

## COLLABORATIVE LAW FOR LGBTQ FAMILIES

### PRESENTATION OUTLINE

- I. Description and brief history of the Collaborative Law process
- II. The Collaborative Law Process: A natural fit for negotiating agreements for same-sex families
  - A. Unavailability or inadequacy of legal remedies
  - B. Privacy
  - C. Fear of homophobic judges
  - D. Opportunities for creative problem-solving
  - E. Protecting children from permanent separation from a parent
  - F. A mechanism for addressing the power imbalance resulting from legal inequalities between the parties
  - G. Interdisciplinary practice
    - 1. The role of child specialists in negotiating parenting agreements
    - 2. Mental health professionals as coaches: Leveling the playing field and addressing power imbalance in a constructive way
    - 3. Financial professionals: Expert advice on complex tax and other financial issues affecting same-sex couples
  - H. Agreements that can successfully be negotiated using Collaborative Law: Family formation agreements, including prenuptial and domestic partnership agreements; family dissolution agreements, including divorce, non-marital separation agreements and parenting agreements.

### ATTACHED MATERIALS:

#### Statutes:

Uniform Collaborative Law Act

State statutes addressing collaborative law: California, North Carolina, Nevada, Texas, Utah

Articles:

“Collaborative Law Handbook for Clients: An Orientation to the divorce process, the dispute-resolution options available to clients, and the new dispute resolution option, ‘Collaborative Law.’” Pauline Tesler, *Published by the American Bar Association in 2001*. (Used with permission of author)

“Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It.” Pauline Tesler, *American Journal of Family Law, Vol. 13, 215-225 (1999)* (Used with permission of author)

# UNIFORM COLLABORATIVE LAW RULES

and

## UNIFORM COLLABORATIVE LAW ACT *(Last Revised or Amended in 2010)*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR  
IN SANTA FE, NEW MEXICO  
JULY 9-16, 2009

*WITHOUT PREFATORY NOTE OR COMMENTS*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

October 7, 2010

***Note for enacting states:** The provisions for regulation of collaborative law are presented in two formats for enactment- by court rules or legislation. The substantive provisions of each format are identical with the exception of several standard form clauses typically found in legislation. Each state considering adopting the Uniform Collaborative Law Rules (UCLR) or the Uniform Collaborative Law Act (UCLA) should review its practices and precedent to first determine whether the substantive provisions are best adopted by court rule or statute. The decision may vary from state to state depending on the allocation of authority between the legislature and the judiciary for regulation of contracts, alternative dispute resolution, and the legal profession. States may also decide to enact part of the substantive provisions by court rule and part by legislation. Specific comments following some particular rules or sections indicate whether the Drafting Committee recommends enactment by court rule or legislation. Drafting agencies may need to renumber sections and cross references depending on their decision concerning the appropriate method of enactment.*

## **UNIFORM COLLABORATIVE LAW RULES**

**RULE 1. SHORT TITLE.** These rules may be cited as the Uniform Collaborative Law Rules.

**RULE 2. DEFINITIONS.** In these rules:

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

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) “Collaborative law participation agreement” means an agreement by persons to participate in a collaborative law process.

(3) “Collaborative law process” means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law

process.

(5) “Collaborative matter” means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

#### **Alternative A**

is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

- (A) marriage, divorce, dissolution, annulment, and property distribution;
- (B) child custody, visitation, and parenting time;
- (C) alimony, maintenance, and child support;
- (D) adoption;
- (E) parentage; and
- (F) premarital, marital, and post-marital agreements.

#### **Alternative B**

is described in a collaborative law participation agreement.

#### **End of Alternatives**

(6) “Law firm” means:

- (A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and
- (B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) “Nonparty participant” means a person, other than a party and the party’s collaborative lawyer, that participates in a collaborative law process.

(8) “Party” means a person that signs a collaborative law participation agreement and

whose consent is necessary to resolve a collaborative matter.

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

(10) “Proceeding” means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(11) “Prospective party” means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

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

(13) “Related to a collaborative matter” means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

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

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

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

(15) “Tribunal” means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter; or

(B) a legislative body conducting a hearing or similar process.

**RULE 3. APPLICABILITY.** These rules apply to a collaborative law participation agreement that meets the requirements of Rule 4 signed [on or] after [the effective date of the rules].

**RULE 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT;  
REQUIREMENTS.**

- (a) A collaborative law participation agreement must:
  - (1) be in a record;
  - (2) be signed by the parties;
  - (3) state the parties' intention to resolve a collaborative matter through a collaborative law process under these rules;
  - (4) describe the nature and scope of the matter;
  - (5) identify the collaborative lawyer who represents each party in the process; and
  - (6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.
- (b) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with these rules.

**RULE 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW  
PROCESS.**

- (a) A collaborative law process begins when the parties sign a collaborative law participation agreement.
- (b) A tribunal may not order a party to participate in a collaborative law process over that party's objection.
- (c) A collaborative law process is concluded by a:
  - (1) resolution of a collaborative matter as evidenced by a signed record;

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative law process terminates:

(1) when a party gives notice to other parties in a record that the process is ended;

(2) when a party:

(A) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(ii) requests that the proceeding be put on the [tribunal's active calendar]; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the parties:



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

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(B) the agreement is amended to identify the successor collaborative lawyer; and

(C) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

(h) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

**RULE 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.**

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Rules 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and

the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

(e) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

***Legislative Note:** In enacting this Rule, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Rule 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.*

**RULE 7. EMERGENCY ORDER.** During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

**RULE 8. APPROVAL OF AGREEMENT BY TRIBUNAL.** A tribunal may approve an agreement resulting from a collaborative law process.

**RULE 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.**

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Rules 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the

collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

#### **RULE 10. LOW INCOME PARTIES.**

(a) The disqualification of Rule 9(a) applies to a collaborative lawyer representing a party with or without fee.

(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Rule 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:

(1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;

(2) the collaborative law participation agreement so provides; and

(3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm

which are reasonably calculated to isolate the collaborative lawyer from such participation.

**RULE 11. GOVERNMENTAL ENTITY AS PARTY.**

(a) The disqualification of Rule 9(a) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.

(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:

(1) the collaborative law participation agreement so provides; and

(2) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

**RULE 12. DISCLOSURE OF INFORMATION.** Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

**RULE 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED.** These rules do not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

#### **RULE 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.**

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Rule 9(c), 10(b), or 11(b).

#### **RULE 15. COERCIVE OR VIOLENT RELATIONSHIP.**

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and

continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(c) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a process;

and

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.

#### **RULE 16. CONFIDENTIALITY OF COLLABORATIVE LAW**

**COMMUNICATION.** A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than these rules.

#### **RULE 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.**

(a) Subject to Rules 18 and 19, a collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

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

(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 because of its disclosure or use in a

collaborative law process.

**RULE 18. WAIVER AND PRECLUSION OF PRIVILEGE.**

(a) A privilege under Rule 17 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 makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Rule 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

**RULE 19. LIMITS OF PRIVILEGE.**

(a) There is no privilege under Rule 17 for a collaborative law communication that is:

(1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

(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, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Rule 17 for a collaborative law communication do not apply to the extent that a communication is:

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

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or

exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Rule 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

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

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under Rule 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

#### **RULE 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.**

(a) If an agreement fails to meet the requirements of Rule 4, or a lawyer fails to comply with Rule 14 or 15, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they:



(1) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(2) reasonably believed they were participating in a collaborative law process.

(b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:

(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Rules 5, 6, 9, 10, and 11; and

(3) apply a privilege under Rule 17.

**RULE 21. EFFECTIVE DATE.** These rules take effect.....

***Note for enacting states:** The provisions for regulation of collaborative law are presented in two formats for enactment- by court rules or legislation. The substantive provisions of each format are identical with the exception of several standard form clauses typically found in legislation. Each state considering adopting the Uniform Collaborative Law Court Rules (UCLR) or the Uniform Collaborative Law Act (UCLA) should review its practices and precedent to first determine whether the substantive provisions are best adopted by court rule or statute. The decision may vary from state to state depending on the allocation of authority between the legislature and the judiciary for regulation of contracts, alternative dispute resolution and the legal profession. States may also decide to enact part of the substantive provisions by court rule and part by legislation. Specific comments following some particular rules or sections indicate whether the Drafting Committee recommends enactment by court rule or legislation. Drafting agencies may need to renumber sections and cross references depending on their decision concerning the appropriate method of enactment.*

## **UNIFORM COLLABORATIVE LAW ACT**

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

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

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

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) “Collaborative law participation agreement” means an agreement by persons to participate in a collaborative law process.

(3) “Collaborative law process” means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law

process.

(5) “Collaborative matter” means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

#### **Alternative A**

is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

- (A) marriage, divorce, dissolution, annulment, and property distribution;
- (B) child custody, visitation, and parenting time;
- (C) alimony, maintenance, and child support;
- (D) adoption;
- (E) parentage; and
- (F) premarital, marital, and post-marital agreements.

#### **Alternative B**

is described in a collaborative law participation agreement.

#### **End of Alternatives**

(6) “Law firm” means:

- (A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and
- (B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) “Nonparty participant” means a person, other than a party and the party’s collaborative lawyer, that participates in a collaborative law process.

(8) “Party” means a person that signs a collaborative law participation agreement and

whose consent is necessary to resolve a collaborative matter.

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

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(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

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(13) “Related to a collaborative matter” means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

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(15) “Tribunal” means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter; or

(B) a legislative body conducting a hearing or similar process.

**SECTION 3. APPLICABILITY.** This [act] applies to a collaborative law participation agreement that meets the requirements of Section 4 signed [on or] after [the effective date of this [act]].

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

- (a) A collaborative law participation agreement must:
  - (1) be in a record;
  - (2) be signed by the parties;
  - (3) state the parties' intention to resolve a collaborative matter through a collaborative law process under this [act];
  - (4) describe the nature and scope of the matter;
  - (5) identify the collaborative lawyer who represents each party in the process; and
  - (6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.
- (b) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this [act].

**SECTION 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW  
PROCESS.**

- (a) A collaborative law process begins when the parties sign a collaborative law participation agreement.
- (b) A tribunal may not order a party to participate in a collaborative law process over that party's objection.
- (c) A collaborative law process is concluded by a:
  - (1) resolution of a collaborative matter as evidenced by a signed record;

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

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(d) A collaborative law process terminates:

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(A) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(ii) requests that the proceeding be put on the [tribunal's active calendar]; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the parties:

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

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(B) the agreement is amended to identify the successor collaborative lawyer; and

(C) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

(h) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

## **SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.**

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Sections 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the

parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

(e) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

***Legislative Note:** In enacting this Section, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Section 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.*

**SECTION 7. EMERGENCY ORDER.** During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

**SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL.** A tribunal may approve an agreement resulting from a collaborative law process.

**SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.**

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before



a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

#### **SECTION 10. LOW INCOME PARTIES.**

(a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party with or without fee.

(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Section 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:

(1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;

(2) the collaborative law participation agreement so provides; and

(3) the collaborative lawyer is isolated from any participation in the collaborative

matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

#### **SECTION 11. GOVERNMENTAL ENTITY AS PARTY.**

(a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.

(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:

(1) the collaborative law participation agreement so provides; and

(2) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

**SECTION 12. DISCLOSURE OF INFORMATION.** Except as provided by law other than this [act], during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

**SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED.** This [act] does not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of

a child or adult under the law of this state.

#### **SECTION 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.**

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Section 9(c), 10(b), or 11(b).

#### **SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.**

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party

has a history of a coercive or violent relationship with another prospective party.

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(c) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a process;  
and

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.

#### **SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW**

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

#### **SECTION 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.**

(a) Subject to Sections 18 and 19, a collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

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

(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 because of its disclosure or use in a collaborative law process.

#### **SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.**

(a) A privilege under Section 17 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 makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Section 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

#### **SECTION 19. LIMITS OF PRIVILEGE.**

(a) There is no privilege under Section 17 for a collaborative law communication that is:

(1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

(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, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Section 17 for a collaborative law communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional

misconduct or malpractice arising from or related to a collaborative law process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Section 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

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

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under Section 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

## **SECTION 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.**

(a) If an agreement fails to meet the requirements of Section 4, or a lawyer fails to

comply with Section 14 or 15, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they:

(1) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(2) reasonably believed they were participating in a collaborative law process.

(b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:

(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Sections 5, 6, 9, 10, and 11; and

(3) apply a privilege under Section 17.

**SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 22. 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 23. SEVERABILITY.** 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.]

***Legislative Note:** Include this section only if the state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

**SECTION 24. 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.*



**Link:** <http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=9870932050+0+0+0&WAIAction=retrieve>

## **California Family Code Section 2013**

2013. (a) If a written agreement is entered into by the parties, the parties may utilize a collaborative law process to resolve any matter governed by this code over which the court is granted jurisdiction pursuant to Section 2000.

(b) "Collaborative law process" means the process in which the parties and any professionals engaged by the parties to assist them agree in writing to use their best efforts and to make a good faith attempt to resolve disputes related to the family law matters as referenced in subdivision (a) on an agreed basis without resorting to adversary judicial intervention.

**Link:**

[http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter\\_50/Article\\_4.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_50/Article_4.html)

## **General Statutes of North Carolina**

### **Chapter 50**

#### **Article 4.**

##### **Collaborative Law Proceedings.**

##### **§ 50-70. Collaborative law.**

As an alternative to judicial disposition of issues arising in a civil action under this Article, except for a claim for absolute divorce, on a written agreement of the parties and their attorneys, a civil action may be conducted under collaborative law procedures as set forth in this Article. (2003-371, s. 1.)

##### **§ 50-71. Definitions.**

As used in this article, the following terms mean:

(1) Collaborative law. – A procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate. The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.

(2) Collaborative law agreement. – A written agreement, signed by a husband and wife and their attorneys, that contains an acknowledgement by the parties to attempt to resolve the disputes arising from their marriage in accordance with collaborative law procedures.

(3) Collaborative law procedures. – The process for attempting to resolve disputes arising from a marriage as set forth in this Article.

(4) Collaborative law settlement agreement. – An agreement entered into between a husband and wife as a result of collaborative law procedures that resolves the disputes arising from the marriage of the husband and wife.

(5) Third-party expert. – A person, other than the parties to a collaborative law agreement, hired pursuant to a collaborative law agreement to assist the parties in the resolution of their disputes. (2003-371, s. 1.)

##### **§ 50-72. Agreement requirements.**

A collaborative law agreement must be in writing, signed by all the parties to the agreement and their attorneys, and must include provisions for the withdrawal of all attorneys involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute. (2003-371, s. 1.)

##### **§ 50-73. Tolling of time periods.**

A validly executed collaborative law agreement shall toll all legal time periods applicable to legal rights and issues under law between the parties for the amount of time the collaborative law agreement remains in effect. This section applies to any applicable statutes of limitations, filing

deadlines, or other time limitations imposed by law or court rule, including setting a hearing or trial in the case, imposing discovery deadlines, and requiring compliance with scheduling orders. (2003-371, s. 1.)

**§ 50-74. Notice of collaborative law agreement.**

(a) No notice shall be given to the court of any collaborative law agreement entered into prior to the filing of a civil action under this Article. (b) If a civil action is pending, a notice of a collaborative law agreement,

signed by the parties and their attorneys, shall be filed with the court. After the filing of a notice of a collaborative law agreement, the court shall take no action in the case, including dismissal, unless the court is notified in writing that the parties have done one of the following:

(1) Failed to reach a collaborative law settlement agreement.

(2) Both voluntarily dismissed the action.

(3) Asked the court to enter a judgment or order to make the collaborative law settlement agreement an act of the court in accordance with G.S. 50-75. (2003-371, s. 1.)

**§ 50-75. Judgment on collaborative law settlement agreement.**

A party is entitled to an entry of judgment or order to effectuate the terms of a collaborative law settlement agreement if the agreement is signed by each party to the agreement. (2003-371, s. 1.)

**§ 50-76. Failure to reach settlement; disposition by court; duty of attorney to withdraw.**

(a) If the parties fail to reach a settlement and no civil action has been filed, either party may file a civil action, unless the collaborative law agreement first provides for the use of arbitration or alternative dispute resolution.

(b) If a civil action is pending and the collaborative law procedures do not result in a collaborative law settlement agreement, upon notice to the court, the court may enter orders as appropriate, free of the restrictions of G.S. 50-74(b).

(c) If a civil action is filed or set for trial pursuant to subsection (a) or (b) of this section, the attorneys representing the parties in the collaborative law proceedings may not represent either party in any further civil proceedings and shall withdraw as attorney for either party. (2003-371, s. 1.)

**§ 50-77. Privileged and inadmissible evidence.**

(a) All statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding. Work product includes any written or verbal communications or analysis of any third-party experts used in the collaborative law procedure.

(b) All communications and work product of any attorney or third-party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties. (2003-371, s. 1.)

**§ 50-78. Alternate dispute resolution permitted.**

Nothing in this Article shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternate dispute resolution, including mediation or binding arbitration, to reach a settlement on any of the issues included in the collaborative law agreement. The parties' attorneys for the collaborative law proceeding may also serve as counsel for any form of alternate dispute resolution pursued as part of the collaborative law agreement. (2003-371, s. 1.)

