrative agency, or  
23 other body acts in an adjudicative capacity if a neutral official, after presentation of evidence or

1 legal argument by a party or parties, will render a binding legal judgment directly affecting a  
2 party's interests in a particular matter.

3 **SECTION 3. COLLABORATIVE LAW PARTICIPATION AGREEMENT**  
4 **REQUIREMENTS.**

5 (a) A collaborative law participation agreement must:

6 (1) be in a record;

7 (2) be signed by the parties;

8 (3) describe the nature and scope of the matter;

9 (4) state the parties' intention to attempt to resolve the matter in collaborative law;

10 (5) identify the collaborative lawyer engaged by each party to represent the party  
11 in collaborative law; and

12 (6) contain a signed acknowledgment by each party's collaborative lawyer  
13 confirming the lawyer's engagement.

14 (b) Parties to a collaborative law participation agreement:

15 (1) may not initiate a proceeding or seek tribunal intervention in a pending  
16 proceeding substantially related to the matter until the collaborative law process terminates,  
17 except:

18 (A) for protective proceedings involving a threat to the safety of a party or  
19 a party's dependent when no successor lawyer is immediately available; or

20 (B) to seek tribunal approval of any settlement agreement and sign orders  
21 to effectuate the agreement of the parties resulting from collaborative law.

22 (2) shall make timely, full, candid and informal disclosure of information  
23 reasonably related to the matter upon request of a party but without formal discovery and shall

promptly update information provided with respect to which there has been a material change;  
and

(3) may unilaterally terminate the collaborative law process at any time for any or  
no reason.

(c) Parties to a collaborative law participation agreement under this [act] may agree to  
include additional terms and provisions not inconsistent with the provisions of this section.

(d) Parties who wish to participate in collaborative law under this [act] cannot agree to  
waive or vary the effect of the requirements of this section.

#### **SECTION 4. BEGINNING AND TERMINATING COLLABORATIVE LAW.**

(a) Collaborative law begins when parties execute a collaborative law participation  
agreement that meets the requirements of section 3.

(b) Except as provided in subsection (d), collaborative law terminates when a party:

(1) gives written notice of termination to other parties and collaborative lawyers;

(2) begins a proceeding substantially related to the matter;

(3) initiates a contested pleading, motion, order to show cause, request for a  
conference with the tribunal, request that the proceeding be put on a tribunal's active calendar or  
takes similar action in a pending proceeding substantially related to the matter; or

(4) discharges a collaborative lawyer or a collaborative lawyer withdraws from  
further representation of a party.

(c) The party who terminates collaborative law and that party's collaborative lawyer shall  
provide prompt written notice of the termination of collaborative law to all other parties and  
collaborative lawyers. The notice:

(1) shall state collaborative law is terminated as of a specific date.

1 (2) need not specify a reason for terminating collaborative law.

2 (d) Notwithstanding the discharge or withdrawal of a collaborative lawyer, the  
3 collaborative law process may continue if within thirty days of the date of the written notice of  
4 discharge or withdrawal:

5 (1) the unrepresented party engages a successor collaborative lawyer;

6 (2) all parties consent to continuation of the collaborative law process by  
7 reaffirming the collaborative law participation agreement in a signed record;

8 (3) the collaborative law participation agreement is amended to identify the and  
9 acknowledge engagement of the successor collaborative lawyer in a signed record.

10 (e) A collaborative law participation agreement may provide additional methods of  
11 terminating collaborative law.

12 **SECTION 5. COLLABORATIVE LAW IN PENDING PROCEEDINGS.**

13 (a) Parties in a pending proceeding may execute a collaborative law participation  
14 agreement to attempt to resolve any matter substantially related to the proceeding.

15 (b) Parties shall promptly file a notice of collaborative law with the tribunal in which the  
16 proceeding is pending after a collaborative law participation agreement is executed.

17 (c) After collaborative law begins a collaborative lawyer may not appear before a tribunal  
18 to represent a party in a pending proceeding substantially related to a matter, except:

19 (1) in protective proceedings involving a threat to the safety of a party or a party's  
20 dependent when no successor lawyer is immediately available;

21 (2) to seek tribunal approval of a settlement agreement and sign orders to  
22 effectuate the agreement resulting from collaborative law.

23 (d) Upon the filing of a notice of collaborative law, a tribunal shall suspend case

1 management and supervision of the pending proceeding until it receives written notice that the  
2 collaborative law process is terminated.

3 (e) Notwithstanding subsection (d), a tribunal may:

4 (1) issue emergency orders to protect the safety of a party or a party's dependent;

5 (2) approve a settlement agreement and sign orders to effectuate a settlement  
6 agreement resulting from collaborative law.

7 (f) Parties shall promptly notify the tribunal in writing if the collaborative law process is  
8 terminated. A tribunal shall then resume case management and enter appropriate orders as the  
9 interests of justice require.

