# TESTIMONY OF THE COMMISSION TO PROMOTE UNIFORM LEGISLATION

# ON H.B. No. 626

## RELATING TO THE HAWAII UNIFORM COLLABORATIVE LAW ACT.

**BEFORE THE HOUSE COMMITTEE ON FINANCE**

**DATE:** Friday, February 24, 2012, at 4:30 p.m.
Conference Room 308, State Capitol

**WRITTEN TESTIMONY ONLY:** (For further information, please contact Commission to Promote Uniform Legislation Commissioner LANI EWART at 547-5600)

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Chair Oshiro, Vice Chair Lee and Members of the Committee:

Thank you for the opportunity to testify on this measure. The State Commission to Promote Uniform Legislation (CPUL).supports the passage of H.B. No. 626, Relating to the Hawaii Uniform Collaborative Law Act.

The Uniform Collaborative Law Act (UCLA) standardizes the most important features of the newly developing area of collaborative law practice, mindful of ethical concerns as well as questions of evidentiary privilege. In recent years, as the use of collaborative law has grown, it has come to be governed by a variety of statutes, court rules, and formal and informal standards in different jurisdictions. A comprehensive statutory framework is necessary in order to guarantee the benefits of the collaborative process and bring uniformity to the essential features of that process. The UCLA encourages the development and growth of collaborative law as an option for parties who wish to use it as a form of alternative dispute resolution.

Collaborative law is a *voluntary* process in which the lawyers and clients agree that the lawyers will represent the clients solely for purposes of settlement, and that the clients will hire new counsel if the case does not settle. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. No one is required to participate, and parties are free to terminate the

process at any time. The UCLA includes explicit informed-consent requirements for parties to enter into collaborative law with an understanding of the costs and benefits of participation. The process is intended to promote full and open disclosure, and information disclosed in a collaborative process, which is not otherwise discoverable, is privileged against use in any subsequent litigation.

The collaborative law process provides lawyers and clients with an important, useful, and cost-effective option for amicable, non-adversarial dispute resolution. Like mediation, it promotes problem-solving and permits solutions not possible in litigation or arbitration.

Three states, Nevada, Texas, and Utah, have enacted the Uniform Collaborative Law Act, while California and North Carolina have enacted statutes authorizing the practice of collaborative law. The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility and at least nine state bar ethics committees (Kentucky, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Pennsylvania, South Carolina and Washington) have expressly approved the use of collaborative law.

While thousands of attorneys are currently practicing collaborative law in the United States, usually on a contractual basis, a clear statutory framework for the collaborative process would bring significant benefits. Parties and counsel would know what to expect, and would be able to rely on a statutorily enacted privilege governing communications during the process. Attorneys would have guidance in determining whether collaborative law is appropriate for a particular dispute or client.

During the interim following the 2011 Regular Session, this measure was reviewed by the Hawaii Supreme Court's Standing Committee on the Rules of Evidence pursuant to House Resolution No. 174 and House Concurrent Resolution No. 202. The committee concluded that it "has no objections to the evidence provisions contained in House Bill No. 626, 2011 Legislature."

Because collaborative law is a form of limited scope representation (where an attorney is retained solely for the purpose of reaching a settlement, and expressly not for the purpose of litigation) clear rules about the mechanics of the practice will help both attorneys and clients. As a uniform state law, the UCLA will help establish uniformity in core procedures and consumer protections, while minimizing the spread of

a patchwork of varying approaches and definitions. As an increasing number of states adopt the uniform approach, costs associated with interstate dispute resolution will be reduced, and both practitioners and clients will benefit from the practical experience of sister jurisdictions.

Like all uniform state laws, the UCLA is the result of more than 3 years of intensive effort. Representatives from state bars, collaborative attorney groups, litigators, domestic violence coalitions, and state courts all participated in the drafting of the UCLA, as did representatives from the family law, dispute resolution, and litigation sections of the ABA.

A section by section summary of this measure has been appended for your reference.

We appreciate the opportunity to submit this testimony in support of H.B. No. 626.