**§ 50-79. Collaborative law procedures surviving death.**

Consistent with G.S. 50-20(l), the personal representative of the estate of a deceased spouse may continue a collaborative law procedure with respect to equitable distribution that has been initiated by a collaborative law agreement prior to death, notwithstanding the death of one of the spouses. The provisions of G.S. 50-73 shall apply to time limits applicable under G.S. 50-20(l) for collaborative law procedures continued pursuant to this section. (2003-371, s. 1.)

Nevada

Enacted as Chapter 38, Uniform Collaborative Law Act, of NRS. Link:

[http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB91\\_EN.pdf](http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB91_EN.pdf) (enrolled version as signed by the Governor on May 13, 2011, effective January 1, 2013)

Legislative History: <http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=212>

**Text as Enacted:**

Assembly Bill No. 91–Assemblyman Segerblom

**CHAPTER.....**

AN ACT relating to collaborative law; enacting the Uniform Collaborative Law Act; establishing the requirements of a collaborative law participation agreement and the collaborative law process; establishing standards applicable to collaborative lawyers; providing that certain collaborative law communications are confidential and privileged; and providing other matters properly relating thereto.

**Legislative Counsel’s Digest:**

This bill enacts the Uniform Collaborative Law Act, as amended by the National Conference of Commissioners on Uniform State Laws in 2010, and aims to standardize the most important features of collaborative law, a form of alternative dispute resolution. Currently, collaborative law has largely been practiced under private collaborative law participation agreements developed by practice groups of private attorneys.

**Section 19** of this bill provides the minimum requirements for written agreements that allow parties to state their intention to resolve a matter through a collaborative law process. **Section 20** of this bill emphasizes that a party’s participation in collaborative law is voluntary and specifies when and how a collaborative law process begins and concludes. **Section 21** of this bill creates a stay of proceedings before a tribunal when parties sign an agreement to attempt to resolve a matter through collaborative law. **Section 23** of this bill authorizes the approval of agreements arising out of a collaborative law process. **Sections 24-26** of this bill: (1) provide that a collaborative lawyer is disqualified from representing a party to a collaborative matter before a tribunal in a proceeding related to the collaborative matter; (2) impute the disqualification to other lawyers in a law firm with which the collaborative lawyer is associated; and (3) provide exceptions to imputed disqualification under certain circumstances if the law firm is representing a low-income party for no fee or if the collaborative lawyer is representing a governmental agency.

**Section 27** of this bill requires parties to disclose relevant information during the collaborative law process without formal discovery requests and to update information previously disclosed that has materially changed. **Sections 29 and 30** of this bill impose certain duties on collaborative lawyers to disclose to and discuss with a prospective party the material risks and benefits of a collaborative law process and require collaborative lawyers to screen prospective parties for any history of a coercive or violent relationship with another party. **Sections 31-34** of this bill authorize parties to agree on the scope of confidentiality of their collaborative law communications, create an evidentiary privilege for collaborative law communications and provide for certain waivers of and limited exceptions to the evidentiary privilege.

Finally, **section 35** of this bill authorizes a tribunal or other body acting in an adjudicative capacity to enforce agreements that result from a collaborative law process and to apply the disqualification provisions and the evidentiary privileges provided for in this bill.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN

SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

**Section 1.** Chapter 38 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 37, inclusive, of this act.

**Sec. 2.** *Sections 2 to 37, inclusive, of this act may be cited as the Uniform Collaborative Law Act.*

**Sec. 3.** *As used in sections 2 to 37, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 4 to 18, inclusive, of this act have the meanings ascribed to them in those sections.*

**Sec. 4.** *“Collaborative law communication” means a statement, whether oral or in a record, or verbal or nonverbal, that:*

*1. Is made to conduct, participate in, continue or reconvene a collaborative law process; and*

*2. Occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.*

**Sec. 5.** *“Collaborative law participation agreement” means an agreement by persons to participate in a collaborative law process.*

**Sec. 6.** *“Collaborative law process” means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:*

*1. Sign a collaborative law participation agreement; and*

*2. Are represented by collaborative lawyers.*

**Sec. 7.** *“Collaborative lawyer” means a lawyer who represents a party in a collaborative law process.*

**Sec. 8.** *“Collaborative matter” means a dispute, transaction, claim, problem or issue for resolution, including a dispute, claim or issue in a proceeding which is described in a collaborative law participation agreement.*

**Sec. 9.** *“Law firm” means:*

*1. Lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited-liability company or association; and*

*2. Lawyers employed in a legal services organization, the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency or instrumentality.*

**Sec. 10.** *“Nonparty participant” means a person, other than a party and the collaborative lawyer of a party, that participates in a collaborative law process.*

**Sec. 11.** *“Party” means a person that signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.*

**Sec. 12.** *“Person” means an individual, corporation, business trust, estate, trust, partnership, limited-liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.*

**Sec. 13. “Proceeding” means:**

- 1. A judicial, administrative, arbitral or other adjudicative process before a tribunal, including related prehearing and posthearing motions, conferences and discovery; or*
- 2. A legislative hearing or similar process.*

**Sec. 14. “Prospective party” means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.**

**Sec. 15. “Record” means information which is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.**

**Sec. 16. “Related to a collaborative matter” means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim or issue as the collaborative matter.**

**Sec. 17. “Sign” means, with present intent to authenticate or adopt a record:**

- 1. To execute or adopt a tangible symbol; or*
- 2. To attach to or logically associate with the record an electronic symbol, sound or process.*

**Sec. 18. “Tribunal” means:**

- 1. A court, arbitrator, administrative agency or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter; or*
- 2. A legislative body conducting a hearing or similar process.*

**Sec. 19. 1. A collaborative law participation agreement must:**

- (a) Be in a record;*
- (b) Be signed by the parties;*
- (c) State the intention of the parties to resolve a collaborative matter through a collaborative law process under sections 2 to 37, inclusive, of this act;*
- (d) Describe the nature and scope of the collaborative matter;*
- (e) Identify the collaborative lawyer who represents each party in the collaborative law process; and*
- (f) Contain a statement by each collaborative lawyer confirming the lawyer’s representation of a party in the collaborative law process.*

*2. The parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with sections 2 to 37, inclusive, of this act.*

**Sec. 20. 1. A collaborative law process begins when the parties sign a collaborative law participation agreement.**

*2. A tribunal may not order a party to participate in a collaborative law process over the objection of that party.*

*3. A collaborative law process is concluded by a:*

- (a) Resolution of a collaborative matter as evidenced by a signed record;*
- (b) Resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the collaborative matter will not be resolved in the*

*collaborative law process; or*

*(c) Termination of the collaborative law process.*

*4. A collaborative law process terminates:*

*(a) When a party gives notice to other parties in a record that the collaborative law process is ended;*

*(b) When a party:*

*(1) Begins a proceeding related to a collaborative matter without the agreement of all parties; or*

*(2) In a pending proceeding related to the collaborative matter:*

*(I) Initiates a pleading, motion, order to show cause or request for a conference with the tribunal;*

*(II) Requests that the proceeding be put on the tribunal's active calendar; or*

*(III) Takes similar action requiring notice to be sent to the parties; or*

*(c) Except as otherwise provided in subsection 7, when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.*

*5. The collaborative lawyer of a party shall give prompt notice to all other parties in a record of the discharge or withdrawal of the collaborative lawyer.*

*6. A party may terminate a collaborative law process with or without cause.*

*7. Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues if, not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection 5 is sent to the parties:*

*(a) The unrepresented party engages a successor collaborative lawyer; and*

*(b) In a signed record:*

*(1) The parties consent to continue the process by reaffirming the collaborative law participation agreement;*

*(2) The agreement is amended to identify the successor collaborative lawyer; and*

*(3) The successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.*

*8. A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.*

*9. A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.*

**Sec. 21. 1.** *The persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties to the collaborative law participation agreement shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection 3 and sections 22 and 23 of this act, the filing operates as an application for a stay of the proceeding.*



*2. The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection 1 is lifted when the notice is filed. The notice must not specify any reason for termination of the process.*

*3. A tribunal in which a proceeding is stayed under subsection 1 may require parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report must include only information on whether the process is ongoing or concluded. It must not include a report, assessment, evaluation, recommendation, finding or other communication regarding a collaborative law process or collaborative law matter.*

*4. A tribunal may not consider a communication made in violation of subsection 3.*

*5. A tribunal shall provide the parties with notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative law process is filed based on delay or failure to prosecute.*

**Sec. 22.** *During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare or interest of a party or a member of the family or the household of a party.*

**Sec. 23.** *A tribunal may approve an agreement resulting from a collaborative law process.*

**Sec. 24. 1.** *Except as otherwise provided in subsection 3, a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.*

*2. Except as otherwise provided in subsection 3 and sections 25 and 26 of this act, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection 1.*

*3. A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:*

*(a) To ask a tribunal to approve an agreement resulting from the collaborative law process; or*

*(b) To seek or defend an emergency order to protect the health, safety, welfare or interest of a party, or a member of the family or the household of a party, if a successor lawyer is not immediately available to represent that person.*

*4. A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party, or a member of the family or the household of a party, under paragraph (b) of subsection 3 only until that person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare or interest of that person.*

**Sec. 25. 1.** *The disqualification of a collaborative lawyer under subsection 1 of section 24 of this act applies to a*

*collaborative lawyer representing a party with or without fee.*

*2. After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer who is disqualified under subsection 1 of section 24 of this act is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:*

*(a) The party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;*

*(b) The collaborative law participation agreement so provides; and*

*(c) The collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.*

**Sec. 26. 1.** *The disqualification of a collaborative lawyer under subsection 1 of section 24 of this act applies to a collaborative lawyer representing a party that is a government or a governmental subdivision, agency or instrumentality.*

*2. After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or a governmental subdivision, agency or instrumentality in the collaborative matter or a matter related to the collaborative matter if:*

*(a) The collaborative law participation agreement so provides; and*

*(b) The collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.*

**Sec. 27.** *Except as otherwise provided by specific statute, during the collaborative law process, on the request of another party, a party shall make timely, full, candid and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall promptly update previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.*

**Sec. 28.** *The provisions of sections 2 to 37, inclusive, of this act do not affect:*

*1. The professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or*

*2. The obligation of a person to report abuse or neglect, abandonment or exploitation of a child or adult under the laws of this State.*

**Sec. 29.** *Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:*

*1. Assess with the prospective party factors that the lawyer reasonably believes relate to whether a collaborative law process is*

*appropriate for the prospective party's matter;*

*2. Provide the prospective party with information that the lawyer reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration or expert evaluation; and*

*3. Advise the prospective party that:*

*(a) After a collaborative law participation agreement is signed, the collaborative law process terminates if a party initiates a proceeding or seeks the intervention of a tribunal in a pending proceeding related to the collaborative matter;*

*(b) Participation in a collaborative law process is voluntary, and any party has the right to terminate unilaterally a collaborative law process with or without cause; and*

*(c) The collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by subsection 3 of section 24 of this act, subsection 2 of section 25 of this act or subsection 2 of section 26 of this act.*

**Sec. 30.** *1. Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer must make reasonable inquiry into whether the prospective party has a history of a coercive or violent relationship with another prospective party.*

*2. Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.*

*3. If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer shall not begin or continue a collaborative law process unless:*

*(a) The party or the prospective party requests beginning or continuing the collaborative law process; and*

*(b) The collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during the process.*

**Sec. 31.** *A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by specific statute.*

**Sec. 32.** *1. Except as otherwise provided in sections 33 and 34 of this act, a collaborative law communication is privileged under subsection 2, is not subject to discovery and is not admissible in evidence.*

*2. In a proceeding, the following privileges apply:*

*(a) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication; and*

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

*3. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.*

**Sec. 33.** *1. A privilege under section 32 of this act 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.*

*2. A person that makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under section 32 of this act, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.*

**Sec. 34.** *1. There is no privilege under section 32 of this act for a collaborative law communication that is:*

*(a) Available to the public under chapter 239 of NRS or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;*

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

*(c) Intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or*

*(d) Set forth in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.*

*2. The privileges under section 32 of this act for a collaborative law communication do not apply to the extent that the communication is:*

*(a) Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or*

*(b) Sought or offered to prove or disprove abuse, neglect, abandonment or exploitation of a child or adult, unless an agency which provides child welfare services, as defined in NRS 432B.030, or the Aging and Disability Services Division of the Department of Health and Human Services is a party to or otherwise participates in the collaborative law process.*

*3. There is no privilege under section 32 of this act if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality and the collaborative law communication is sought or offered in:*

*(a) A court proceeding involving a felony or misdemeanor; or*

*(b) A proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.*

*4. If a collaborative law communication is subject to an exception under subsection 2 or 3, only the part of the communication necessary for the application of the exception may be disclosed or admitted into evidence.*

*5. Disclosure or admission of evidence excepted from the privilege under subsection 2 or 3 does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.*

*6. The privileges under section 32 of this act do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.*

**Sec. 35.** *1. If a collaborative law participation agreement fails to meet the requirements of section 19 of this act, or if a prospective collaborative lawyer fails to comply with section 29 or 30 of this act, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if the parties:*

*(a) Signed a record indicating an intention to enter into a collaborative law participation agreement; and*

*(b) Reasonably believed they were participating in a collaborative law process.*

*2. If a tribunal makes the findings specified in subsection 1 and the interests of justice require, the tribunal may:*

*(a) Enforce an agreement evidenced by a record resulting from the process in which the parties participated;*

*(b) Apply the disqualification provisions of sections 24, 25 and 26 of this act; and*

*(c) Apply the privileges under section 32 of this act.*

**Sec. 36.** *In applying and construing the Uniform Collaborative Law Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.*

**Sec. 37.** *Sections 2 to 37, inclusive, of this act modify, limit and supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., but do not modify, limit or supersede Section 101(c) of that Act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that Act, 15 U.S.C. § 7003(b).*

**Sec. 38.** Sections 2 to 37, inclusive, of this act apply to a collaborative law participation agreement that is signed on or after January 1, 2013.

**Sec. 39.** This act becomes effective on January 1, 2013.

Enacted as Title 1-A, Collaborative Family Law, Chapter 15, Collaborative Family Law Act, of the Texas Family Code. Link:

<http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB03833F.pdf#navpanes=0> (enrolled version as signed by the Governor on June 17, 2011, effective September 1, 2011)

Legislative History: <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB3833>

**Text as Enacted:**

H.B. No. 3833

AN ACT

relating to the adoption of a uniform collaborative law Act in regard to family law matters.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The Family Code is amended by adding Title 1-A to read as follows:

TITLE 1-A. COLLABORATIVE FAMILY LAW

CHAPTER 15. COLLABORATIVE FAMILY LAW ACT

SUBCHAPTER A. APPLICATION AND CONSTRUCTION

Sec. 15.001. POLICY. It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including disputes involving the conservatorship of, possession of or access to, and support of a child, and the early settlement of pending litigation through voluntary settlement procedures.

Sec. 15.002. CONFLICTS BETWEEN PROVISIONS. If a provision of this chapter conflicts with another provision of this code or another statute or rule of this state and the conflict cannot be reconciled, this chapter prevails.

Sec. 15.003. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact a collaborative law process Act for family law matters.

Sec. 15.004. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This chapter 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)).

[Sections 15.005-15.050 reserved for expansion]

SUBCHAPTER B. GENERAL PROVISIONS

Sec. 15.051. SHORT TITLE. This chapter may be cited as the Collaborative Family Law Act.

Sec. 15.052. DEFINITIONS. In this chapter:

(1) "Collaborative family law communication" means a statement made by a party or nonparty participant, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative family law process; and

(B) occurs after the parties sign a collaborative family law participation agreement and before the collaborative family law process is concluded.

(2) "Collaborative family law participation agreement" means an agreement by persons to participate in a collaborative family law process.

(3) "Collaborative family law matter" means a dispute, transaction, claim, problem, or issue for resolution that arises under Title 1 or 5 and that is described in a collaborative family

law participation agreement. The term includes a dispute, claim, or issue in a proceeding.

(4) "Collaborative family law process" means a procedure intended to resolve a collaborative family law matter without intervention by a tribunal in which parties:

(A) sign a collaborative family law participation agreement; and

(B) are represented by collaborative family law lawyers.

(5) "Collaborative lawyer" means a lawyer who represents a party in a collaborative family law process.

(6) "Law firm" means:

(A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(B) lawyers employed in a legal services organization or in the legal department of a corporation or other organization or of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, including a collaborative lawyer, other than a party, who participates in a collaborative family law process.

(8) "Party" means a person who signs a collaborative family law participation agreement and whose consent is necessary to resolve a collaborative family law matter.

(9) "Proceeding" means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and posthearing motions, conferences, and discovery.

(10) "Prospective party" means a person who discusses with a prospective collaborative lawyer the possibility of signing a collaborative family law participation agreement.

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

(12) "Related to a collaborative family law matter" means a matter involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative family law matter.

(13) "Sign" means, with present intent to authenticate or adopt a record, to:

(A) execute or adopt a tangible symbol; or

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

(14) "Tribunal" means a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter.

Sec. 15.053. APPLICABILITY. This chapter applies only to a matter arising under Title 1 or 5.

[Sections 15.054-15.100 reserved for expansion]

#### SUBCHAPTER C. COLLABORATIVE FAMILY LAW PROCESS

Sec. 15.101. REQUIREMENTS FOR COLLABORATIVE FAMILY LAW PARTICIPATION AGREEMENT. (a) A collaborative family law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intent to resolve a collaborative family law matter through a collaborative family law process under this chapter;

(4) describe the nature and scope of the collaborative family law matter;

(5) identify the collaborative lawyer who represents

each party in the collaborative family law process; and

(6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative family law process.