10 (g) A tribunal shall not dismiss a pending proceeding in which a notice of collaborative  
11 law is filed based on failure to prosecute or delay without providing parties and collaborative  
12 lawyers appropriate notice and an opportunity to be heard.

13 ***Legislative Note:*** *In states where judicial procedures for management of pending proceedings*  
14 *can be prescribed only by court rule or administrative guideline and not by legislative act, the*  
15 *duties of courts and other tribunals listed in this section should be adopted by the appropriate*  
16 *measure.*

17  
18 **SECTION 6. DISQUALIFICATION OF COLLABORATIVE LAWYER.**

19 (a) If a collaborative law process terminates, a collaborative lawyer, and any law firm  
20 with which the collaborative lawyer is affiliated, is disqualified from representing a party in the  
21 matter and substantially related matters or proceedings.

22 (b) Notwithstanding subsection (a), a collaborative lawyer and any law firm with which  
23 the collaborative lawyer is affiliated is not disqualified from representing a party:

24 (1) in protective proceedings involving a threat to the safety of a party or a party's  
25 dependent when no successor lawyer is immediately available;

26 (2) to seek tribunal approval of a settlement agreement and sign orders to

1 effectuate the agreement resulting from collaborative law.

2 (c) A tribunal may enforce the provisions of this section through entry of appropriate  
3 orders as the interests of justice require.

4 **SECTION 7. DISCLOSURES CONCERNING AND APPROPRIATENESS OF**  
5 **COLLABORATIVE LAW.**

6 (a) Before a client executes a collaborative law participation agreement, a lawyer shall:

7 (1) provide the client with adequate information about the material benefits and  
8 risks of collaborative law as compared to the material benefits and risks of other reasonably  
9 available alternatives such as litigation, mediation, arbitration, or expert evaluation sufficient for  
10 the client to make an informed decision about whether to enter into collaborative law to attempt  
11 to resolve the matter;

12 (2) advise the client:

13 (A) that any party has the right to terminate a collaborative law process at  
14 any time;

15 (B) that if the collaborative law process terminates a collaborative lawyer:

16 (i) must withdraw from further representation of the party in the  
17 matter and any substantially related matter or proceeding, except in protective proceedings  
18 involving a threat to the safety of a party or a party's dependent when no successor lawyer is  
19 immediately available; and

20 (ii) is disqualified from representing the party in any future  
21 substantially related matter or proceeding.

22 (3) inquire about and discuss with the client factors relevant to whether the  
23 collaborative law process is appropriate for the client's matter.

1 (b) A lawyer shall make reasonable efforts to determine whether a client has a history of  
2 domestic violence with other prospective parties before a client signs a collaborative law  
3 participation agreement and shall continue throughout the collaborative law process to assess for  
4 the presence of domestic violence.

5 (c) If it appears to a collaborative lawyer that the lawyer's client is a victim of domestic  
6 violence, the lawyer shall not begin or shall terminate any collaborative law process previously  
7 begun unless:

8 (1) the client requests beginning or continuation of the collaborative law process;

9 (2) the collaborative lawyer reasonably believes that the client's safety can be  
10 adequately protected during the collaborative law process; and

11 (3) the collaborative lawyer is competent in representing victims of domestic  
12 violence.

### 13 **SECTION 8. COLLABORATIVE LAW AND LOW INCOME PARTIES.**

14 (a) This section applies to collaborative law participation agreements if a party is  
15 represented by a collaborative lawyer who is an employee of or affiliated with a law firm, legal  
16 aid office, law school clinic, court sponsored program, or not-for-profit organization which  
17 provides free or low cost legal services to low income persons.

18 (b) If a party is represented by a collaborative lawyer described in subsection (a), a  
19 collaborative law participation agreement may provide that the law firm, office, clinic, program  
20 or organization that employs the lawyer or with which the lawyer is affiliated is not disqualified  
21 by section 6 from continuing to represent a party after collaborative law terminates, if:

22 (1) the collaborative lawyer is personally disqualified from continuing to  
23 represent a party in the matter and any substantially related matter or proceeding;

1 (2) all parties consent to the continued representation of a party by the law firm,  
2 office, clinic, program or organization; and

3 (3) the disqualified collaborative lawyer is isolated from any participation in the  
4 matter or any substantially related matter or proceeding, except as necessary to transfer  
5 responsibility for the matter to successor counsel.

6 (c) If a collaborative law participation agreement contains the provisions authorized by  
7 section (b) and collaborative law terminates, the law firm, office, clinic, program or organization  
8 with which the collaborative lawyer is employed or affiliated is not disqualified under section 6  
9 from continuing to represent a party, if the collaborative lawyer:

10 (1) is personally disqualified from continuing to represent a party in the matter  
11 and substantially related matter or proceeding;

12 (2) is isolated from any participation in the matter or any substantially related  
13 matter or proceeding, except as necessary to transfer responsibility for the matter to successor  
14 counsel.