**Uniform Comparative Law Act**
**Section-by-Section Summary:**

**SECTION 1.**

***Section -1*** sets forth the title: Uniform Collaborative Law Act.

***Section -2*** sets forth definitions of terms used in the Act.

***Section -3*** makes the Act applicable to a collaborative law participation agreement signed after the effective date of the Act and emphasizes that a tribunal cannot order a party to participate in the collaborative law process over that party's objection.

***Section -4*** establishes minimum requirements for a collaborative law participation agreement, which is the agreement that parties sign to initiate the collaborative law process. The agreement must be in writing, state the parties' intention to resolve the matter (issue for resolution) through collaborative law, contain a description of the matter and identify and confirm engagement of the collaborative lawyers. The section further provides that the parties may include other provisions not inconsistent with the Act.

***Section -5*** specifies when and how the collaborative law process begins, and how the process is concluded or terminated. The process begins when parties sign a participation agreement, and any party may unilaterally terminate the process at any time without specifying a reason. The process is concluded by a negotiated, signed agreement resolving the matter, or a portion of the matter and the parties' agreement that the remaining portions of the matter will not be resolved in the process.

Several actions will terminate the process, such as a party giving notice that the process is terminated, beginning a proceeding, filing of motions or pleadings, requesting a hearing in an adjudicatory proceeding without the agreement of all parties, or the discharge or withdrawal of a collaborative lawyer. The section further provides that under certain conditions the collaborative process may continue with a successor collaborative lawyer in the event of the withdrawal or discharge of a collaborative lawyer. The party's participation agreement may provide additional methods of terminating the process.

***Section -6*** provides for an automatic application for stay of proceedings before a tribunal (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law with the tribunal. A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to ensure confidentiality of the collaborative law process.

***Section -7*** creates an exception to the stay of proceedings by authorizing a tribunal to issue emergency orders to protect the health, safety, welfare, or interests of a party or family or household member; or, to protect financial or other interests of a party in any critical area in any civil dispute.

***Section -8*** authorizes a tribunal to approve an agreement resulting from a collaborative law process.

***Section -9*** sets forth a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process terminate without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated, are disqualified from representing a party in a proceeding before a tribunal in the collaborative matter, except to seek emergency orders *(section -7)* or to approve an agreement resulting from the collaborative law process *(section -8).* The disqualification requirement is further modified regarding collaborative lawyers representing low-income parties (*section -10*) and governmental entities as parties (*section -11*).

***Section -10*** creates an exception to the disqualification for lawyers representing low income parties in a legal aid office, law school clinic, or a law firm providing free legal services to low income parties. If the process terminates without settlement, a lawyer in the organization or law firm with which the collaborative lawyer is associated may represent the low income party in an adjudicatory proceeding involving the matter in the collaborative law process, provided that the participation agreement so provides, and the representation is without fee, and the individual collaborative lawyer is appropriately isolated from any participation in the collaborative matter before a tribunal.

***Section -11*** creates a similar exception to the disqualification requirement for lawyers representing a party that is a government or governmental subdivision, agency, or instrumentality.

***Section -12*** sets forth another core element of collaborative law. Parties in the process must, upon request of a party make timely, full, candid, and informal disclosure of information substantially related to the collaborative matter without formal discovery, and promptly update information that has materially changed. Parties are free to define the scope of disclosure in the collaborative process, so long as they do not violate another other law, such as an Open Records Act.

***Section -13*** acknowledges that standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.

***Section -14*** deals with appropriateness of the collaborative law process. Prior to the parties signing a participation agreement, a collaborative lawyer is required to discuss with a prospective client factors which the collaborative lawyer reasonably believes relate to the appropriateness of the prospective client's matter for the collaborative

process, and provide sufficient information for a prospective client to make an informed decision about the material benefits and risks of the process as compared to the material benefit and risks of other reasonably available processes, such as litigation, arbitration, mediation, or expert evaluation. Further, a prospective party must be informed of the events that will terminate the process and the effect of the disqualification requirement.

***Section -15*** obligates a collaborative lawyer to make a reasonable effort to determine if a prospective client has a history of a coercive or violent relationship with another prospective party and, if such circumstances exist, establishes criteria for beginning and continuing the process and providing safeguards.