(b) A collaborative family law participation agreement must include provisions for:

(1) suspending tribunal intervention in the collaborative family law matter while the parties are using the collaborative family law process; and

(2) unless otherwise agreed in writing, jointly engaging any professionals, experts, or advisors serving in a neutral capacity.

(c) Parties may agree to include in a collaborative family law participation agreement additional provisions not inconsistent with this chapter.

Sec. 15.102. BEGINNING AND CONCLUDING COLLABORATIVE FAMILY LAW PROCESS. (a) A collaborative family law process begins when the parties sign a collaborative family law participation agreement.

(b) A tribunal may not order a party to participate in a collaborative family law process over that party's objection.

(c) A collaborative family law process is concluded by:

(1) resolution of a collaborative family law matter as evidenced by a signed record;

(2) resolution of a part of a collaborative family law matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process under Subsection (d).

(d) A collaborative family law process terminates:

(1) when a party gives notice to other parties in a record that the process is ended;

(2) when a party:

(A) begins a proceeding related to a collaborative family law matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) without the agreement of all parties, initiates a pleading, motion, or request for a conference with the tribunal;

(ii) initiates an order to show cause or requests that the proceeding be put on the tribunal's active calendar; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by Subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party's collaborative lawyer shall give prompt notice in a record to all other parties of the collaborative lawyer's discharge or withdrawal.

(f) A party may terminate a collaborative family law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative family law process continues if, not later than the 30th day after the date the notice of the collaborative lawyer's discharge or withdrawal required by Subsection (e) is sent to the parties:

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

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative family law participation



agreement;

(B) the agreement is amended to identify the successor collaborative lawyer; and

(C) the successor collaborative lawyer confirms the lawyer 's representation of a party in the collaborative process.

(h) A collaborative family law process does not conclude if, with the consent of the parties to a signed record resolving all or part of the collaborative matter, a party requests a tribunal to approve a resolution of the collaborative family law matter or any part of that matter as evidenced by a signed record.

(i) A collaborative family law participation agreement may provide additional methods of concluding a collaborative family law process.

Sec. 15.103. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT. (a) The parties to a proceeding pending before a tribunal may sign a collaborative family law participation agreement to seek to resolve a collaborative family law matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after the agreement is signed. Subject to Subsection (c) and Sections 15.104 and 15.105, the filing operates as a stay of the proceeding.

(b) A tribunal that is notified, not later than the 30th day before the date of a proceeding, that the parties are using the collaborative family law process to attempt to settle a collaborative family law matter may not, until a party notifies the tribunal that the collaborative family law process did not result in a settlement:

(1) set a proceeding or a hearing in the collaborative family law matter;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the proceeding.

(c) The parties shall notify the tribunal in a pending proceeding if the collaborative family law process results in a settlement. If the collaborative family law process does not result in a settlement, the parties shall file a status report:

(1) not later than the 180th day after the date the collaborative family law participation agreement was signed or, if the proceeding was filed by agreement after the collaborative family law participation agreement was signed, not later than the 180th day after the date the proceeding was filed; and

(2) on or before the first anniversary of the date the collaborative family law participation agreement was signed or, if the proceeding was filed by agreement after the collaborative family law participation agreement was signed, on or before the first anniversary of the date the proceeding was filed, accompanied by a motion for continuance.

(d) The tribunal shall grant a motion for continuance filed under Subsection (c)(2) if the status report indicates that the parties desire to continue to use the collaborative family law process.

(e) If the collaborative family law process does not result in a settlement on or before the second anniversary of the date the proceeding was filed, the tribunal may:

(1) set the proceeding for trial on the regular docket; or

(2) dismiss the proceeding without prejudice.

(f) Each party shall file promptly with the tribunal notice in a record when a collaborative family law process concludes. The stay of the proceeding under Subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(g) A tribunal in which a proceeding is stayed under

Subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative family law process and the proceeding. A status report:

(1) may include only information on whether the process is ongoing or concluded; and

(2) may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative family law process or collaborative family law matter.

(h) A tribunal may not consider a communication made in violation of Subsection (g).

(i) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding based on delay or failure to prosecute in which a notice of collaborative family law process is filed.

Sec. 15.104. EMERGENCY ORDER. During a collaborative family law process, a tribunal may issue an emergency order to protect the health, safety, welfare, or interest of a party or a family, as defined by Section 71.003. If the emergency order is granted without the agreement of all parties, the granting of the order terminates the collaborative process.

Sec. 15.105. EFFECT OF WRITTEN SETTLEMENT AGREEMENT. (a) A settlement agreement under this chapter is enforceable in the same manner as a written settlement agreement under Section 154.071, Civil Practice and Remedies Code.

(b) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative family law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the collaborative lawyer of each party.

Sec. 15.106. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM; EXCEPTION. (a) In this section, "family" has the meaning assigned by Section 71.003.

(b) Except as provided by Subsection (d), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative family law matter regardless of whether the collaborative lawyer is representing the party for a fee.

(c) Except as provided by Subsection (d) and Sections 15.107 and 15.108, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative family law matter if the collaborative lawyer is disqualified from doing so under Subsection (b).

(d) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to request a tribunal to approve an agreement resulting from the collaborative family law process; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party or a family if a successor lawyer is not immediately available to represent that party.

(e) The exception prescribed by Subsection (d) does not apply after the party is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that party or family.

Sec. 15.107. EXCEPTION FROM DISQUALIFICATION FOR REPRESENTATION OF LOW-INCOME PARTIES. After a collaborative family law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Section 15.106(b) is

associated may represent a party without a fee in the collaborative family law matter or a matter related to the collaborative family law matter if:

- (1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;
- (2) the collaborative family law participation agreement authorizes that representation; and
- (3) the collaborative lawyer is isolated from any participation in the collaborative family law matter or a matter related to the collaborative family law matter through procedures within the law firm that are reasonably calculated to isolate the collaborative lawyer from such participation.

Sec. 15.108. GOVERNMENTAL ENTITY AS PARTY. (a) In this section, "governmental entity" has the meaning assigned by Section 101.014.

(b) The disqualification prescribed by Section 15.106(b) applies to a collaborative lawyer representing a party that is a governmental entity.

(c) After a collaborative family law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a governmental entity in the collaborative family law matter or a matter related to the collaborative family law matter if:

- (1) the collaborative family law participation agreement authorizes that representation; and
- (2) the collaborative lawyer is isolated from any participation in the collaborative family law matter or a matter related to the collaborative family law matter through procedures within the law firm that are reasonably calculated to isolate the collaborative lawyer from such participation.

Sec. 15.109. DISCLOSURE OF INFORMATION. (a) Except as provided by law other than this chapter, during the collaborative family law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party shall update promptly any previously disclosed information that has materially changed.

(b) The parties may define the scope of the disclosure under Subsection (a) during the collaborative family law process.

Sec. 15.110. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED. This chapter does not affect:

- (1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or
- (2) the obligation of a person under other law to report abuse or neglect, abandonment, or exploitation of a child or adult.

Sec. 15.111. INFORMED CONSENT. Before a prospective party signs a collaborative family law participation agreement, a prospective collaborative lawyer must:

- (1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative family law process is appropriate for the prospective party's matter;
- (2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative family law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, including litigation, mediation, arbitration, or expert evaluation; and
- (3) advise the prospective party that:
  - (A) after signing an agreement, if a party initiates a proceeding or seeks tribunal intervention in a pending

proceeding related to the collaborative family law matter, the collaborative family law process terminates;

(B) participation in a collaborative family law process is voluntary and any party has the right to terminate unilaterally a collaborative family law process with or without cause; and

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative family law matter, except as authorized by Section 15.106(d), 15.107, or 15.108(c).

Sec. 15.112. FAMILY VIOLENCE. (a) In this section:

(1) "Dating relationship" has the meaning assigned by Section 71.0021(b).

(2) "Family violence" has the meaning assigned by Section 71.004.

(3) "Household" has the meaning assigned by Section 71.005.

(4) "Member of a household" has the meaning assigned by Section 71.006.

(b) Before a prospective party signs a collaborative family law participation agreement in a collaborative family law matter in which another prospective party is a member of the prospective party's family or household or with whom the prospective party has or has had a dating relationship, a prospective collaborative lawyer must make reasonable inquiry regarding whether the prospective party has a history of family violence with the other prospective party.

(c) If a collaborative lawyer reasonably believes that the party the lawyer represents, or the prospective party with whom the collaborative lawyer consults, as applicable, has a history of family violence with another party or prospective party, the lawyer may not begin or continue a collaborative family law process unless:

(1) the party or prospective party requests beginning or continuing a process; and

(2) the collaborative lawyer or prospective collaborative lawyer determines with the party or prospective party what, if any, reasonable steps could be taken to address the concerns regarding family violence.

Sec. 15.113. CONFIDENTIALITY OF COLLABORATIVE FAMILY LAW COMMUNICATION. (a) A collaborative family law communication is confidential to the extent agreed to by the parties in a signed record or as provided by law other than this chapter.

(b) If the parties agree in a signed record, the conduct and demeanor of the parties and nonparty participants, including their collaborative lawyers, are confidential.

(c) If the parties agree in a signed record, communications related to the collaborative family law matter occurring before the signing of the collaborative family law participation agreement are confidential.

Sec. 15.114. PRIVILEGE AGAINST DISCLOSURE OF COLLABORATIVE FAMILY LAW COMMUNICATION. (a) Except as provided by Section 15.115, a collaborative family law communication, whether made before or after the institution of a proceeding, is privileged and not subject to disclosure and may not be used as evidence against a

party or nonparty participant in a proceeding.

(b) Any record of a collaborative family law communication is privileged, and neither the parties nor the nonparty participants may be required to testify in a proceeding related to or arising out of the collaborative family law matter or be subject to a process requiring disclosure of privileged information or data related to the collaborative matter.

(c) An oral communication or written material used in or made a part of a collaborative family law process is admissible or discoverable if it is admissible or discoverable independent of the collaborative family law process.

(d) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of privilege may be presented to the tribunal having jurisdiction of the proceeding to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the tribunal or whether the communications or materials are subject to disclosure. The presentation of the issue of privilege under this subsection does not constitute a termination of the collaborative family law process under Section 15.102(d)(2)(B).

(e) A party or nonparty participant may disclose privileged collaborative family law communications to a party's successor counsel, subject to the terms of confidentiality in the collaborative family law participation agreement. Collaborative family law communications disclosed under this subsection remain privileged.

(f) A person who makes a disclosure or representation about a collaborative family law communication that prejudices the rights of a party or nonparty participant in a proceeding may not assert a privilege under this section. The restriction provided by this subsection applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Sec. 15.115. LIMITS OF PRIVILEGE. (a) The privilege prescribed by Section 15.114 does not apply to a collaborative family law communication that is:

(1) in an agreement resulting from the collaborative family law process, evidenced in a record signed by all parties to the agreement;

(2) subject to an express waiver of the privilege in a record or orally during a proceeding if the waiver is made by all parties and nonparty participants;

(3) available to the public under Chapter 552, Government Code, or made during a session of a collaborative family law process that is open, or is required by law to be open, to the public;

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

(5) a disclosure of a plan to commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(6) a disclosure in a report of:

(A) suspected abuse or neglect of a child to an appropriate agency under Subchapter B, Chapter 261, or in a proceeding regarding the abuse or neglect of a child, except that evidence may be excluded in the case of communications between an attorney and client under Subchapter C, Chapter 261; or

(B) abuse, neglect, or exploitation of an elderly or disabled person to an appropriate agency under Subchapter B, Chapter 48, Human Resources Code; or

(7) sought or offered to prove or disprove:

(A) a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative family law process;

(B) an allegation that the settlement agreement was procured by fraud, duress, coercion, or other dishonest means or that terms of the settlement agreement are illegal;

(C) the necessity and reasonableness of attorney's fees and related expenses incurred during a collaborative family law process or to challenge or defend the enforceability of the collaborative family law settlement

agreement; or

(D) a claim against a third person who did not participate in the collaborative family law process.

(b) If a collaborative family law communication is subject to an exception under Subsection (a), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(c) The disclosure or admission of evidence excepted from the privilege under Subsection (a) does not make the evidence or any other collaborative family law communication discoverable or admissible for any other purpose.

Sec. 15.116. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE. (a) Notwithstanding that an agreement fails to meet the requirements of Section 15.101 or that a lawyer has failed to comply with Section 15.111 or 15.112, a tribunal may find that the parties intended to enter into a collaborative family law participation agreement if the parties:

(1) signed a record indicating an intent to enter into a collaborative family law participation agreement; and

(2) reasonably believed the parties were participating in a collaborative family law process.

(b) If a tribunal makes the findings specified in Subsection (a) and determines that the interests of justice require the following action, the tribunal may:

(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Sections 15.106, 15.107, and 15.108; and

(3) apply the collaborative family law privilege under Section 15.114.

SECTION 2. Sections 6.603 and 153.0072, Family Code, are repealed.

SECTION 3. Title 1-A, Family Code, as added by this Act, applies only to a collaborative family law participation agreement signed on or after the effective date of this Act. A collaborative family law participation agreement signed before that date is governed by the law in effect on the date the agreement was signed, and the former law is continued in effect for that purpose.

SECTION 4. This Act takes effect September 1, 2011.

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President of the Senate Speaker of the House  
I certify that H.B. No. 3833 was passed by the House on May 13, 2011, by the following vote: Yeas 138, Nays 0, 1 present, not voting.

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Chief Clerk of the House  
I certify that H.B. No. 3833 was passed by the Senate on May 24, 2011, by the following vote: Yeas 30, Nays 0.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor

1

## UNIFORM COLLABORATIVE LAW ACT

2

2010 GENERAL SESSION

3

STATE OF UTAH

4

**Chief Sponsor: Lorie D. Fowlke**

5

Senate Sponsor: Lyle W. Hillyard

6

7 **LONG TITLE**

8 **General Description:**

9 This bill creates the Utah Uniform Collaborative Law Act.

10 **Highlighted Provisions:**

11 This bill:

12 . establishes minimum requirements for collaborative law participation  
agreements,

13 including written agreements, description of the matter submitted to a  
collaborative

14 law process, and designation of collaborative lawyers;

15 . requires that the collaborative law process be voluntary;

16 . specifies when and how a collaborative law process begins and is  
terminated;

17 . creates a stay of proceedings when parties sign a participation agreement to  
attempt

18 to resolve a matter related to a proceeding pending before a tribunal while  
allowing

19 the tribunal to ask for periodic status reports;

20 . creates an exception to the stay of proceedings for a collaborative law  
process for

21 emergency orders to protect health, safety, welfare, or interests of a party, a family

22 member, or a dependent;  
23 . authorizes courts to approve settlements arising out of a collaborative law  
process;  
24 . codifies the disqualification requirement of collaborative lawyers if a  
collaborative  
25 law process terminates;  
26 . defines the scope of the disqualification requirement to both the matter  
specified in  
27 the collaborative law participation agreement and to matters related to the  
28 collaborative matter;  
29 . extends the disqualification requirement to lawyers in a law firm with which  
the

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30 collaborative lawyer is associated;  
31 . requires parties to a collaborative law participation agreement to voluntarily  
32 disclose relevant information during the collaborative law process without formal  
33 discovery requests and update information previously disclosed that has materially  
34 changed;  
35 . acknowledges that standards of professional responsibility and child abuse  
36 reporting for lawyers and other professionals are not changed by their  
participation  
37 in a collaborative law process;  
38 . requires that lawyers disclose and discuss the material risks and benefits of a  
39 collaborative law process to help insure parties enter into collaborative law  
40 participation agreements with informed consent;  
41 . creates an obligation on collaborative lawyers to screen clients for domestic  
42 violence and, if present, to participate in a collaborative law process only if the  
43 victim consents and the lawyer is reasonably confident that the victim will be safe;  
44 and  
45 . authorizes parties to reach an agreement on the scope of confidentiality of  
their

46 collaborative law communications.

47 **Monies Appropriated in this Bill:**

48 None

49 **Other Special Clauses:**

50 None

51 **Utah Code Sections Affected:**

52 ENACTS:

53 **78B-19-101**, Utah Code Annotated 1953

54 **78B-19-102**, Utah Code Annotated 1953

55 **78B-19-103**, Utah Code Annotated 1953



56       **78B-19-104**, Utah Code Annotated 1953  
57       **78B-19-105**, Utah Code Annotated 1953

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58       **78B-19-106**, Utah Code Annotated 1953  
59       **78B-19-107**, Utah Code Annotated 1953  
60       **78B-19-108**, Utah Code Annotated 1953  
61       **78B-19-109**, Utah Code Annotated 1953  
62       **78B-19-110**, Utah Code Annotated 1953  
63       **78B-19-111**, Utah Code Annotated 1953  
64       **78B-19-112**, Utah Code Annotated 1953  
65       **78B-19-113**, Utah Code Annotated 1953  
66       **78B-19-114**, Utah Code Annotated 1953  
67       **78B-19-115**, Utah Code Annotated 1953  
68       **78B-19-116**, Utah Code Annotated 1953

69

70       *Be it enacted by the Legislature of the state of Utah:*

71       Section 1. Section **78B-19-101** is enacted to read:

72

## **CHAPTER 19. UTAH UNIFORM COLLABORATIVE LAW ACT**

73       **78B-19-101. Title.**

74       *This chapter may be cited as the "Utah Uniform Collaborative Law Act."*

75       Section 2. Section **78B-19-102** is enacted to read:

76       **78B-19-102. Definitions.**

77       *In this chapter:*

78       (1) "Collaborative law communication" means a statement, whether oral or in a  
*record,*

79       or verbal or nonverbal, that:

80       (a) is made to conduct, participate in, continue, or reconvene a collaborative  
*law*

81       process; and

82       (b) occurs after the parties sign a collaborative law participation agreement  
*and before*

83       the collaborative law process is concluded.