15 (d) A tribunal may enforce the provisions of this section through entry of appropriate  
16 orders as the interests of justice require.

17 **SECTION 9. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE**  
18 **LAW COMMUNICATIONS; ADMISSIBILITY; DISCOVERY.**

19 (a) Except as otherwise provided in section 11, a collaborative law communication is  
20 privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence  
21 in a proceeding unless waived or precluded as provided by section 10.

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

23 (1) a party may refuse to disclose, and may prevent any other person from

disclosing, a collaborative law communication.

(2) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.

(c) Evidence 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.

#### **SECTION 10. WAIVER AND PRECLUSION OF PRIVILEGE.**

(a) A privilege under section 9 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a collaborative law communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 9, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a collaborative law process to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity, is precluded from asserting a privilege under this section.

#### **SECTION 11. EXCEPTIONS TO PRIVILEGE.**

(a) There is no privilege under section 9 for a collaborative law communication which is:

(1) waived in an agreement evidenced by a record signed by all parties;

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

(3) intentionally used to plan a crime, attempt to commit or commit a crime, or

1 conceal an ongoing crime or ongoing criminal activity;

2 (4) sought or offered to prove or disprove a claim or complaint of professional  
3 misconduct or malpractice arising from or related to collaborative law; or

4 (5) sought or offered to prove or disprove abuse, neglect, abandonment, or  
5 exploitation in a proceeding in which the abuse or neglect of a child, or a vulnerable adult as  
6 defined by law is an issue.

7 (b) There is no privilege under section 9 if a tribunal finds, after a hearing in camera, that  
8 the party seeking discovery or the proponent of the evidence has shown that the evidence is not  
9 otherwise available, that there is a need for the evidence that substantially outweighs the interest  
10 in protecting confidentiality, and that the collaborative law communication is sought or offered  
11 in:

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

13 (2) a proceeding to prove a claim to rescind or reform or a defense to avoid  
14 liability on a contract arising out of the collaborative law process.

15 (c) If a collaborative law communication is not privileged under subsection (a) or (b),  
16 only the portion of the communication necessary for the application of the exception from  
17 nondisclosure may be admitted.

18 (d) Admission of evidence under subsection (a) or (b) does not render the evidence, or  
19 any other collaborative law communication, discoverable or admissible for any other purpose.

20 (e) If the parties agree in advance in a signed record, or if a record of a proceeding  
21 reflects agreement by the parties, that all or part of the collaborative law process is not  
22 privileged, the privileges under section 9 do not apply to the collaborative law process or the part  
23 thereof to which the agreement to waive the privilege applies. However, section 9 applies to a

collaborative law communication made by a person that has not received actual notice of the agreement before the communication is made.

## **SECTION 12. CONFIDENTIALITY OF COLLABORATIVE LAW**

**COMMUNICATIONS.** A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by other law other than this [act] or rule of this state.

## **SECTION 13. ENFORCEMENT OF COLLABORATIVE LAW PARTICIPATION**

**AGREEMENTS NOT MEETING REQUIREMENTS.** Notwithstanding the failure of a collaborative law participation agreement to meet the requirements of section 3, or a lawyer's failure to comply with the disclosure requirements of section 7, if a tribunal finds that parties had a reasonable expectation of participating in collaborative law, the tribunal may, if the interests of justice require:

- (1) enforce an agreement resulting from the process in which the parties participated;
- (2) apply the disqualification provisions of section 6; or
- (3) apply the evidentiary privilege of section 9.

## **SECTION 14. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING.**

(a) The professional responsibility obligations and standards of a collaborative lawyer are not changed because of the lawyer's engagement to represent a party in collaborative law.

(b) The professional responsibility obligations and standards applicable to any licensed professional who participates in collaborative law as a non party participant are not changed because of that participation.

(c) The obligations of any person to report abuse or neglect of a child or vulnerable adult

under the laws of this state are not changed by a person’s participation in collaborative law.

**SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

applying and construing this [act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 16. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

**NATIONAL COMMERCE ACT.** This act modifies, limits, and supersedes the federal

Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq.,

but does not modify, limit or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or

authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

U.S.C. Section 7003(b).

**SECTION 17. SEVERABILITY CLAUSE.** If any provision of this [act] or its

application to any person or circumstance is held invalid, the invalidity does not affect other

provisions or applications of this [act] which can be given effect without the invalid provision or

application, and to this end the provisions of this [act] are severable.

**SECTION 18. APPLICATION TO EXISTING AGREEMENTS.**

(a) This [act] governs a collaborative law participation agreement signed on or after [the effective date of this [act]].

(b) On or after [a delayed date], this [act] governs a collaborative law participation agreement whenever made.

**SECTION 19. EFFECTIVE DATE.** This [act] takes effect.....

***Legislative Note:*** States should choose an effective date for the act that allows substantial time for notice to the bar and the public of its provisions and for the training of collaborative lawyers.