***Section -16*** provides that oral and written communications developed in the collaborative process are confidential to the extent agreed by the parties or as provided by state law, other than the Act.

***Section -17*** creates a broad privilege prohibiting disclosure of communications developed in the process in legal proceedings. The provisions are similar to those in Uniform Mediation Act (i.e., privileges to refuse to disclose and ability to prevent disclosure of collaborative law communications) and apply to party and non-party participants in the process.

***Sections -18 and -19*** provide for the possibility of waiver of privilege by all parties, and certain exceptions to the privilege based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records law, or to prove or disprove professional misconduct or malpractice. Parties may agree that all or part of the process is not privileged.

***Section -20*** deals with enforcement of an agreement made in a collaborative process that fails to meet the mandatory requirement for a participation agreement (section -4), or a collaborative lawyer who has not fully complied with the disclosure requirements (section -14). When the interests of justice so require, a tribunal is given discretion to enforce an agreement resulting from a flawed participation agreement, if the tribunal finds that the parties intended to enter into a participation agreement, and reasonably believed that they were participating in the collaborative process.

***Section -21*** emphasizes the need to promote uniformity in applying and construing the Act among states that adopt it.

***Section -22*** provides that the Act may modify, limit, or supersede certain provisions the Federal Electronic Signatures in Global and National Commerce Act.

**SECTION 2** of the bill establishes an effective date.

**Circuit Court of the First Judicial Circuit** — THE JUDICIARY • STATE OF HAWAI'I
CHAMBERS OF THE FOURTH DIVISION • 777 PUNCHBOWL STREET • KA'AHUMANU HALE • HONOLULU, HAWAI'I 96813
TELEPHONE (808) 539-4320

Glenn J. Kim
CIRCUIT JUDGE



November 1, 2011

Gilbert S.C. Keith-Agaran
Chair, House Committee on Judiciary
State Capitol
415 South Beretania Street, Room 302
Honolulu, HI 96813

Dear Representative Keith-Agaran:

Pursuant to your letter to Chief Justice Mark Recktenwald dated February 23, 2011, and the subsequent passage of House Resolution No. 174, 2011 Legislature, which both requested the Hawaii Supreme Court Standing Committee on the Rules of Evidence (Evidence Committee) to study and report on the implementation of the Hawaii Uniform Collaborative Law Act (HUCLA), the Judiciary respectfully submits the attached advanced copy of the Evidence Committee's report, "Report of the committee's work in 2011." The report will subsequently be distributed to all members of the 2012 Legislature.

Please note, as you may recall, that in its testimony to the House Committee on Judiciary for House Resolution No. 174/House Concurrent Resolution No. 202, the Judiciary stated that the Evidence Committee is prepared to review the HUCLA, but noted that its study and recommendations would be limited strictly to the potential evidence provisions of the measure.

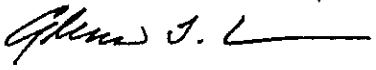
The following excerpt from the report pertains directly to the Evidence Committee's study of the evidence provisions in the HUCLA:

> "At its September 14th meeting the committee took up the matter of the Uniform Collaborative Law Act, H.B. No. 626, 2011 Legislature. The committee focused its attention on Sections 16 through 19, which contain the evidentiary provisions of this measure. Thus, our report does not address the balance of the collaborative law act, which contains civil procedure and is beyond the purview of our committee.
>
> "What follows below is quoted from the September 14 minutes.'
>
> "Members noted that the UCLA evidence provisions provide for confidentiality, privilege, and exclusion of collaborative law communications,

to established rules of evidence or procedure. These provisions are compatible with H.R.E. 408, entitled 'Compromise, offers to compromise, and mediation proceedings.' Indeed, given that collaborative law processes, aimed at resolution and settlement of disputes by collaborative lawyers, would constitute 'compromise negotiations' under rule 408, the UCLA adds nothing of substance to existing Hawaii evidence rules. On the other hand, this committee finds this redundancy benign and tolerable."