84       (2) "Collaborative law participation agreement" means an agreement by  
*persons to*

85       participate in a collaborative law process.

---

86       (3) "Collaborative law process" means a procedure intended to resolve a  
*collaborative*

87       matter without intervention by a tribunal in which persons:

88       (a) sign a collaborative law participation agreement; and

89 (b) are represented by collaborative lawyers.  
90 (4) "Collaborative lawyer" means a lawyer who represents a party in a  
collaborative  
91 law process.  
92 (5) "Collaborative matter" means a dispute, transaction, claim, problem, or  
issue for  
93 resolution described in a collaborative law participation agreement.  
94 (6) "Law firm" means:  
95 (a) lawyers who practice law together in a partnership, professional  
corporation, sole  
96 proprietorship, limited liability company, or association;  
97 (b) lawyers employed in a legal services organization;  
98 (c) the legal department of a corporation or other organization; or  
99 (d) the legal department of a government or governmental subdivision, agency,  
or  
100 instrumentality.  
101 (7) "Nonparty participant" means a person, other than a party and the party's  
102 collaborative lawyer, that participates in a collaborative law process.  
103 (8) "Party" means a person that signs a collaborative law participation  
agreement and  
104 whose consent is necessary to resolve a collaborative matter.  
105 (9) "Person" means an individual, corporation, business trust, estate, trust,  
partnership,  
106 limited liability company, association, joint venture, public corporation,  
government or  
107 governmental subdivision, agency, or instrumentality, or any other legal or  
commercial entity.  
108 (10) "Proceeding" means:  
109 (a) a judicial, administrative, arbitral, or other adjudicative process before a  
tribunal,  
110 including related pre-hearing and post-hearing motions, conferences, and  
discovery; or  
111 (b) a legislative hearing or similar process.  
112 (11) "Prospective party" means a person that discusses with a prospective  
113 collaborative lawyer the possibility of signing a collaborative law participation  
agreement.

---

114 (12) "Record" means information that is inscribed on a tangible medium or  
that is  
115 stored in an electronic or other medium and is retrievable in perceivable form.  
116 (13) "Related to a collaborative matter" means involving the same parties,  
transaction  
117 or occurrence, nucleus of operative fact, dispute, claim, or issue as the

collaborative matter.

- 118 (14) "Sign" means, with present intent to authenticate or adopt a record:  
119 (a) to execute or adopt a tangible symbol; or  
120 (b) to attach to or logically associate with the record an electronic symbol,

sound, or

121 process.

122 (15) "Tribunal" means:

123 (a) a court, arbitrator, administrative agency, or other body acting in an

adjudicative

124 capacity which, after presentation of evidence or legal argument, has

jurisdiction to render a

125 decision affecting a party's interests in a matter; or

126 (b) a legislative body conducting a hearing or similar process.

127 Section 3. Section **78B-19-103** is enacted to read:

128 **78B-19-103. Applicability.**

129 This chapter applies to a collaborative law participation agreement that meets

the

130 requirements of Section 78B-19-104 signed on or after May 11, 2010.

131 Section 4. Section **78B-19-104** is enacted to read:

132 **78B-19-104. Collaborative law participation agreement -- Requirements.**

133 (1) A collaborative law participation agreement must:

134 (a) be in a record;

135 (b) be signed by the parties;

136 (c) state the parties' intention to resolve a collaborative matter through a

collaborative

137 law process under this chapter;

138 (d) describe the nature and scope of the matter;

139 (e) identify the collaborative lawyer who represents each party in the process;

and

140 (f) contain a statement by each collaborative lawyer confirming the lawyer's

141 representation of a party in the collaborative law process.

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142 (2) Parties may agree to include in a collaborative law participation

agreement

143 additional provisions not inconsistent with this chapter.

144 Section 5. Section **78B-19-105** is enacted to read:

145 **78B-19-105. Beginning and concluding a collaborative law process.**

146 (1) A collaborative law process begins when the parties sign a collaborative

law

147 participation agreement.

148 (2) A tribunal may not order a party to participate in a collaborative law

process over

149 that party's objection.  
150 (3) A collaborative law process is concluded by a:  
151 (a) resolution of a collaborative matter as evidenced by a signed record;  
152 (b) resolution of a part of the collaborative matter, evidenced by a signed  
record, in  
153 which the parties agree that the remaining parts of the matter will not be  
resolved in the  
154 process; or  
155 (c) termination of the process.  
156 (4) A collaborative law process terminates:  
157 (a) when a party gives notice to other parties in a record that the process is  
ended; or  
158 (b) when a party:  
159 (i) begins a proceeding related to a collaborative matter without the  
agreement of all  
160 parties; or  
161 (ii) in a pending proceeding related to the matter:  
162 (A) initiates a pleading, motion, order to show cause, or request for a  
conference with  
163 the tribunal;  
164 (B) requests that the proceeding be put on the tribunal's calendar; or  
165 (C) takes similar action requiring notice to be sent to the parties; or  
166 (c) except as otherwise provided by Subsection (5), when a party discharges a  
167 collaborative lawyer or a collaborative lawyer withdraws from further  
representation of a party.  
168 (5) A party's collaborative lawyer shall give prompt notice to all other parties  
of a  
169 discharge or withdrawal, in accordance with the Rules of Civil Procedure.

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170 (6) A party may terminate a collaborative law process with or without cause.  
171 (7) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a  
172 collaborative law process continues, if not later than 30 days after the date that  
the notice of  
173 the discharge or withdrawal of a collaborative lawyer required by Subsection  
(4)(c) is sent to  
174 the parties:  
175 (a) the unrepresented party engages a successor collaborative lawyer; and  
176 (b) in a signed record:  
177 (i) the parties consent to continue the process by reaffirming the collaborative  
law  
178 participation agreement;  
179 (ii) the agreement is amended to identify the successor collaborative lawyer;  
and

180 (iii) the successor collaborative lawyer confirms the lawyer's representation of  
a party  
181 in the collaborative process.  
182 (8) A collaborative law process does not conclude if, with the consent of the  
parties, a  
183 party requests a tribunal to approve a resolution of the collaborative matter or  
any part thereof  
184 as evidenced by a signed record.  
185 (9) A collaborative law participation agreement may provide additional  
methods of  
186 concluding a collaborative law process.  
187 Section 6. Section **78B-19-106** is enacted to read:  
188 **78B-19-106. Proceedings pending before tribunal -- Status report.**  
189 (1) Persons in a proceeding pending before a tribunal may sign a  
collaborative law  
190 participation agreement to seek to resolve a collaborative matter related to the  
proceeding.  
191 Parties shall file promptly with the tribunal a notice of the agreement after it is  
signed. Subject  
192 to Subsection (3) and Sections 78B-19-107 and 78B-19-108 , the filing shall  
include a request  
193 for a stay of the proceeding.  
194 (2) Parties shall file promptly with the tribunal notice in a record when a  
collaborative  
195 law process concludes and request the stay to be lifted. The notice may not  
specify any reason  
196 for termination of the process.  
197 (3) A tribunal in which a proceeding is stayed under Subsection (1) may  
require  

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198 parties and collaborative lawyers to provide a status report on the collaborative  
law process  
199 and the proceeding. A status report may include only information on whether the  
process is  
200 ongoing or concluded. It may not include a report, assessment, evaluation,  
recommendation,  
201 finding, or other communication regarding a collaborative law process or  
collaborative law  
202 matter.  
203 (4) A tribunal shall provide parties notice and an opportunity to be heard  
before  
204 dismissing a proceeding in which a notice of collaborative process is filed based  
on delay or

205 failure to prosecute.  
 206 Section 7. Section **78B-19-107** is enacted to read:  
 207 **78B-19-107. Emergency orders.**  
 208 During a collaborative law process, a court may issue emergency orders,  
 including  
 209 protective orders in accordance with Title 78B, Chapter 7, Part 1, Cohabitant  
 Abuse Act, or  
 210 Part 2, Child Protective Orders, to protect the health, safety, welfare, or interest  
 of a party or  
 211 member of a party's household.  
 212 Section 8. Section **78B-19-108** is enacted to read:  
 213 **78B-19-108. Approval of agreement by tribunal.**  
 214 A court may approve an agreement resulting from a collaborative law  
 process.  
 215 Section 9. Section **78B-19-109** is enacted to read:  
 216 **78B-19-109. Disclosure of information.**  
 217 Except as provided by law other than this chapter, during the collaborative  
 law process,  
 218 on the request of another party, a party shall make timely, full, candid, and  
 informal disclosure  
 219 of information related to the collaborative matter without formal discovery. A  
 party also shall  
 220 update promptly previously disclosed information that has materially changed.  
 Parties may  
 221 define the scope of disclosure during the collaborative law process.  
 222 Section 10. Section **78B-19-110** is enacted to read:  
 223 **78B-19-110. Standards of professional responsibility and mandatory**  
 reporting  
 224 **not affected.**  
 225 This chapter does not affect:

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226 (1) the professional responsibility obligations and standards applicable to a  
 lawyer or  
 227 other licensed professional; or  
 228 (2) the obligation of a person to report abuse or neglect, abandonment, or  
 exploitation  
 229 of a child or adult under the law of this state.  
 230 Section 11. Section **78B-19-111** is enacted to read:  
 231 **78B-19-111. Appropriateness of collaborative law process.**  
 232 Before a prospective party signs a collaborative law participation agreement,  
 a  
 233 prospective collaborative lawyer shall:  
 234 (1) assess with the prospective party factors the lawyer reasonably believes

relate to

235 whether a collaborative law process is appropriate for the prospective party's  
matter;

236 (2) provide the prospective party with information that the lawyer reasonably  
believes

237 is sufficient for the party to make an informed decision about the material  
benefits and risks of

238 a collaborative law process as compared to the material benefits and risks of  
other reasonably

239 available alternatives for resolving the proposed collaborative matter, such as  
litigation,

240 mediation, arbitration, or expert evaluation; and

241 (3) advise the prospective party that:

242 (a) after signing an agreement if a party initiates a proceeding or seeks  
tribunal

243 intervention in a pending proceeding related to the collaborative matter, the  
collaborative law

244 process terminates;

245 (b) participation in a collaborative law process is voluntary and any party has  
the right

246 to terminate unilaterally a collaborative law process with or without cause; and

247 (c) the collaborative lawyer and any lawyer in a law firm with which the  
collaborative

248 lawyer is associated may not appear before a tribunal to represent a party in a  
proceeding

249 related to the collaborative matter, except as authorized by the Rules of  
Professional Conduct.

250 Section 12. Section **78B-19-112** is enacted to read:

251 **78B-19-112. Coercive or violent relationship.**

252 (1) Before a prospective party signs a collaborative law participation  
agreement, a

253 prospective collaborative lawyer shall make reasonable inquiry whether the  
prospective party

---

254 has a history of a coercive or violent relationship with another prospective party.

255 (2) Throughout a collaborative law process, a collaborative lawyer  
reasonably and

256 continuously shall assess whether the party the collaborative lawyer represents  
has a history of

257 a coercive or violent relationship with another party.

258 (3) If a collaborative lawyer reasonably believes that the party the lawyer  
represents or

259 the prospective party who consults the lawyer has a history of a coercive or



violent relationship

260 with another party or prospective party, the lawyer may not begin or continue a  
collaborative

261 law process unless:

262 (a) the party or the prospective party requests to begin or to continue a  
process; and

263 (b) the collaborative lawyer reasonably believes that the safety of the party or  
264 prospective party can be protected adequately during a process.

265 Section 13. Section **78B-19-113** is enacted to read:

266 **78B-19-113. Confidentiality of collaborative law communication.**

267 A collaborative law communication is confidential to the extent agreed by the  
parties

268 in a signed record or as provided by law of this state other than this chapter.

269 Section 14. Section **78B-19-114** is enacted to read:

270 **78B-19-114. Authority of tribunal in case of noncompliance.**

271 (1) If an agreement fails to meet the requirements of Section 78B-19-104 , or a  
lawyer

272 fails to comply with Section 78B-19-111 or 78B-19-112 , a tribunal may  
nonetheless find that

273 the parties intended to enter into a collaborative law participation agreement if  
they:

274 (a) signed a record indicating an intention to enter into a collaborative law

275 participation agreement; and

276 (b) reasonably believed they were participating in a collaborative law process.

277 (2) If a court makes the findings specified in Subsection (1), and the interests  
of

278 justice require, the court may:

279 (a) enforce an agreement evidenced by a record resulting from the process in  
which

280 the parties participated;

281 (b) apply the disqualification provisions of Sections 78B-19-105 and 78B-19-  
106 ; and

---

282 (c) apply the privileges in the Utah Rules of Evidence.

283 Section 15. Section **78B-19-115** is enacted to read:

284 **78B-19-115. Uniformity of application and construction.**

285 In applying and construing this uniform act, consideration shall be given to  
the need to

286 promote uniformity of the law with respect to its subject matter among states that  
enact it.

287 Section 16. Section **78B-19-116** is enacted to read:

288 **78B-19-116. Relation to Electronic Signatures in Global and National**  
**Commerce**



289     **Act.**  
290         *This chapter modifies, limits, and supersedes the federal Electronic Signatures*  
*in*  
291         *Global and National Commerce Act, 15 U.S.C.A. Sec. 7001 et seq. (2009), but*  
*does not*  
292         *modify, limit, or supersede Section 101(c) of that act, 15 U.S.C.A. Sec. 7001(c),*  
*or authorize*  
293         *electronic delivery of any of the notices described in Sec. 103(b) of that act, 15*  
*U.S.C.A. Sec.*  
294         *7003(b).*

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**Link:** <http://www.utcourts.gov/resources/rules/ucja/ch04/4-510.htm>

**Utah Judicial Council Rules of Judicial Administration, Chapter 4, Operation of the Courts, Article 5, Civil Practice, Rule 4-510. Alternative dispute resolution.**

Intent:

To establish a program of court-annexed alternative dispute resolution for civil cases in the District Courts.

Applicability:

This rule does not apply to the following actions:

- (1) Title 26, Chapter 19, Medical Benefits Recovery Act;
- (2) Title 62A, Chapter 11, Recovery Services;
- (3) Title 78A, Chapter 8, Small Claims Court;
- (4) Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer;
- (5) Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act;
- (6) Title 78B, Chapter 12, Utah Child Support Act;
- (7) Title 78B, Chapter 15, Utah Uniform Parentage Act;
- (8) Title 78B, Chapter 13, Utah Uniform Child Custody Jurisdiction and Enforcement Act;
- (9) Title 62A, Chapter 15, Substance Abuse and Mental Health Act;

- (10) Rules 65A, 65B and 65C of the Utah Rules of Civil Procedure;
- (11) temporary orders requested under Title 30, Husband and Wife;
- (12) uncontested matters brought under:
  - (12)(A) Title 42, Chapter 1, Change of Name;
  - (12)(B) Title 75, Utah Uniform Probate Code;
  - (12)(C) Title 78B, Chapter 5, Part 3, Foreign Judgment Act;
  - (12)(D) Title 78B, Chapter 6, Part 1, Adoption; or
- (13) actions pursued by an assignee of a claim.

This rule applies in the district court. Paragraph (6) applies only in judicial districts 2, 3 and 4.

Statement of the Rule:

(1) Definitions.

(1)(A) "ADR" means alternative dispute resolution and includes arbitration, mediation, and other means of dispute resolution, other than court trial, authorized by this rule and URCADR.

(1)(B) "ADR program" means the alternative dispute resolution program.

(1)(C) "Binding arbitration" means an ADR proceeding in which the award is final and enforceable as any other judgment in a civil action unless vacated or modified by a court pursuant to statute, and in which the award is not subject to a demand for a trial de novo.

(1)(D) "Collaborative Law" is a process in which the parties and their counsel agree in writing to use their best efforts and make a good faith effort to resolve their divorce, paternity, or annulment action by agreement without resorting to judicial intervention except to have the court approve the settlement agreement and sign orders required by law to effectuate the agreement of the parties. The parties' counsel may not serve thereafter as litigation counsel except to obtain court approval of the settlement agreement.

...

(6)(A) All cases subject to this rule shall be referred to the ADR program, pursuant to this rule and URCADR, upon the filing of a responsive pleading unless the parties have participated in a collaborative law process.

# COLLABORATIVE LAW

## HANDBOOK FOR CLIENTS

### AN ORIENTATION TO THE DIVORCE PROCESS, THE DISPUTE-RESOLUTION OPTIONS AVAILABLE TO CLIENTS, AND THE NEW DISPUTE-RESOLUTION OPTION, “COLLABORATIVE LAW.”

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#### 1. What are my choices for professional help in my divorce?

