April __, 1989

Councilmember Wilhelmina Rolark
The District Building
1350 Pennsylvania Avenue, N.W.
Room 125
Washington, D.C. 20004

Re: District of Columbia Uniform Premarital Agreement Act of 1989, Bill 8-32

Dear Councilmember Rolark:

The undersigned, who are all of the members of the Steering Committee of the Estates, Trusts and Probate Law Section of the district of Columbia Bar, are writing in general support of the District of Columbia Uniform Premarital Agreement Act of 1989, Bill 8-32, which is under consideration by the Committee on the Judiciary. We believe that the legislation as introduced goes a long way toward providing much-needed guidance as to the legal effect of premarital agreements in the District of Columbia. There are, however, several amendments that we propose in order to clarify and better effectuate the goals of the Act.1/

Our proposed amendments are as follows:

1. Section 4. Content (4). -- We suggest the deletion of the words "the modification or elimination of", prior to the words "spousal support", thus permitting the parties to a premarital agreement to contract with respect to spousal support generally. Because the level of spousal support, if any, will not be known at the time of execution of a premarital agreement, we

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1/ The views expressed herein represent only those of the Estates, Trusts and Probate Law Section of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors.

believe that it is somewhat misleading to refer to the modification or elimination of spousal support.

2. Section 5. Effect of Marriage -- We suggest the addition of the words "of the parties to each other" at the end of the provision, to clarify that a premarital agreement becomes effective upon marriage <u>of the parties to each other</u>.

3. Section 7. Enforcement. (a) -- We suggest the addition of the words "by clear and convincing evidence" after the word "proves" to clarify the standard of proof that will be required of a party seeking to set aside a premarital agreement.

4. Section 7. Enforcement. (a)(3) -- We suggest that the word "and" be replaced with the word "or" in the third line of subparagraph (3) so that non-disclosure of the property <u>or</u> of the financial obligations of the other party will be sufficient to invalidate a premarital agreement. In addition, we suggest the addition of the words "and did not have actual knowledge thereof" at the end of subparagraph (3) so that the failure of one party to provide disclosure of that party's property or financial obligations to the other party will not invalidate a premarital agreement if the other party had actual knowledge of such matters.

5. Section 7. Enforcement. (b) -- We suggest that this paragraph be amended to correspond to and be consistent with our proposed amendment to section 4(a)(4) relating to spousal support. More particularly, we suggest that the words "modifies or eliminates" be deleted so that the first three lines of the paragraph will read as follows: "If a provision of a premarital agreement <u>addresses</u> spousal support and that <u>provision</u> causes one party to the agreement to be eligible...".

6. Section 7. Enforcement. (c) -- We suggest that the following language be added at the end of paragraph (c): "Unless a premarital agreement

expressly provides otherwise, the provisions of a premarital agreement shall be severable so that a court may enforce those provisions of a premarital agreement that are not deemed unconscionable or otherwise invalid". We believe that a premarital agreement should be enforceable except to the extent that it is deemed unconscionable or otherwise invalid. Premarital agreements often contain provisions that do not directly affect a spouse's rights to the other spouse's property. For example, many premarital agreements contain a waiver of a spouse's right to serve as a personal representative or other fiduciary of the other spouse. We believe that a court clearly should be permitted to uphold such a provision even where other provisions of the premarital agreement are deemed to be unconscionable or otherwise invalid. The language we suggest, of course, preserves the right of the parties to provide that the provisions of their premarital agreement shall not be treated as severable.

7. Section 10. Applicability. -- We suggest that the words "on or after its effective date" be replaced with the words "on or after the effective date of this act". Also, we suggest the addition of the following sentence at the end of the section: "Nothing in this Act shall be construed to invalidate any premarital agreement entered into prior to the effective date of this Act".

8. Finally, we believe that the provisions of the act should apply to postmarital agreements as well as to premarital agreements. Conceptually, there is no difference between an agreement entered into by prospective married persons and an agreement entered into by persons after marriage. We note that under Virginia law, Va. Code §20-155, postmarital agreements are given effect to the same extent as premarital agreements. We suggest that the following language be added as a separate section of the act:

> Married persons may enter into agreements with each other for the purpose of settling

> the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions as provided in the provisions of this act for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution.

The foregoing proposed amendments reflect our consideration of the Uniform Premarital Agreement Act as approved by the National Conference of Commissioners on Uniform State Laws, variations from the Uniform Premarital Agreement Act as adopted in other jurisdictions, and our collective experience in representing clients in connection with marital agreements. We believe that the proposed amendments will clarify the Act, thus providing additional guidance to lawyers, to clients, and to the courts.

If we can be of any further assistance with respect to the District of Columbia Uniform Premarital Agreement Act of 1989, please contact the Chairperson of the Steering Committee, Carol Rhees, at 429-6220, or Nancy Fax, at 457-7317.

Thank you for your consideration.

Sincerely,

Carol A. Rhees, Chairperson
Henry L. Rucker, Vice-Chairperson
Thomas J. Cholis
Paul B. Cromelin, III
Nancy G. Fax
Virginia A. McArthur
Lloyd Leva Plaine

cc: David A. Clarke, Chairman
Frank Smith, Jr., Chairman Pro Tempore
Charlene Drew Jarvis, Councilmember
Nadine P. Winter, Councilmember
H.R. Crawford, Councilmember
John A. Wilson, Councilmember
James E. Nathanson, Councilmember

Harry L. Thomas, Councilmember
Carol Schwartz, Councilmember at Large
Hilda H.M. Mason, Councilmember at Large
Betty Ann Kane, Councilmember at Large
John Ray, Councilmember at Large