Therefore, the Evidence Committee has no objections to the evidence provisions contained in House Bill No. 626, 2011 Legislature. Thank you for allowing the Evidence Committee the opportunity to review and offer comments regarding this issue. Please feel free to call me if you have any questions or would like to discuss this matter further.

Sincerely,



Honorable Glenn J. Kim
Chair, Hawaii Supreme Court Standing Committee on the Rules of Evidence

**Memorandum**

To: Chief Justice Mark E. Recktenwald

From: Hon. Glenn J. Kim, Chair
Prof. Addison M. Bowman, Reporter
Standing Committee on Rules of Evidence

Subject: Report of the committee's work in 2011

Date: October 24, 2011

1. Introduction. The Standing Committee on Rules of Evidence was established by the Chief Justice on 15 July 1993 "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence."

Current membership on the committee:

Hon. Glenn J. Kim, Chair
Hon. Gary W.B. Chang
Hon. Derrick H.M. Chan
Prof. John L. Barkai
Prof. Addison M. Bowman
Donn Fudo, Esq.
David W. Hall, Esq.
Charlene Y. Iboshi, Esq.
Philip H. Lowenthal, Esq.
Deirdre Marie-Iha, Esq.
Judith A. Pavey, Esq.
John D. Thomas, Esq.
John M. Tonaki, Esq.

This is the committee's seventeenth annual report. 1993, 1995, 1996, 1997, 1998, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 reports were furnished by the committee to the Chief Justice and forwarded to the Legislature. This report reflects the committee's work in 2011.

2. 2011 meetings. The committee met on February 18th, June 8th, and September 14th. Minutes of those meetings are attached in Appendix A.

3. Activity at the 2011 Legislature. The committee monitored a number of evidence related measures that were introduced in the House and Senate, including H.B. No. 439, which would amend HRE 303(c) by augmenting the presumptions of subdivisions (13) and (14) so that books, other printed material, and reports of adjudicated cases that are placed on government websites are presumed to have been correctly reproduced. The committee submitted written testimony in support of H.B. No. 439, and the measure passed both houses and was signed into law as Act 47. The amended rule can be found on p. 3 of the 2011 Supplement to A. Bowman, Hawaii Rules of Evidence Manual (2010-2011 ed.).

Another measure that caught the committee's attention was H.B. No.194, which would have perpetuated the news media privilege of Act 210, 2008 Legislature, by eliminating the

sunset clause pursuant to which the privilege would have expired on June 30th of this year. The committee submitted testimony requesting that action on H.B. No. 194 be deferred and that the measure be referred to this committee for study and a report to the 2012 Legislature concerning the advisability of retaining this privilege. The Legislature acceded to this request by adopting H.B. No. 1376, S.D. 1, extending the expiration date of Act 210 until June 30, 2013, and referring the measure to this committee for study and a "report to the legislature no later than twenty days prior to the convening of the regular session of 2012." The committee's report is contained in paragraph 4 below.

Paragraph 5 below contains a second report to the Legislature, this one in compliance with a request from Gilbert S.C. Keith Agaran, Chair of the House Committee on Judiciary, contained in a letter to Chief Justice Mark Recktenwald urging that this committee study the Uniform Collaborative Law Act, H.B. No. 626, 2011 Legislature, and report its findings to the House Judiciary Committee by November 1st.

4. Report on the news media privilege. The committee's June 8th meeting accommodated a request from Jeffrey S. Portnoy, Esq., a proponent of the news media privilege, to meet with the committee and discuss the matter. The exchange between Portnoy and committee members that took place is described in the June 8th minutes. In addition to valuable input from Mr. Portnoy, the committee had two memoranda from Reporter Bowman and one from Member Marie-Iha. These three memoranda are included in Appendix B to this report.

The minutes of the committee's September 14th meeting memorialize its discussion of the journalists' privilege and its recommendations to the Legislature. What follows here is quoted from the minutes.