All divorces involve decisions and choices. Which professionals will assist you, and how you will utilize their help, are decisions that can powerfully affect whether your divorce moves forward smoothly or not.

Some couples resolve all their divorce issues without any professional assistance at all, and process their own divorce papers themselves through the courts. On the other end of the spectrum, some couples engage in drawn-out courtroom battles that cost dearly in emotional and financial resources and can take considerable time to complete. Most people find their needs fall between these extremes.

Below are the choices for obtaining professional legal services in divorce that are available in most localities today. The list moves from choices involving the least degree of professional intervention, and the most privacy and client control, to choices involving greater professional intervention and the least privacy and control.

**Unbundled Legal Assistance:** The client in this model acts as a “general contractor” and takes primary responsibility for the divorce, making use of legal counsel on an “as needed” basis for help in resolving specific issues, drafting papers, and so forth. The lawyer doesn’t take over responsibility for managing the case.

**Mediation:** A single neutral person, who may be a lawyer, a mental health professional, or simply someone with an interest in mediation, acts as the mediator for the couple. The mediator helps the couple reach agreement, but does not give individual legal advice, and may or may not prepare the divorce agreement. Few mediators will process the divorce through the court. Retaining your own lawyer for independent legal advice during mediation is generally wise. In some locales the lawyers sit in on the mediation process, and in other locales they remain outside the mediation process. Mediators do not have to be licensed professionals in most jurisdictions.

**Collaborative Law:** Each person retains his or her own trained collaborative lawyer to advise and assist in negotiating an agreement on all issues. All negotiations take place in “four-way” settlement meetings that both clients and both lawyers attend. The lawyers cannot go to court or threaten to go to court. Settlement is the only agenda. If either client goes to court, both collaborative lawyers are disqualified from further participation. Each client has built-in legal advice and advocacy during negotiations, and each lawyer’s job includes guiding the client toward reasonable resolutions. The legal advice is an integral part of the process, but all the decisions are made by the clients. The lawyers generally prepare and process all papers required for the divorce.

**Conventional Representation:** Each person hires a lawyer. The lawyers may be good at settling cases, in which case they work toward that goal at the same time that they prepare the case for the possibility of trial. If the lawyers are not particularly good at, or interested in, settling the case all lawyer efforts are aimed solely at preparing for trial, though a settlement may still result at or near the time of trial. Either way, the pacing and objectives of the legal representation tend to be dictated by what happens in court. Cases handled this way generally involve higher legal fees, and take longer to complete, than collaborative law cases or mediated cases. The risk of a high conflict divorce is higher than with mediation or collaborative law.

**Arbitration, Private Judging, and Case Management:** In some states, it is possible for clients and their lawyers to choose private judges or arbitrators who will be given the power to make certain decisions for the clients as an alternative to taking the case into the public courts. Case management is an option available from private and some public judges, in which the judge is given the power to manage the procedural stages of pretrial preparation, as well as settlement conferences, by agreement of the clients and their lawyers. These options can reduce somewhat the financial cost and delays associated with litigation in the public courts. The financial and emotional costs may still remain high, however, because positions are polarized and the lawyers have no particular commitment to settlement as the preferred goal, and continue to represent the client whether the case settles or goes to trial.

**“War”:** One or both parties is motivated primarily by strong emotion (fear, anger, guilt, etc.) and as a consequence the parties take extreme, black and white positions and look to the courts for revenge or validation. Reasonable accommodations are not made. The attorneys often function as “alter egos” for their clients instead of counseling the clients toward sensible solutions. This is the costliest form of dispute resolution, emotionally and financially. It is always destructive for the children involved. Such cases can drag on for many years. Few clients report satisfaction with the outcome of cases handled this way, regardless of who won.

## **2. Can you say more about Collaborative Law?**

Collaborative law is the newest divorce dispute-resolution model. In collaborative law, both parties to the divorce retain separate, specially trained lawyers whose only job is to help them settle the case. If the lawyers do not succeed in helping the clients resolve the issues, the lawyers are out of a job and can never represent either client against the other again. All participants agree to work together respectfully, honestly, and in good faith to try to find win-win solutions to the legitimate needs of both parties. Four creative minds work together to devise individualized settlement scenarios. No one may go to court, or even threaten to do so, and if that should occur, the collaborative law process terminates and both lawyers are disqualified from any further involvement in the case. Lawyers hired for a collaborative law representation can never under any circumstances go to court for the clients who retained them.

## **3. Is Collaborative Law only for divorces?**

Collaborative lawyers can do everything that a conventional family lawyer does except go to court. They can negotiate non-marital custody agreements, premarital and postnuptial agreements, and agreements terminating gay and lesbian relationships. Collaborative Law can also be used in probate disputes, business partnership dissolutions, employment and commercial disputes-wherever disputing parties want a contained, creative, civilized process that builds in legal counsel and distributes the risk of failure to the lawyers as well as the clients.

## **4. What is the difference between Collaborative Law and mediation?**

In mediation, there is one neutral professional who helps the disputing parties try to settle their case. Mediation can be challenging where the parties are not on a level playing field with one another, because the mediator cannot give either party legal advice, and cannot help either side advocate its position. If one side or the other becomes unreasonable or stubborn, or lacks negotiating skill, or is emotionally distraught, the mediation can become unbalanced, and if the mediator tries to deal with the problem, the mediator may be seen by one side or the other as biased, whether or not that is so. If the mediator does not find a way to deal with the problem, the mediation can break down, or the agreement that results can

be unfair. If there are lawyers for the parties at all, they may not be present at the negotiation and their advice may come too late to be helpful. Collaborative Law was designed to deal with these problems, while maintaining the same absolute commitment to settlement as the sole agenda. Each side has legal advice and advocacy built in at all times during the process. Even if one side or the other lacks negotiating skill or financial understanding, or is emotionally upset or angry, the playing field is leveled by the direct participation of the skilled advocates. It is the job of the lawyers to work with their own clients if the clients are being unreasonable, to make sure that the process stays positive and productive.

**5. How is Collaborative Law different from the traditional adversarial divorce process?**

- In Collaborative law, all participate in an open, honest exchange of information. Neither party takes advantage of the miscalculations or mistakes of the others, but instead identifies and corrects them.
- In Collaborative law, both parties insulate their children from their disputes and, should custody be an issue, they avoid the professional custody evaluation process.
- Both parties in collaborative law use joint accountants, mental health consultants, appraisers, and other consultants, instead of adversarial experts.
- In collaborative law, a respectful, creative effort to meet the legitimate needs of both spouses replaces tactical bargaining backed by threats of litigation.
- In collaborative law, the lawyers must guide the process to settlement or withdraw from further participation, unlike adversarial lawyers, who remain involved whether the case settles or is tried.
- In collaborative law, there is parity of payment to each lawyers so that neither party's representation is disadvantaged vis-a-vis the other by lack of funds, a frequent problem in adversarial litigation.

**6. What kind of information and documents are available in the collaborative law negotiations?**

Both sides sign a binding agreement to disclose all documents and information that relate to the issues, early and fully and voluntarily. "Hide the ball" and stonewalling are not permitted. Both lawyers stake their professional integrity on ensuring full, early, voluntary disclosure of necessary information.

**7. What happens if one side or the other does play "hide the ball," or is dishonest in some way, or misuses the Collaborative Law process to take advantage of the other party?**

That can happen. There are no guarantees that one's rights will be protected if a participant in the collaborative law process acts in bad faith. There also are no guarantees in conventional legal representation. What is different about collaborative law is that the collaborative agreement requires a lawyer to withdraw upon becoming aware his/her client is being less than fully honest, or participating in the process in bad faith.

For instance, if documents are altered or withheld, or if a client is deliberately delaying matters for economic or other gain, the lawyers have promised in advance that they will withdraw and will not continue to represent the client. The same is true if the client fails to keep agreements made during the course of negotiations, for instance an agreement to consult a vocational counselor, or an agreement to engage in joint parenting counseling.

**8. How do I know whether it is safe for me to work in the Collaborative Law process?**

The collaborative law process does not guarantee you that every asset or every dollar of income will be disclosed, any more than the conventional litigation process can guarantee you that. In the end, a dishonest person who works very hard to conceal money can sometimes succeed, because the time and expense involved in investigating concealed assets can be high, and the results uncertain. However, far greater efforts to track down concealed assets and income can be expected in conventional litigation than in collaborative law, which relies upon voluntary disclosure.

You are generally the best judge of your spouse or partner's basic honesty. If s/he would lie on an income tax return, he or she is probably not a good candidate for a Collaborative Law divorce, because the necessary honesty would be lacking. But if you have confidence in his or her basic honesty, then the process may be a good choice for you. The choice ultimately is yours.

**9. Is Collaborative Law the best choice for me?**

It isn't for every client (or every lawyer), but it is worth considering if some or all of these are true for you:

- a) You want a civilized, respectful resolution of the issues.
- b) You would like to keep open the possibility of friendship with your partner down the road.
- c) You and your partner will be co-parenting children together and you want the best coparenting relationship possible.
- d) You want to protect your children from the harm associated with litigated dispute resolution between parents.
- e) You and your partner have a circle of friends or extended family in common that you both want to remain connected to.
- f) You have ethical or spiritual beliefs that place high value on taking personal responsibility for handling conflicts with integrity.
- g) You value privacy in your personal affairs and do not want details of your problems to be available in the public court record.
- h) You value control and autonomous decision making and do not want to hand over decisions about restructuring your financial and/or child-rearing arrangements to a stranger (i.e., a judge).
- i) You recognize the restricted range of outcomes and "rough justice" generally available in the public court system, and want a more creative and individualized range of choices available to you and your spouse or partner for resolving your issues.
- j) You place as much or more value on the relationships that will exist in your restructured family situation as you place on obtaining the maximum possible amount of money for yourself.
- k) You understand that conflict resolution with integrity involves not only achieving your own goals but finding a way to achieve the reasonable goals of the other person.
- l) You and your spouse will commit your intelligence and energy toward creative problem solving rather than toward recriminations or revenge-fixing the problem rather than fixing blame.

**10. My lawyer says she settles most of her cases. How is collaborative law different from what she does when she settles cases in a conventional law practice?**

Any experienced collaborative lawyer will tell you that there is a big difference between a settlement that is negotiated during the conventional litigation process, and a settlement that takes place in the context of an agreement that there will be no court proceedings or even the threat of court. Most conventional family law cases settle figuratively, if not literally, "on the courthouse steps." By that time, a great deal of money has been spent, and a great deal of emotional damage can have been caused. The settlements are reached under conditions of considerable tension and anxiety, and both "buyer's remorse" and "seller's remorse" are common. Moreover, the settlements are reached in the shadow of trial, and are generally shaped largely by what the lawyers believe the judge in the case is likely to do.

Nothing could be more different from what happens in a typical collaborative law settlement. The process is geared from day one to make it possible for creative, respectful collective problem solving to happen. It is quicker, less costly, more creative, more individualized, less stressful, and overall more satisfying in its results than what occurs in most conventional settlement negotiations.

**11. Why is collaborative law such an effective settlement process?**

Because the collaborative lawyers have a completely different state of mind about what their job is than traditional lawyers generally bring to their work. We call it a “paradigm shift.” Instead of being dedicated to getting the largest possible piece of the pie for their own client, no matter the human or financial cost, collaborative lawyers are dedicated to helping their clients achieve their highest intentions for themselves in their post-divorce restructured families.

Collaborative lawyers do not act as a hired guns, nor do they take advantage of mistakes inadvertently made by the other side, nor do they threaten, or insult, or focus on the negative either in their own clients or on the other side. They expect and encourage the highest good-faith problem-solving behavior from their own clients and themselves, and they stake their own professional integrity on delivering that, in any collaborative representation they participate in.

Collaborative lawyers trust one another. They still owe a primary allegiance and duty to their own clients, within all mandates of professional responsibility, but they know that the only way they can serve the true best interests of their clients is to behave with, and demand, the highest integrity from themselves, their clients, and the other participants in the collaborative process.

Collaborative Law offers a greater potential for creative problem solving than does either mediation or litigation, in that only collaborative law puts two lawyers in the same room pulling in the same direction with both clients to solve the same list of problems. Lawyers excel at solving problems, but in conventional litigation they generally pull in opposite directions. No matter how good the lawyers may be for their own clients, they cannot succeed as Collaborative Lawyers unless they also can find solutions to the other party’s problems that both clients find satisfactory. This is the special characteristic of collaborative law that is found in no other dispute resolution process.

**12. What if my spouse and I can reach agreement on almost everything, but there is one point on which we are stuck. Would we have to lose our Collaborative Lawyers and go to court?**

In that situation it is possible, if everyone agrees (both lawyers and both clients), to submit just that one issue for decision by an arbitrator or private judge. We do this with important limitations and safeguards built in, so that the integrity of the collaborative law process is not undermined. Everyone must agree that the good faith atmosphere of the collaborative law process would not be damaged by submitting the issue for third party decision, and everyone must agree on the issue and on who will be the decision maker.

**13. What if my spouse or partner chooses a lawyer who doesn’t know about Collaborative Law?**

Collaborative lawyers have different views about this. Some will “sign on” to a collaborative representation with any lawyer who is willing to give it a try. Others believe that is unwise and will not do that.

Trust between the lawyers is essential for the collaborative law process to work at its best. Unless the lawyers can rely on one another’s representations about full disclosure, for example, there can be insufficient protection against dishonesty by a party. If your lawyer lacks confidence that the other lawyer will withdraw from representing a dishonest client, it might be unwise to sign on to a formal collaborative law process (involving disqualification of both lawyers from representation in court if the collaborative law process fails).

Similarly, collaborative law demands special skills from the lawyers—skills in guiding negotiations, and in managing conflict. Lawyers need to study and practice to learn these new skills, which are quite

different from the skills offered by conventional adversarial lawyers. Without them, a lawyer would have a hard time working effectively in a collaborative law negotiation.

And some lawyers might even collude with their clients to misuse the collaborative law process, for delay, or to get an unfair edge in negotiations. For these reasons, some lawyers hesitate to sign on to a formal collaborative law representation with a lawyer inexperienced in this model. That doesn't mean your lawyer could not work cordially or cooperatively with that lawyer, but caution is advised in signing the formal agreements that are the heart of collaborative law where there is no track record of mutual trust between the lawyers. You and your spouse will get the best results by retaining two lawyers who both can show that they have committed to learning how to practice collaborative law by obtaining training as well as experience in this new way of helping clients through divorce.

**14. Why is it so important to sign on formally to the official Collaborative Law Agreement? Why can't you work collaboratively with the other lawyer but still go to court if the process doesn't work?**

The special power that Collaborative Law has to spark creative conflict resolution seems to happen only when the lawyers and the clients are all pulling together in the same direction, to solve the same problems in the same way. If the lawyers can still consider unilateral resort to the courts as a fallback option, their thought processes do not become transformed; their creativity is actually crippled by the availability of court and conventional trials. Only when everyone knows that it is up to the four of them and only the four of them to think their way to a solution, or else the process fails and the lawyers are out of the picture, does the special "hypercreativity" of collaborative law get triggered. The moment when each person realizes that solving both clients' problems is the responsibility of all four participants is the moment when the magic can happen.

Collaborative law is not just two lawyers who like each other, or who agree to "behave nicely." It is a special technique that demands special talents and procedures in order to work as promised.

Any effort by parties and their lawyers to resolve disputes cooperatively and outside court is to be encouraged, but only collaborative law is collaborative law.

**15. How do I find a collaborative lawyer?**

You can check the yellow pages and contact your local bar association to see if there are listings of collaborative lawyers in your area. You can contact the International Academy of Collaborative Professionals (web site: <http://www.collabgroup.com>) to inquire about collaborative lawyers near you. Find the best collaborative practitioner that you can; interview several, and ask for resumes. Ask how many collaborative cases the lawyer has handled and how many of them terminated without agreements. Ask what training the lawyer has in Collaborative Law, alternate dispute resolution, and conflict management.

**16. How do I enlist my spouse in the process?**

Talk with your spouse, and see whether there is a shared commitment to collaborative, win-win conflict resolution. Share materials with your spouse such as this handbook and articles that discuss collaborative law. Encourage your spouse to select counsel who has experience and training in collaborative law and who works effectively with your own lawyer: lawyers who trust one another are an excellent predictor of success in dispute resolution.

**17. How long will my divorce take if I use collaborative law?**

The collaborative law process is flexible and can expand or contract to meet your specific needs. Most people require from three to seven of the four-way negotiating meetings to resolve all issues, though some divorces take less and some take more. These meetings can be spaced with long intervals between, or close together, depending on the particular needs of the clients. Once the issues are resolved, the lawyers will complete the paperwork for the divorce. Time limits and requirements for divorce vary from state to state; ask your lawyer.



**18. How expensive is collaborative law?**

Collaborative lawyers generally charge by the hour as do conventional family lawyers. Rates vary from locale to locale and according to the experience of the lawyer.

No one can predict exactly what you will pay for this kind of representation because every case is different. Your issues may be simple or complex; you and your partner may have already reached agreement on most, or none, of your issues. You may be very precise or very casual in your approach to problems. You and your partner may be at very different emotional stages in coming to terms with separating from one another. What can be said with confidence is that no other kind of professional conflict resolution assistance is consistently as efficient or economical as collaborative law for as broad a range of clients. While the cost of your own fees cannot be predicted accurately, a rule of thumb is that collaborative law representation will cost from one tenth to one twentieth as much as being represented conventionally by a lawyer who takes issues in your case to court.

