Memorandum

To: Drafting Committee for the Uniform Collaborative Law Act

CC: Observers and Dennis Cooper, Style Committee liaison

From: Andrew Schepard

Re: January 2009 Draft of the UCLA

Date: December 30, 2008

Enclosed, as promised (or perhaps threatened) is an end of year redraft of the Uniform Collaborative Law Act. It is labeled the January 2009 Draft to distinguish it from the December 2008 Draft.

The January 2009 Draft has somewhat more changes from the December 2008 Draft than I initially anticipated. I thus suggest that you should take one more look at the Act before I begin redrafting the preface and commentary.

I would appreciate your comments on this draft but need them expeditiously. Please feel free to circulate the draft to anyone you want who might be able to provide feedback. I hope this version is as close to final as possible so that I can begin redrafting the preface and comments with some certainty as to what the statute will say and what the order of the sections will be.

Timing for your comments:

Please send any suggestions for revision to the enclosed draft to me and Yishai by 5:00 p.m. EDT on Friday, January 9th, 2009. I will begin revising the preface and section by section commentary shortly thereafter. That revised commentary will include any agreements for material to be placed in commentary at the November meeting.

Please note that my goal remains to circulate the revised preface and commentary to you by the middle of February or beginning of March.

Depending on the scope of changes suggested to this Draft, I may circulate another draft without preface or commentary before March.

Here is what I would like you to do:

As before, I ask you to place your comments on the enclosed draft into one of the following categories:

Category 1- Typo, technical or drafting suggestion that I have discretion to make or not.

Category 2- Important change that must be incorporated for you or your organization to support the UCLA. I obviously hope that, after the number of previous drafts, the extensive discussions and decisions at the November meeting, and at this late date in the drafting process, the number of suggested changes in this category will be zero. If, however, something arises I will discuss all changes in this category with Peter and Harry to decide how best to proceed.

You might want to especially focus your attention on the following sections of the January 2009 Draft:

(1) Section 2(1) – I made another attempted revision of the definition of "collaborative law process" to avoid defining it as a "process" but make it something more than an "attempt"

(2) Section 4(d) and (e)- These sections remain the same in substance as in previous drafts, though as Jack suggested, their order has been reversed.

(3) Section 4(f) - This section was revised to incorporate the revision of former section 5. See discussion under (3).

(4) Sections 5, 6 and 7- At Jack's suggestion, I have broken the former Section 5 into three separate sections and renumbered sections and cross references accordingly. Section 5 covers pending proceedings, Section 6 covers approval of settlements and Section 6 covers the "emergency" exception. All of these sections were revised to focus on a *tribunal's* powers vis a vie the collaborative law process.

This change required a number of other revisions:

- The revision of section 4(f) mentioned above was designed to incorporate the idea that the collaborative law process does not terminate if a party takes agreed upon action to seek approval of an agreement. I tried to draft the section with a high enough level of generality to avoid the vexing problem of different state procedures for approving agreements.

- The language of section 7 (tribunal approval of settlements) was expanded to track the revision of section 4(f). Again, the goal was to simplify the section by giving a tribunal power to approve an agreement without specifying in detail the form with which the agreement is brought to the tribunal's attention.

- The language of section 8 (the former section 6), the disqualification provision, was expanded to disqualify a collaborative lawyer from representing a party before a tribunal (with exceptions) if collaborative law terminates but to allow the collaborative lawyer to represent a party before a tribunal with the agreement of

all other parties to present an agreement, again without specifying the form for that representation (e.g. initiating an action, making a motion)

(5) Section 5 (c) – Based on a decision made at our November meeting, the December 2008 Draft authorized tribunals to ask parties and collaborative counsel for status reports while the proceeding is stayed. Comments raised concern about the scope of the status reports that were authorized by this section. To address these concerns, Elizabeth made the suggestion that we incorporate the substance of Section 7 of the Uniform Mediation Act which sets forth guidelines on the nature and substances of reports that tribunals can require of mediators. I tried to incorporate those guidelines in this section to make clear what a status report to a court on a collaborative law process can and cannot cover.

(6) Section 8- this is former section 6 on disqualification expanded and modified as described above. In addition, subsection (c) now combines the two exceptions to the disqualification requirement- presenting agreements and emergency orders- in a single place. Finally, this section *no longer* authorizes courts to enforce its provisions through entry of appropriate orders. I received several negative comments on that authorization as encouraging litigation and motions relating to collaborative law and took them out throughout this draft. Courts will make the decision about what powers they have to enforce the Act without statutory authorization.

(7) Section 9(a) - This is the section allowing an exception to the rule of imputed disqualification for low income parties continued from the December 2008 Draft. As the Committee instructed at the November meeting, it still focuses on the nature of the party, not the nature of the entity providing collaborative law representation for the low income client. In response to a comment, I added a sentence though which makes it clear that to get the benefit of this section the representation of the low income client must be "without fee" to limit the authorization to *pro bono* representation.

(8) Section 16 (6) - This is a revised Section 14 of the December 2008 Draft (and previous drafts) listing exceptions to evidentiary privilege based on a similar section of the Uniform Mediation Act. Sections 14 (6) and (7) of the December 2008 Draft and previous drafts contained two provisions creating an exception to the evidentiary privilege for proof of child abuse, neglect, abandonment or exploitation. Section 14 (6) covered state child protective proceeding and Section 14 (7) covered parent versus parent child custody disputes.

Revised Section 16(6) in the January 2009 Draft combines these two sections into a single section creating what might be called a "child abuse" exception to the evidentiary privilege otherwise granted to collaborative law communications. It makes an exception to the exception if a state child protection agency is a party or participates in a collaborative law process but

not for private parties and their attorneys. The exception for state child protection agencies is the same is in the Uniform Mediation Act and in previous drafts of the UCLA. The Committee previously decided that private parties and their lawyers should not be subject to the exception to the exception for fear of displacing state law regarding mandatory reporting of child abuse and neglect.

I look forward to your comments and suggestions on the sections above, or on anything else.

Thank you for your help and support throughout the drafting process.

Continued best wishes from Hofstra and New York for a happy and healthy New Year.