> The committee recommends that the sunset provision be eliminated and that Act 210 be integrated into H.R.S. ch.621. The committee also suggests that the Legislature might, were it so inclined, elect to take another look at: (1) subsection (a)(2), shielding a journalist's unpublished information; (2) the possibility of deleting the words, "for defamation," from the exception of subsection (c)(3); and (3) the possibility of redrafting subsection (d) to read: "No fine or imprisonment shall be imposed against a person validly claiming a privilege pursuant to this section."
>
> The reasons for the committee's suggestions follow:
>
> (1) The policy of this privilege is limited to protecting the identity of sources. It does not extend to unpublished information, which may or may not have been given in confidence. If the information will tend to disclose the source, then it can be redacted pursuant to subsection (a)(1). Thus subsection (a)(2) is unnecessary and inconsistent with the underlying justification for the privilege. A substantial number of states limit their privileges to sources and do not shield "unpublished information."
>
> (2) The defamation limitation is too narrow, and the exception should apply to felonies and civil actions generally, provided the criteria of subsections (c)(3)(A), (B), and (C) are met.
>
> (3) The shield should arguably extend only to valid privilege claims, as defined in this section. If the claim is rejected, then the normal contempt remedies should apply.

5. Report on the Uniform Collaborative Law Act. At its September 14th meeting the committee took up the matter of the Uniform Collaborative Law Act, H.B. No. 626, 2011 Legislature. The committee focused its attention on Sections 16 through 19, which contain the evidentiary provisions of this measure. Thus, our report does not address the balance of the collaborative law act, which concerns civil procedure and is beyond the purview of our committee.

What follows below is quoted from the September 14 minutes.

> Members noted that the UCLA evidence provisions provide for confidentiality, privilege, and exclusion of collaborative law communications, except for material that is otherwise admissible or subject to discovery pursuant to established rules of evidence or procedure. These provisions are compatible with H.R.E. 408, entitled "Compromise, offers to compromise, and mediation proceedings." Indeed, given that collaborative law processes, aimed at resolution and settlement of disputes by collaborative lawyers, would constitute "compromise negotiations" under rule 408, the UCLA adds nothing of substance to existing Hawaii evidence rules. On the other hand, this committee finds this redundancy benign and tolerable.

6. Conclusion. The committee appreciates the opportunity to be of service to the courts and to the legislature. The committee will stand ready in 2012 to address all evidence measures that are referred to it. The committee is grateful to Judge Kim and to Judge Kim's staff for their support during 2010.

*The Judiciary, State of Hawaii*

**Testimony to the House Committee on Judiciary**
Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair

Friday, February 24, 2012, 4:30 p.m.
State Capitol, Conference Room 308

by
Judge Glenn Kim, Chair
Supreme Court Standing Committee on the Rules of Evidence

**WRITTEN TESTIMONY ONLY**

**Bill No. and Title:** House Bill No. 626, Relating to the Hawaii Uniform Collaborative Law Act

**Purpose:** Enacts Uniform Collaborative Law Act, which authorizes disputants to enter into collaborative law participation agreements signifying interest to resolve the dispute without intervention of a tribunal (court or other third party decision maker). Requires parties to a collaborative law process to disclose information fully, candidly, and informally without formal discovery. Subject to certain exceptions, disqualifies attorneys in the collaborative process (and their law firms) from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

## Judiciary's Position:

The Supreme Court Standing Committee on the Rules of Evidence (Evidence Committee) has no objections to the evidence provisions contained in House Bill No. 626.

Pursuant to House Concurrent Resolution No. 174, 2011 Legislature, which requested the Evidence Committee to study and report on the implementation of the Hawaii Uniform Collaborative Law Act (HUCLA), the Judiciary respectfully submitted its report, "Report of the committee's work in 2011," to the 2012 Legislature. The Evidence Committee's study and report were limited strictly to the evidence-related provisions contained in House Bill No. 626, 2011 Legislature.

The following excerpt from the report pertains directly to the Evidence Committee's study of the evidence provisions in the HUCLA:

"At its September 14th meeting the committee took up the matter of the Uniform Collaborative Law Act, H.B. No. 626, 2011 Legislature. The committee focused its attention on Sections 16 through 19, which contain the evidentiary provisions of this measure. Thus, our report does not address the balance of the collaborative law act, which contains civil procedure and is beyond the purview of our committee.

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Thank you for the opportunity to provide comments on House Bill No. 626.