**19. Isn't mediation cheaper because only one neutral, instead of two lawyers, has to be paid?**

No, mediation is not usually cheaper. Because there is nobody in a mediation negotiation whose job it is to help the client refine issues and participate with maximum effectiveness in the process, mediation can become stalled more easily than collaborative law does. Mediations can take longer, and can involve more wheel-spinning, than collaborative law negotiations. They also can be at greater risk for falling apart entirely, since the mediator must remain neutral and cannot work privately with the more disturbed client to get past impasses. In either event, the resulting inefficiencies can be costly.

Also, most mediators strongly urge that independent lawyers for each party review and approve the mediated agreement. If the lawyers have not been a part of the negotiations, the lawyers may be unhappy with the results and a new phase of negotiations or even litigation may result. If the lawyers do participate, then three professionals are being paid in the mediation.

Lawyers who do both mediation and collaborative law typically see collaborative law as the model that offers greatest promise of successful outcome for the broadest range of divorcing couples. Of course, if two calm and reasonable people whose issues are not complex go to a mediator, they can usually achieve agreement efficiently and often at low cost. Generally, it is only after the fact that we know that a couple was well-suited for mediation. Strong feelings arise unexpectedly; issues become more complicated than anyone anticipated. Collaborative law can usually deal with these predictable happenings more readily than can mediation.

Many people genuinely believe that they will have a very quick and simple divorce negotiation, but life can be surprising. Many people prefer to have a process in place from the start that is well-equipped to deal with unexpected problems rather than to have to terminate a mediation and start over with litigation counsel.

**20. How does the cost of collaborative law compare with the cost of litigation?**

Litigation is, quite simply, the most expensive way of resolving a dispute. By way of illustration, it is common for litigated divorces to begin with a motion for temporary support. The result is exactly that—a temporary order, not any final resolution of any issues. It is not uncommon for a single temporary support motion to cost as much or more in lawyers' fees and costs as it costs for an entire collaborative law representation.

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# Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It

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Any seasoned family law attorney knows some uncomfortable facts about this area of specialty. Of course, the entire picture is not bleak. To begin with, the disclaimers: Most family law attorneys work hard to do a good job for their clients, and as a result, they settle a high percentage of cases. When cases must be tried, family lawyers often achieve good results for clients and sometimes make new law. Each of us gets our share of reasonable, civilized clients and opposing attorneys, the people who make the practice of family law satisfying.

Despite those comforting facts, the evidence suggests disturbing trends that family law attorneys ought to address. Put baldly, current research tells us that our clients are unhappy with us—and we are unhappy with them and with ourselves.

Collaborative law is a thoughtful, forward-looking response to the current state of affairs in the area of family law. Before looking at exactly what it is, we must understand the context that makes awareness of collaborative law potentially so important to family lawyers.

## UNHAPPY PARTICIPANTS

### Unhappy Clients

Our clients and potential clients, generally speaking, do not trust us very much, and for good reasons. This is evident from considering the growing percentage of divorcing couples who are able to

afford lawyers, but who “just say no.” Although the number of divorces annually rose by 67 percent between 1970 and 1990,<sup>1</sup> more and more potential clients are deciding to eschew professional legal representation altogether.<sup>2</sup> In California,<sup>3</sup> family law judges deplore the clogging of their court dockets with unrepresented *in propria persona* litigants who file papers that are substantively and procedurally flawed and who flounder helplessly attempting to secure custody, support, and restraining orders on their own.<sup>4</sup>

This refusal to secure needed legal advice cannot be dismissed as a reflection of poverty or lack of complexity. Many of these unrepresented litigants need legal advice and can afford it.<sup>5</sup> They stay away from lawyers because they believe that they and their loved ones are better off without our help. One need only read the daily newspapers, listen to the jokes being told at the watercooler, or scan the Internet humor web sites to appreciate the depth of fear and scorn felt toward lawyers.<sup>6</sup>

Instead of simply wringing our hands about how misunderstood and disliked we are, we can play what Professor Deborah Tannen calls “the believing game”<sup>7</sup> about this situation. What if our clients feel this way about lawyers for good reasons?

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What might those reasons be, and what might we do about the problem?

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*We lawyers generally are poorly suited, by both temperament and training, to deal effectively with strong emotions.*

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### *The Gladiator Model*

The first thing that might cause clients to fear, distrust, and avoid family lawyers is that we are a great deal more adversarial in our thinking and behavior than our clients need or want.<sup>8</sup> We over-litigate, exacerbating intrafamilial stress when we could be calming it. And, as a result, we charge our clients a high emotional and financial price that few can afford. We do this not because we wish to harm our clients or their families, but because we believe that is what lawyers are supposed to do.

We have absorbed from movies, television, novels, the newspapers, and our law school education a gladiatorial model for our professional role that is so deeply imbedded in our definition of what it means to be a lawyer that most of us do not even see it. It is invisible, the water in which we swim and the air we breathe; and, consequently, we reconsider our automatic adversarial behavior just about as often as we remind ourselves to breathe.

The research also shows remarkably clearly that as a profession, we lawyers generally are poorly suited, by both temperament and training, to deal effectively with strong emotions.<sup>9</sup> Strong emotion, of course, is the currency that our family law clients are richest in: They are in the midst of one of the most stressful life passages that people can endure, second only to the death of a spouse, and, consequently, they often are awash in fear, anger, guilt, grief, shame, and remorse, sometimes even to the point of diminished capacity to cope with the ordinary demands of life.<sup>10</sup> In that state, they enter the unfamiliar world of law, and, in that state, they must make decisions that will affect them and their children for the rest of their lives. Although divorce is a major life passage, as big a piece of a person's life history as marriage, our clients commonly have only us, the family law attorneys, to help them through it.<sup>11</sup>

### *Poor Preparation for the Complexities of Divorce*

How well prepared are we for this momentous task? Not well at all. We studied contracts and civil

procedure in law school, and perhaps even domestic relations law. If our law school was forward-looking and we are not too old, we may have been exposed to courses in negotiations and mediation—or even a clinical semester.

Most of us have studied little or nothing about the psychodynamics of the divorce process and of family breakdown and restructuring. We are largely ignorant of the predictable stages of grief and recovery, and, consequently, cannot incorporate proper attention to that reality into our pacing of the legal divorce process. What we know about child development, we most often learned by preparing adversarial experts for contested custody trials, a perspective that oversimplifies reality, weeds out inconvenient facts and theories, and leaves us unaware of, perhaps even indifferent to, the catastrophic impact of the divorce process itself—especially high-conflict divorce—upon children. We delude ourselves that such concerns are outside the lawyer's purview, ignoring the unpleasant fact that what we do during the course of our representation may cause far more injury to the children than what led up to their parents' decision to divorce.<sup>12</sup>

Our ignorance of the psychological dimensions of divorce leads us to inflict other avoidable harms. Because most of us don't know nearly enough about the psychological phenomena of splitting, transference, and counter-transference, we may jump unthinkingly onto white horses in full battle array when that might be the very worst thing we can do for our clients. Later, we wonder why, since we won such a powerful legal victory in court, our client is nonetheless furious.<sup>14</sup>

### *The Duty of Zealous Representation*

Another reason why our clients may be right to distrust lawyers is that over the course of this century, we lawyers have learned to construe our duty of zealous representation in the narrowest possible fashion. Wanting to do the best possible job, and being most comfortable with outcomes that are measurable and least comfortable with the fuzzy, the emotional, the illogical, the relational,<sup>15</sup> lawyers can easily find themselves focusing considerable legal efforts on achieving very small increments of financial gain. In doing so, it is rare for a lawyer to think much about the corollary damage caused by that narrow focus.

The very process of what lawyers refer to as "spotting the issues," which is what we do in the preliminary stages of representation, involves

excluding as legally irrelevant those parts of the client's actual concerns that do not fit in the "lawyer's comfort zone":<sup>16</sup> the realm of the logical, the measurable, and the quantifiable. In so doing, we ignore, and often do irreparable harm to, the nonquantifiable human concerns that may well have far greater impact on the quality of our clients' lives long after the legal divorce is over than any marginal financial gain we might achieve at trial. These concerns—which we would learn are of immense importance to our clients, if we would ask and then listen—often include questions like these:

- Will my spouse and I be able to parent our children adequately after the divorce? Can we shield them from the harms that seem to afflict children of divorce? Will fighting about every last cent of support and every last dollar of assets permit any of the remaining good faith between us to survive? Can I protect my interests without becoming my spouse's enemy?
- Will it be possible for my spouse and me to meet at graduations, weddings, births, and funerals with any civility or sense of mutual pride? Is there anything I can do to enhance that possibility?
- Will the grandparents, aunts, uncles, and cousins who have close connections to my children be able to sustain these relationships after a divorce? Can I remain close to the in-laws and extended family whom I love, even though I am losing my spouse?
- Will our friends be able to avoid choosing between my spouse and me? Will I have any friends left after a contested divorce?
- Can the legal process allow room for my personal values of ethical dispute resolution, privacy, and self-determination?
- Will I be able to look back upon how I conducted myself during this divorce process with pride and a sense of integrity?

#### *Insufficient Counseling about Dispute-Resolution Options*

Any experienced family law attorney knows that for most clients who take their divorce issues to court for resolution, the answers to the foregoing questions are overwhelmingly negative. Yet, in most parts of the country, it is rare indeed for family lawyers to begin their representation by inviting clients to consider what kind of a divorce experi-

ence they want and how they might best go about achieving it, or to give clients a realistic picture of how adversarial dispute resolution typically affects families.<sup>17</sup> While many individual attorneys may be exceptions to this rule, we, as a whole, overwhelmingly fail to take any ethical or moral leadership in counseling our clients that there is a way to divorce with dignity and integrity if they want that outcome sufficiently and that we are available to show them how. We are the only ones who can tell them the truth about what really happens when divorcing couples take their issues to court.<sup>18</sup>

Yet, unless we have something better to offer clients, it would make little sense to speak so candidly about the adversarial paradigm. And since there has been little else to offer,<sup>19</sup> family lawyers have, for the most part, trudged forward to court with their clients, feeling little confidence that anything fundamentally satisfying will come of it but unwilling to say so. In this, we resemble physicians who must treat patients with dreadful, incurable diseases. With no cure to offer, the choice is to officiate at the patient's death with false hope or with honest, detached gloom.<sup>20</sup>

Whether we win or whether we lose, the sad reality is that at the end of many litigated divorces, our clients will be unhappy.<sup>21</sup> As an experienced civil and family litigator with a successful track record in trial and appellate courts, this author has come to understand that however big a "win" I may obtain (from the lawyer's perspective), it is invariably less than or other than what my client secretly expected, and it comes at a tremendous financial and emotional cost. As one respected family law judge in my county used to tell litigants at the start of trials, "If anyone leaves this courtroom happy, I've made a dreadful error."

#### *Unhappy Lawyers*

The commentators generally agree that the well of client dissatisfaction and the stresses and incivilities of litigation are getting worse, not better. The consequences hurt not only clients; they can be nearly catastrophic for the mental and physical health of lawyers.

Many of us went to law school for idealistic reasons, thinking we were joining a helping profession. We saw ourselves as gladiatorial heroes, who would fight on the side of the angels (our clients), using our intellects and our passion to win their just causes. In law school, we were taught to win via the dominant paradigm for dispute resolution, the zeitgeist that Deborah Tannen refers to as "the

argument culture." In that model, the lawyer is the dispassionate warrior, advancing the client's self-identified goals with total zeal, passion, and guile.<sup>22</sup> In that model, we learned to follow agreed rules of combat (the code of civil procedure) in our march toward the courthouse, where the judge would ascertain the truth, find out who was at fault, and dispense impartial justice (trial and judgment). In this dominant paradigm, the role of the lawyer is to remain morally disengaged, to become the extension of the client's legal and moral personality.<sup>23</sup> The lawyer, in this gladiatorial role definition, is expected to take no moral responsibility for the purposes to which the lawyer's services are put. We park our moral consciousness in the courthouse parking lot and pick up the lawyer's substitute for a conscience, the "duty of zealous representation."

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*Our clients frequently come to us gripped by a "shadow state" of powerful negative emotions, and we insist that they set major life goals while in that state.*

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This role-defined morality is superficially seductive; it allows us as family lawyers to float above the inherent messiness of human relationships as they unravel. In its seductiveness, it can link up with our buried idealism and with the zero-sum game that is adversarial engagement, causing us to cast our clients' stories in black and white, and to ignore the relativity and situational complexity of human relationships. If our job is to march forward zealously to achieve our client's goals, whatever they may be, we are a good deal more comfortable as gladiators if we can convince ourselves that we are acting on behalf of angels.<sup>24</sup> An all-out custody battle is easier to mount if the lawyer believes what he or she will have to prove, that his or her client is a superb parent and the other is a danger. Our role definition, in other words, encourages us to oversimplify reality.

For these same reasons, we are far more comfortable with goals that have clear bottom lines that are readily quantifiable because they lend themselves readily to adversarial simplification. It's easy to tell who won, and by how much, when the issues are confined to money and hours. We define the legally cognizable issues this way, and we know which gladiator won (and did a better job for the client) by the size of the bottom line. Since we played by the rules, we are comfortable with the outcome, because justice was done: It

emerged from the judge's application of fair, general rules to the messy facts of our clients' lives, which we so capably simplified at trial.

Another factor operating in this dominant paradigm is that our clients' goals, which are the holy grail of the gladiator's duty of zealous representation, tend to be identified in a process marred by diminished capacity on the part of the clients, and shaped by transference and countertransference of which neither the lawyer nor the client is generally much aware.<sup>25</sup>

Family law clients do not call their lawyers to report that everything is fine, that they are getting along well with their spouses, and that their ability to work out issues on their own is improving. Those moments do occur during the course of many divorces, but clients typically call their divorce lawyers only when things are worst, when they or their spouses are locked in the grip of primitive emotion and they are paralyzed by grief, fear, anxiety, remorse, shame, guilt, or anger. In that state, it is the rare client who has sufficiently clear insight into his own needs or the needs of the others most important to him; it is the rare client who can take the long view and consider with the lawyer what outcomes will serve her interests best 15 or 20 years from now. Instead, most clients sit down with the lawyer in this flood of overwhelming negative emotion to identify goals and priorities and to plan strategies. Inevitably, things get better, but the client does not typically call the lawyer back to report the improvement and reconsider the litigation plan.<sup>26</sup> The other client and lawyer are planning goals and strategies in a similar state.

It should be apparent from a moment's reflection that there is no room in this model for consideration of a client's long-term, enlightened self-interest, whether financial or emotional. Very few family law attorneys expect their clients to ponder the larger questions in setting goals and strategy, questions such as, "Should I be seeking this? How will it further my overall health and welfare and the best interests of those I care about, if I achieve this goal?"

In short, our clients frequently come to us gripped by a "shadow state" of powerful negative emotions, and we insist that they set major life goals while in that state. Once those goals have been defined, we set out to reach them for the client. To do so, we take control to maximize the possibility of a win. We see other professionals (therapists, mediators) as meddlers who are compromising our ability to win big for our client by blurring the neat black and white lines we are drawing. We discourage direct negotiations between the clients, for this too will undercut our

trial strategies. We take our instructions from our clients in their least functional state and are surprised that later they don't appreciate our efforts. Sooner or later, all but those at the far ends of the bell-shaped curve will recover from the immediate divorce trauma and resume a more normal, balanced state of functioning most of the time. Many of them, however, will look back on the divorce process with pain for the rest of their lives.<sup>27</sup>

For all these reasons, not only do many of our clients fear and dislike us, but we fear our clients. We know that they may well end the legal divorce process angry and frustrated and looking for someone to blame. Experienced family lawyers can attest that many clients retain us but don't pay us. Fee disputes are common in family law, not only because money tends to be scarce when two households form out of one, but also because family law clients tend to be unhappy with the results, however good the job their lawyers may have done. When our clients have accrued large bills—an error lawyers try to, but cannot always, avoid—fee disputes and the reverse side of that coin, malpractice suits, are common.<sup>28</sup> Lawyers who have made the mistake of acting as their clients' alter egos, stoking their anger or fear and raising unreasonable expectations from the adversarial process, are particular targets of this anger.

And, in this author's state of California, a fee dispute or malpractice action is far from the worst the family lawyer needs to guard against. Clients have used their guns to shoot the lawyers who epitomize for them all that is wrong with how our legal system handles the breakdown and restructuring of families.<sup>29</sup>

It is small wonder that many family lawyers regret their choice of profession, are leaving the field of law in unprecedented numbers, and report that they would not advise their children to choose the law as a career.<sup>30</sup> Even more troubling are the high drug and alcohol abuse rates for attorneys and their disturbingly high rates of clinical depression.<sup>31</sup> These reports confirm what many of us know from first-hand experience: Family lawyers, as a group, have difficulty taking pride and satisfaction in their work, however well they are doing it. When we look in the mirror, we are not happy with what we see.

## A NEW PARADIGM WITH NEW POSSIBILITIES

Out of this ferment (client and attorney malaise, dissatisfaction with the obvious shortcomings of adversarial litigation as a way of helping families

resolve the inevitable disputes attendant upon family restructuring in divorce, and recognition of the limitations of existing alternate dispute resolution models), the new paradigm of collaborative law emerged in the early 1990s. It was the inspiration of a single disgusted family lawyer practicing in Minneapolis.<sup>32</sup>

Very rapidly, lawyers learned about this new way of practicing family law and began spreading the model to other parts of the country.<sup>33</sup> Presentations about collaborative law have been offered in recent years at a number of conferences sponsored by organizations including the American Bar Association, the Association of Family and Conciliation Courts, the American Academy of Matrimonial Lawyers, the American Psychological Association, the University of California, the Judith Wallerstein Center for the Family in Transition, and the American Institute of Collaborative Professionals.

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*If the process fails to reach agreement and either party then wishes to have matters resolved in court, both collaborative attorneys are disqualified from further representation.*

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## What Collaborative Law Is: The Bare Bones

Collaborative law consists of two clients and two attorneys, working together toward the sole goal of reaching an efficient, fair, comprehensive settlement of all issues.<sup>34</sup> Each party selects independent collaborative counsel. Each lawyer's retainer agreement specifies that the lawyer is retained solely to assist the client in reaching a fair agreement and that under no circumstances will the lawyer represent the client if the matter goes to court. If the process fails to reach agreement and either party then wishes to have matters resolved in court, both collaborative attorneys are disqualified from further representation. They assist in the orderly transfer of the case to adversarial counsel. Experts are brought into the collaborative process as needed, but only as neutrals, jointly retained by both parties. They, too, are disqualified from continuing work and cannot assist either party if the matter goes to court. The process involves binding commitments to disclose voluntarily all relevant information, to proceed respectfully and in good faith, and to refrain from any threat of litigation during the collaborative process.

The process moves forward via carefully managed four-way settlement meetings, preceded by

considerable groundwork between lawyer and client, and between lawyer and lawyer. The lawyer's job is challenging: In addition to the usual identification, investigation, and development of issues and proposals for settlement, the lawyer must work with the client and the other lawyer to anticipate and manage conflict and to guide the negotiation process. The lawyer also must encourage the client to take a considered and broad view in setting goals and priorities and must teach the client how to use interest-based, rather than positional, bargaining.<sup>35</sup>

Before any negotiating session, the collaborative lawyers generally meet and confer, sharing information that will assist them both in managing conflict and in setting the agendas for four-way meetings. The skill here is to manage agendas in such a way that the clients experience success during the early meetings, thereby building in the clients a sense of confidence, safety, and competency that will serve them as more difficult issues are tackled.

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*The transformation that often occurs in the attorneys' capacity to find creative solutions to thorny issues in collaborative practice simply must be experienced to be believed.*

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An important element of collaborative representation is the lawyers' commitment to manage conflict creatively. To do so effectively, the lawyer needs a whole new array of understandings and skills. Without this new toolbox, the lawyer runs the risk of promising more than can be delivered and disappointing clients. Given the unconscious, knee-jerk adversarial proclivities of most lawyers, this is easier said than done. The "retooling" needed to become excellent at collaborative law can be described in four stages:<sup>36</sup>

1. Retooling how one thinks, speaks, and behaves.
2. Retooling how one relates to the client.
3. Retooling how one relates to the other attorney, the other party, and other professionals.
4. Retooling how one conducts settlement meetings.

The questions most often asked about collaborative law are (1) I already settle cases, and I'm a reasonable lawyer; so isn't it true that I'm already doing what you do, only by a different name? and (2) Isn't this really just like mediation? The answer to both questions is no.

The best family lawyers have always offered settlement-oriented representation where appropriate, wherein discovery is voluntary, and agreements are more common than trials. Collaborative law differs in several important respects from that pragmatic orientation toward settling cases. The differences arise from the profound effects that the formal written commitments made at the start of the process have upon the state of mind of the parties and their attorneys.

First, both parties entering a collaborative law dissolution process commit to selecting counsel on both sides who willingly bind themselves to prearranged ground rules. Ideally, the clients choose attorneys who have a history of working cooperatively and effectively as opposing or collaborative counsel.<sup>37</sup>

Second, everyone signs a stipulation about how the process will be conducted, which remains in effect so long as all participants conduct themselves in good faith.

Third, a core element of the stipulation is that the process continues only so long as no one threatens litigation as a means of conducting negotiations, nor takes any steps to bring the matter into the court's litigation process.

Fourth, if the process breaks down, either because of bad faith or because one party or the other feels obliged to turn to the courts for relief, the attorneys must withdraw, and thereafter cannot represent either party against the other. Although departing collaborative law counsel will assist in an orderly transition to litigation counsel, the financial and emotional costs of starting over with new representation will usually be significant.

These stipulated commitments become powerful "carrots" and "sticks" encouraging immediate engagement in good-faith problem solving on all sides and discouraging the parties from lightly electing to litigate. Suspicion and paranoia decline dramatically; this is because most of the process takes place in the presence of both parties, and because the explicit commitment on both sides is that collaborative law counsel will withdraw if they have any reason to doubt the good faith of their own clients.

The transformation that often occurs in the attorneys' capacity to find creative solutions to thorny issues in collaborative practice simply must be experienced to be believed, and the essential key to entering this "creative hyperspace" is the disqualification stipulation. Without it, you may have something cordial and reasonably effective in settling cases, but you do not have collaborative

law. When the attorneys' range of options no longer includes going to court, the thought process changes from "Well, we can always see what Judge Smith will do with this problem," to "If I don't come up with a way to solve this problem that the other three participants find acceptable, I've failed and I will have to withdraw." In collaborative law, if I cannot find a good solution for the other party's legitimate needs that is also acceptable to my client, the process ends just as surely as if my own client's problems are not being attended to sufficiently.

For those reasons, in a collaborative representation involving difficult issues, there is often a distinct transforming moment when everyone around the table recognizes that either the four of them must devise a solution or the process ends and someone else will do the deciding.<sup>38</sup> At that point, instead of the oppositional negotiations that characterize litigation-dominated settlement conferences, it often happens that both parties and both lawyers enter a creative problem-solving mode in which all build on the ideas emerging around the table. In that situation, surprising solutions can emerge that would have been unimaginable in a conventional negotiation. The process encourages imaginative lateral thinking at a high level among all four participants from the start. None of these effects is impossible to achieve in a traditional settlement negotiation, but nothing about the traditional lawyer-client relationship fosters these effects as collaborative law does.

Mediation, too, can be an effective dispute-resolution mode,<sup>39</sup> but it, also, lacks the powerful problem-solving potential that is at the structural core of collaborative law. First, in mediation, a single neutral mediator manages the negotiations and conflicts. Whether or not the clients have independent counsel assisting them, it is not the job of either the mediator or the attorneys to work privately with a very unreasonable or upset client so that productive negotiations can resume. Such problems can sink a mediation permanently. Second, the mediator is not able, as collaborative lawyers are, to deal well with one-sided delay, resistance, withholding of information, and similar problems that can impair the integrity and efficiency of the process. In collaborative law, the lawyers place their own integrity on the line, committing to not continuing to represent a client who refuses to abide by the good-faith commitments contained in the stipulation. Third, the single talent that lawyers most often bring to a dispute is creative problem-solving skill. With two lawyers working together to find mutually acceptable solutions, both clients

benefit from the double professional talent engaged toward the same goal.

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*More marital reconciliations have occurred during this author's 6 years of collaborative practice than in her preceding 13 years in family law.*

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In short, collaborative law melds vigorous attorney advocacy and advice with a very sophisticated dispute resolution process that, at its best, engages the highest intentions and creativity of the participants. Many lawyers who practice collaborative law report a degree of enthusiasm and gratification from their work that had long been missing. Their clients genuinely appreciate the lawyers' work and are quick to recognize that the risk of failure is being distributed to the attorneys as well as the parties.<sup>40</sup> Surprisingly often, the experience of solving problems without the emotional toll exacted in prior efforts to negotiate with the spouse leads clients to acts of spontaneous generosity at the bargaining table. More marital reconciliations have occurred during this author's 6 years of collaborative practice than in her preceding 13 years in family law.<sup>41</sup>

Collaborative law is not a panacea; nothing is. It isn't for every client, and it isn't for every lawyer.<sup>42</sup> There will always be clients who need to take their cases to trial, and there will always be lawyers ready and willing to assist them. For those lawyers who worry about the damage done to clients, their families, their lawyers, and our communities from unthinking, avoidable adversarial conflict in divorce, collaborative law is a model worth learning about.

## ENDNOTES

<sup>1</sup>U.S. Commission on Child and Family Welfare, *Parenting Our Children: In the Best Interest of the Nation* 12 (1996).

<sup>2</sup>Some of them may be seeking out mediators; some may be using freelance paralegals who skirt the area of unlicensed practice of law. Some may be securing "unbundled" legal advice without retaining counsel of record. Many are buying "do it yourself" divorce manuals and going it alone. For people with short marriages, and those without children and without significant income or assets, the issues may be simple enough that a lawyer is an unnecessary luxury. But for many, negotiating without legal advice spawns unfair agreements, inadequate support, and future postjudgment conflicts that may give rise to otherwise avoidable litigation.

<sup>3</sup>California is so populous, has such a high divorce rate, and has been the source of sufficient trends in family law, that



lawyers from other regions might be wise to look at reports from this state as "the canary in the coal mine."

<sup>4</sup>Contested family law cases involving *pro per* litigants create substantial problems for judges and court personnel as well as the litigants themselves. See Roderic Duncan, *Pro Per Do-It-Yourself Divorce*, Cal. Law., Jan. 1998, at 44.

<sup>5</sup>Some commentators have estimated that as many as 70 percent of California divorces proceed to judgment without attorneys of record. Of these, it is further estimated that half—35 percent or so of all divorcing couples—can readily afford lawyers but refuse to retain them.

<sup>6</sup>Popular humor websites generally have a special category for jokes about lawyers. See, e.g., *scroom.com/humor/lawyer/html; netfit.com*; and *humor.com*. No other profession is singled out for this attention. Even legal research websites put forth the same scornful lawyer jokes. See, e.g., *nolo.com/humor* and *counselquest.com/jokes.htm*. The jokes have numbingly repetitive themes: Lawyers are greedy, unethical, crooked; they will do anything to keep litigation going and build up higher fees; they cheat their clients and anyone else they deal with. They are routinely compared to rodents, snakes, and other vermin and found to be less admirable. Many of the jokes involve killing lawyers, with the punch lines suggesting that nobody could possibly grieve for them and that a service to society has been done thereby. This is chilling material when read alongside the disturbingly frequent news reports of lawyers being shot and killed by clients and adverse parties. In California, the two courtrooms that routinely have metal detectors at the entrance are the criminal and the domestic relations departments.

<sup>7</sup>Deborah Tannen, *The Argument Culture* 273 (1998).

<sup>8</sup>See, e.g., Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U.L. Rev. 1337 (1997); Stephen Reich, *California Psychological Inventory: Profile of a Sample of First-Year Law Students*, 36 Psychol. Rep. 871-74 (1976); Carl Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 Soc. Probs. 599 (1979); Paul J. Spiegleman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J.L. Educ. 243-70 (1988); Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589 (1985); Susan P. Sturm, *Gender and the Higher Education Classroom, in Maximizing the Learning Environment: From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 Duke J. Gen. L. & Pol'y 119 (1997); Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. Rev. 514, 533-39 (1978); Lani Guinier et al., "Hey! There's Ladies Here!" 73 N.Y.U. L. Rev. 1022, 1035 (1998); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Children and the Adversary System*, 52 U. Miami L. Rev. 79 (1997).

<sup>9</sup>Daicoff, *supra* note 8; Reich, *supra* note 8. See also Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically Derived Attorney Personality Attributes*, 11 Georgetown J. Leg. Ethics 547 (1998).

<sup>10</sup>In the words of one custody expert, "I have seen normal people become neurotic, and neurotic people become psychotic, as a direct result of embroilment in adversarial proceedings associated with their divorces." Richard A. Gardner, M.D., *My Involvement in Child Custody Litigation*, 27 Fam. & Conciliation Cts. Rev. 1, 3-9 (1989). Another noted specialist in high-conflict divorces notes:

[E]ntrenched disputes often represent a response to overpowering feelings of shame and vulnerability which are evoked by the marital separation as well as by the perception that professionals are increasingly in charge of what was once the family's private life. Vulnerable parents frequently manage these feelings of shame and helplessness by projecting all incompetence and badness onto the former spouse and holding all competence and goodness for themselves. From this dynamic evolves a wish that the judge, Solomon-like, will erase the shame by publicly answering, once and for all, the question of which parent is good and competent and which parent is bad and incompetent.

Vivienne Roseby, Ph.D., *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 Fam. L.Q. 97, 98 (1999).

<sup>11</sup>It is beyond the scope of this article to pursue the implications of this fact, but they are significant. Our culture has prescribed ceremonies and rituals to assist people in handling the sometimes overwhelming emotions that accompany major life transitions. For births, weddings, and deaths, there are religious and social ceremonies and customs that provide support and aid participants in understanding the larger meaning of the event and one's own place in it. In Joseph Campbell terms, these ceremonies help people fit themselves and these events into their own personal myths. No such traditions have evolved to support people through divorce, though most people will experience divorce either directly or in their immediate families during their lifetimes. Most people go through divorce without the help of mental health professionals. See Austin Sarat & William Felstiner, *Law and Society in the Divorce Lawyer's Office*, 20 Law & Soc'y Rev. 93 (1986). The divorce lawyer is the de facto priest assigned the full cultural weight of bringing clients through this intensely destabilizing experience, and the trial is the only ceremony offered. Divorce for us is a set of legal issues; for our clients, it is a multidimensional experience that begins long before and ends long after the legal divorce, including emotional, spiritual, physical, financial, familial, relational, and ethical dimensions. Generally, there is no other professional assisting clients through this complex experience, and generally, we lawyers deal with this complex transition by defining most of it as irrelevant.

<sup>12</sup>One commentator observes:

[L]itigation itself is often demeaning, as litigants attempt to exaggerate each other's flaws and reopen old wounds in order to win points for themselves. Further, the process is disempowering as it forces the parties to place their fates in the hands of their attorneys and the court. In the process, the family's resources are expended and depleted with no beneficial outcome for the child or the parents.

Weinstein, *supra* note 8, at 133. Despite the fact that children need extra attention from their parents during the upheavals of divorce, they get less because litigation drains the personal and emotional, as well as financial, resources of their parents. Judith S. Wallerstein & Joan Berlin Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* 30 (1980). Andrew Schepard puts it this way:

Despite a child's overriding need for conflict management, the prevalent adversarial model of courtroom confrontation rewards parental conflict . . . Precisely when children need parents to lessen the degree of hostility and behave cooperatively, the specter of court-

room combat—and especially the conflict over the vague legal standard of the “best interests of the child”—encourages conflict. . . . The adversarial process encourages parents to denigrate one another, rather than to cooperate on the essential task of post-divorce child rearing. . . . [T]he custody dispute also drains resources from limited marital assets at a time when those assets could better be used to preserve the family’s standard of living.

Andrew Shepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. Mich. J. L. Reform 131, 145-47 (1993).

<sup>13</sup>See Roseby, *supra* note 10.

<sup>14</sup>Cf. Marygold S. Melli *et al.*, *The Process of Negotiations: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 Rutgers L. Rev. 1133, 1143-44, 1160 (1988).

<sup>15</sup>See *supra* notes 8 and 9. Also illustrative are the conclusions of clinical law professor Alan Lerner, *Law and Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem-Solvers*, 32 Akron L. Rev. 107, 114-117 (1999).

<sup>16</sup>See Hosticka, *supra* note 8.

<sup>17</sup>A fair analogy in the medical field would be the failure to advise critically ill patients about the range of treatment options and the risks commonly associated with each—a failure most lawyers would consider to be at least arguably malpractice. Surely our own standard of care requires no less. See, e.g., Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?* Arbitration J., June 1993, at 8.

<sup>18</sup>For a vivid judicial snapshot of what is wrong with court-based family dispute resolution, see the comments of family law judge Arne Kass, in *Clinical Advice from the Bench*, 7 J. Child & Adolescent Psychiatric Clinics N. Am. 247, 251-53 (1998):

[T]oo few judges and lawyers have examined their personal beliefs, attitudes, and expectations about family matters in any depth, and that leaves them vulnerable to becoming emotionally entangled in divorce and custody cases, sometimes quite unconsciously. . . . What does reach their conscious awareness is that they are extremely uncomfortable, but they haven’t the skills to reflect on their discomfort through introspection. In short, family law has the propensity to diminish objectivity and blur boundaries for judges and lawyers and thus cause emotional overload.

—Worse yet, the art of “building and maintaining appropriate boundaries is missing from legal education, so we find lawyers and judges who assume the inappropriate roles of rescuer and avenger.” Communication about hard facts is often “tied to fault and blame,” and lawyers and judges communicate in “linear and triangular patterns with little understanding that doing so causes misinterpretations, suspicion, and confusion.” *Id.*

Janet Johnston and Vivienne Roseby deplore the faulty reasoning involved in asking courts and judges to

take on and resolve family dilemmas that other professionals and the community at large have failed to resolve—cases that attorneys have failed to negotiate and mediators have failed to settle, for families that counselors and therapists have failed to help. Inexplicably, there is an assumption that judges have some special capacity to resolve the most difficult, the most complex of all family problems. Is it any wonder

that family court assignments for judges are so unpopular, so often avoided, and usually staffed by rotating assignments to prevent burnout?

Janet Johnston & Vivienne Roseby, *In the Name of the Child* 223 (1998).

Retired California Court of Appeals Justice Donald M. King made the point more succinctly: “Family court is where they shoot the survivors.” King, address at New Ways of Helping Children and Families Through Divorce, a conference sponsored by Judith Wallerstein Center for the Family in Transition and University of California, Santa Cruz; Quail Lodge, Carmel Valley, CA (Nov. 21, 1998).

<sup>19</sup>We do, of course, settle many cases, but we do so in a litigation-driven matrix in which much of the harm of adversarial wrangling has already occurred before settlement discussions begin. In recent years, mediation has been an option, but for many (though certainly not all) couples, it may provide insufficient protections and controls to be a wise dispute resolution choice. For an example of a feminist critique of mediation which includes some cautions about who should not mediate, see Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 Fam. L.Q. 177, 193-207 (1994).

<sup>20</sup>There is, however, an important difference. If the physician’s treatments should cause additional harm to the patient, the patient with the fatal illness does not survive to chastise him. Family law clients who are injured by the dispute resolution process selected or imposed by the lawyer will live to mull about who is to blame for the pain they experienced.

<sup>21</sup>See generally Stephen Erickson, *ADR and Family Law*, 12 Hamline J. Pub. L. & Pol’y 5 (1991); Bruce Winick, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychological-based Approach to Lawyering*, 34 Cal. W.L. Rev. 15 (1997).

<sup>22</sup>See *supra* notes 8, 9, and 15.

<sup>23</sup>See Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589 (1985); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts. 1 (1975); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63 (1980); Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989); Richard Zitron & Carol M. Langford, *The Moral Compass of the American Lawyer: Truth, Justice, Power, and Greed* (1999).

<sup>24</sup>What the better family lawyers understand, after some years in the practice of law, is that in reality there are very few angels hiring us to represent them and very few devils on the opposing side. As the saying in the San Francisco legal community goes, “Snow White rarely marnes Hitler.” The vast majority of our clients are simply good people going through a very bad time in their lives, and sooner or later most of us realize that casting their stones in black and white, win-lose terms does their families no service.

<sup>25</sup>The family law client, from this perspective, looks to the lawyer and the court system to assuage unbearable narcissistic wounds. Roseby, *supra* note 10.

<sup>26</sup>First, it is costly to spend any time with a lawyer, and, therefore, paying money to report good news probably does not occur to clients. Second, meetings with the lawyer tend to be painful and fraught with anxiety and therefore are to be avoided if possible. Third, clients too absorb the dominant gladiatorial model. Lawyers are hired warriors who go to battle for you against a demonized spouse. Why call on them for assistance when a hired gun isn’t needed?

<sup>27</sup>If they are reflective and mature, they may look back with a mixture of shame, remorse, regret, and guilt at their own contribution to a "bad divorce." If they are, by nature, more primitive in emotional development, they may carry forward from the wreckage of their divorce a permanent, unchangeable picture of themselves as victim and the ex-spouse as demon, a stance that thwarts their own personal growth and the emotional development of any children of the marriage.

<sup>28</sup>According to one large malpractice carrier, Lawyers' Mutual Insurance Company, "[E]xperience has shown us that a cross-complaint for malpractice is not an unusual concomitant to a fee dispute between attorney and client." 10 *Law. Mutual Ins. Co. Bull.* (1995).

<sup>29</sup>Gardner, *supra* note 10, observes that the stresses of litigation can produce rage so extreme it induces serious urges to murder, a risk recognized by the California court system in installing metal detectors at the entrance to many family law departments. See Weinstein, *supra* note 8, at 133 n.178.

<sup>30</sup>Joseph Bellacosa, *A Nation Under Lost Lawyers*, 100 *Dick. L. Rev.* 505 (1996); Mary Jordon, *More Attorneys Making a Motion for the Pursuit of Happiness*, *Wash. Post*, Sept. 4, 1993.

<sup>31</sup>See Association of American Law Schools, *Report of AALS Special Committee on Substance Abuse in the Law Schools*, 44 *J. Legal Educ.* 35, 41-46 (1994); Connie J. A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 *J. L. & Health* 1, 45-58 (1995-96).

<sup>32</sup>Stuart Webb describes his inspiration simply. He was so fed up with family law and its inconsistency with his personal ethics that he decided he would simply have to stop practicing law. Then it struck him that if he was willing to give up law altogether, there was no reason why he couldn't first try to reshape what was wrong about it and see if he could devise a mode of family law practice that made more sense to him. Pauline H. Tesler, *Collaborative Law: Where Did It Come From, Where Is It Now, Where Is It Going?* 1 *The Collaborative Q.* 1 (1999).

<sup>33</sup>Groups of collaborative lawyers formed in California and Ohio in the early 1990s. By the mid-1990s, several experienced collaborative lawyers were offering training around the country. In northern California, a parallel development among financial and mental health professionals called "collaborative divorce" emerged, opening for the first time the possibility of a well-trained interdisciplinary team of lawyers and other divorce professionals working in collaboration to help couples achieve a settlement entirely outside the court system, with all the benefits of sophisticated professional advocacy and support. Stuart Webb and the author are now offering training in conjunction with the originators of the collaborative divorce model, for interdisciplinary groups of lawyers, financial professionals, and mental health professionals. (See *Collaborative Divorce: A New, Interdisciplinary Model* on page 226 of this issue; also see the collaborative divorce web site at [collaborativedivorce.com](http://collaborativedivorce.com) for information.)

<sup>34</sup>The model first emerged in connection with divorce, but it can be applied in any situation where preservation of an ongoing relationship between the parties is an important objective. This article focuses on the model as it is applied in divorce and other family law matters, but it certainly should be considered an option in probate and commercial matters as well.

<sup>35</sup>Positional bargaining is most easily described as horse-trading, or "Mediterranean marketplace" bargaining, which proceeds via choreographed presentation of a sequence of unreasonable positions, always moving closer toward an intermediate reasonable compromise that often can be predicted by

looking at the parties' opening positions. Some theorists also describe and avoid "Scandinavian bargaining" (in which a party decides what is the right and fair outcome, proposes it, and refuses to deviate from it, because it is fair and right), and "Soviet Cold War bargaining" (in which ultimatums and threats replace reasoned negotiations). Interest-based bargaining is more complex. The lawyer works with his or her client to examine how a given goal or objective will help the client, and why, and whether there are other ways that could also achieve the same or better ends. The lawyer does not bring the issue to the bargaining table until it can be explained persuasively why the client needs whatever is being sought, and why the other party ought to consider it a reasonable goal. The collaborative process includes commitments to respect the legitimate settlement objectives of the other party, and to attempt to find win-win solutions that achieve the legitimate goals of both whenever possible. Those commitments give rise to the primary importance of working first with one's own client to be sure that true interests, not artificial negotiating positions, are being presented.

<sup>36</sup>I am indebted to my colleague, Laurence Wilson, for giving me permission to use and adapt this theoretical framework. The actual work of retooling in the four stages is subtle and fascinating, and it cannot be mastered from reading an article or book. Trainings that include role-playing and critique are the most efficient way to learn these skills. It can be done independently through a combination of working with trusted colleagues and studying with mental health and communications professionals, but the learning curve will be considerably slower, and more of the learning will be via trial and error.

<sup>37</sup>See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *Colum. L. Rev.* 509 (1994).

<sup>38</sup>It is important to emphasize that the clients are not giving up their right to have their dispute adjudicated in court. Either party can terminate the collaborative process and go to court at any time. The lawyers, however, cannot go with them. In this respect, collaborative law is a "limited purpose retention." That being so, it is particularly important that the retention agreement is drafted clearly and that the clients fully understand and agree that should they go to court, they will need to retain new counsel.

<sup>39</sup>It is effective but is not for all clients. In the family mediation model most prevalent in Northern California, attorneys do not participate directly in the process and are not present during mediation. Where there are significant imbalances in financial sophistication, negotiating skill, or emotional comfort about the divorce, or if serious emotional disturbance is present, it can be difficult for a neutral mediator to maintain the level playing field that is essential if a fair agreement is to result. Either an unfair agreement may result, or one or the other of the parties may perceive the mediator as biased and the process may end. Consequently, mediation may be best suited for the higher functioning divorcing spouses, those who are capable of handling conflict and strong feelings without losing their ability to negotiate.

<sup>40</sup>One client of mine, a successful forensic physician with a well-honed suspicion of lawyers, was especially delighted with this aspect of collaborative law. "If you guys can't solve the problem, you're out of a job!" he chortled. The lawyers, of course, tend to emphasize how effectively collaborative law provides incentives for difficult clients to behave reasonably. Both are true.

<sup>41</sup>I attribute this to the fact that effective collaborative

lawyers model and demonstrate good problem-solving skills and succeed in eliciting both spouses' positive participation in that process. Where there is a residual core of positive affection between the parties—and that is often present, but extinguished early in the conventional legal process—successful, cordial problem solving together sometimes moves couples to try again.

<sup>42</sup>Collaborative law requires basic honesty, self-respect, and at least a modicum of respect for the other spouse. It is inconsistent with active domestic violence and with certain kinds of mental illness and character disorders. For the process to work well, both parties need to trust the other's fundamental honesty as to assets, debts, and income; both need to take considerable personal responsibility for their own behavior; both need the ability to control emotions under stress sufficiently so that unacceptable outbursts do not fatally undermine the process. Further qualities correlated with successful collabora-

tive representations include that each party value integrity, civility, and a mutually fair outcome more than getting the biggest share of the pie above all else, and that each party be able to prioritize, and to take ultimate responsibility for devising and accepting their own terms for settlement. Not all clients can do these things. Nor can all lawyers engage in the self-examination, self-criticism, and retraining required to undo the instinctive, unreflective behavior of the career gladiator. Further, there will always be clients who prefer not to take so much responsibility for their own destinies, who would rather turn their cases over to lawyers and judges. And, from time to time (but probably far less often than we might imagine), there will be, with all the good faith that could be desired, still an issue that cannot be resolved except via third-party decision making. There are ways consistent with the collaborative process to contain resolution of those disputes and avoid runaway litigation, but discussion of them is beyond the scope of this article.

## ***FREQUENTLY ASKED QUESTIONS***

### **What is the goal of collaborative law?**

The goal or purpose of collaborative law is to offer attorneys and their clients a structured, non-adversarial alternative to an adversarial system of dispute resolution. It guarantees consumers of legal services high quality, skilled legal counsel to assist in the evaluation and resolution of a problem, without litigation.

### **For whom is collaborative law a good idea?**

Not every attorney will want or be able to practice collaborative law. Not every client will be willing to give up the adversarial contest. For many attorneys, however, their trial court experience has led to a belief that the commitment of their skill and time to a litigated case often does not achieve an outcome which is cost effective or even a good solution for their clients' problems. Similarly, many clients are looking for experienced legal counsel, knowledgeable guidance and skilled advocacy, but do not want litigation. For these attorneys and for these clients, Collaborative Law is an excellent option.

### **Can an attorney represent a client zealously if it is agreed in advance not to go to court?**

By entering into a collaborative law participation agreement attorneys and their clients have thoughtfully agreed to limit the attorney's role within the contractual relationship to that of providing representation for settlement purposes, only. Nothing in the Canons of Ethics precludes such a limitation. In stepping out of the adversarial process, the collaborative attorney does not give up the role of advocate for his or her client. The collaborative law attorney is representing his or her client zealously, not only to achieve a short term goal, but to realize the best result in the long run.

### **Can a party terminate the process?**

Nothing in the participation agreement precludes a party from terminating the collaborative law process and deciding to litigate. However, the clients will have been advised at the outset that doing so will require them to hire other counsel. The other party also will be trading his or her collaborative attorney for a litigator.

### **How does an attorney's assessment of the likely outcome of the client's case were it to be litigated affect the way the attorney approaches a collaborative law case?**

While the participation agreement prohibits threatening litigation, the attorney's advice to his or her client as to the strengths and merits of various claims will always include an assessment of the likely outcome if the case had to be litigated. Consideration of the law and one's legal rights is always appropriate in analyzing what a fair outcome in a collaborative process might be. Along with this assessment will be consideration of all of the costs and risks of litigation.

### **What are the Association of Collaborative Law Attorneys' requirements for participating lawyers?**

1. Lawyers must have been in practice for a minimum of five years.
2. They must complete a two-day Collaborative Law Center training program and such additional training as the Center requires.
3. They must commit themselves to faithfully observing all of the elements of the collaborative law participation agreement.

### **Is everybody in the attorney's firm precluded from participating in litigation in the event the collaborative law process is unsuccessful?**

Yes. Only in this way can parties be assured that there is no benefit to be gained by counsel in failing to succeed with settlement.

**Why must an attorney resign if the other party decides to go to court?**

The requirement that all attorneys be disqualified in the event of a breakdown guarantees that all participating counsel will be totally and exclusively motivated to have the process succeed. This way, all participants are equally and fully invested in finding the solutions to all problems. In addition, it is believed that the way people participate in negotiation, and especially the way attorneys participate, is affected by the certainty that that attorney will never litigate the case. Openness, mutual trust, and cooperation replace guardedness, secrecy, and threats as the techniques most likely to achieve ultimate success.

**How is an attorney's relationship with a client different in the collaborative law process, and how do attorneys prepare clients for participating collaboratively?**

First, the attorney never ceases to be the client's advocate and the client is so assured. By entering into the participation agreement, the client has already decided and declared the intent to neither threaten nor pursue litigation (an entitlement, however, which the client never waives). Now the objective is to discern and attempt to satisfy the interests of both (all) parties. To that end, all parties and counsel must cooperate. Counsel will encourage their clients to speak clearly about their own needs and desires, and to listen carefully to those expressed by others. Collaborative law attorneys remind and reassure their clients that by treating the other participant's interests with respect, they are serving their client's goals and interests. Collaborative attorneys are trained in communication skills and will assist the parties in this endeavor.

**Can one attorney practice collaborative law if the other participant has not signed a participation agreement?**

We will proceed on a collaborative law basis only when all attorneys and clients have signed the participation agreement. Clients and their attorneys may decide that they will use collaborative principles and use their best efforts to settle the case, however, the members of the Association of Collaborative Family Law Attorneys will term this non-adversarial process "working cooperatively". Unless the participation agreement is signed and there is a contractual obligation on the attorneys' part not to proceed with litigation for the clients, we are not truly working for our clients "collaboratively".

**How is collaborative law different from mediation?**

Mediation involves the use of a single neutral person (who may be an attorney, a mental health professional, or someone who has an interest in mediating) to facilitate the negotiation and settlement of a dispute between the parties. The mediator's goal is for the parties to reach agreement and, to that end, the parties usually are responsible for negotiate for themselves. The mediator cannot give legal advice to either of the parties; the parties may or may not be advised to seek independent legal counsel during their mediation. In New York, mediators are not required to be licensed.

In collaborative law cases, each party retains his or her own trained collaborative law attorney to advise and assist in negotiating an agreement. All negotiations take place in four-way conferences where settlement is the only agenda. The legal advice given to the parties at the four-way conferences is an important part of the collaborative law process, however, all decisions are made by the parties. When a final agreement on all issues is reached, the attorneys prepare and process whatever legal documents are needed to finalize a separation and/or divorce.

**How do you deal with courts' case management deadlines?**

It is anticipated that most collaborative law cases will be resolved prior to and without any court filings. However, for cases that have already been filed at the time the participation agreement is signed, stay motions have been developed for use pending completion of the collaborative law process.

**How do you deal with Statutes of Limitation?**

In collaborative law cases counsel and parties will cooperate with each other fully to prevent the necessity of any court filings while the collaborative case proceeds. This may involve agreements to toll the Statute of Limitations when possible. The participation agreement provides for some limited court filings, as agreed upon and as necessary to protect the parties' interests, while the collaborative law case proceeds.

**How does the practice of collaborative law affect attorney fees?**

Representation and fee agreements between attorney and client are not directly affected by the participation agreement.

**What can collaborative attorneys do if negotiations reach an impasse?**

Attorneys participating in the Association of Collaborative Law Attorneys have agreed to act as mentors for each other to assist in reviewing problem cases or situations. Additionally, collaborative attorneys and their clients can agree to employ experts to advise both participants as to disputed facts or law and hire a mediator or arbitrator at any time.

**What happens if a participant doesn't fulfill his/her disclosure obligation under the participation agreement?**

Participation in the collaborative law process is based on the assumption that the parties to the participation agreement (both attorneys and clients) have acted in good faith and have provided accurate information as required. Thus, while not automatically ending the collaborative law process, a party's refusal to fulfill his/her disclosure obligation under the participation agreement will, as a practical matter, probably make it impossible for the participants to reach a fair resolution. As with any instance in which a participant fails to fulfill the participation agreement, the other participant can elect to waive the violation and let the collaborative law process continue. When an attorney learns that his/her client has withheld or misrepresented information that should have been disclosed, the participation agreement requires the collaborative lawyer to withdraw.

**What if, sometime after entering into a settlement as a result of a collaborative law process, a collaborative attorney discovers that the other party failed to disclose information that should have been disclosed?**

In this respect, a settlement agreement reached via a collaborative law process is no different from any other negotiated settlement agreement, and the former is no more or less susceptible to being annulled for such a reason than the latter. To address this concern, the participation agreement states that, in any settlement agreement reached during the collaborative law process, the attorneys and the parties may wish to recite the material facts upon which the settlement is based.