

**COLLABORATIVE LAW:
AN IDEA WHOSE TIME HAS COME**

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THE ADVANTAGES OF SETTLING FAMILY LAW DISPUTES IN THE COLLABORATIVE LAW MODEL vs. THE LITIGATION MODEL

I. INTRODUCTION

There are numerous dispute resolution processes available for people to use to resolve their family law disputes. They range from getting things worked out at the kitchen table to having a full blown jury trial to resolve the dispute. Regardless of the dispute resolution process used, most family law cases settle without ultimately being tried to a judge or jury.

A question that confronts both lawyers and their clients is – if the case is likely going to ultimately settle, which process is better to use to achieve the settlement, the collaborative law process or the litigation process handled with the primary goal of settling?

In many cases it may be more advantageous for the parties to attempt to settle using the collaborative law process. In other cases, the goals of the client, the stubbornness of the opposing party or their lawyer, the existence of an emergency, the viciousness of the dispute or other strategic factors may dictate that the best course for the client lies in staying in the litigation process and keeping the courthouse more accessible.

Collaborative law is but one of many dispute resolution options available for parties to resolve their disputes. The best dispute resolution option to use for each case will depend on the facts, finances, goals and personalities involved in each dispute. No one dispute resolution process will be right for every case.

This outline will discuss the major differences and advantages in many cases of attempting to settle using the collaborative law model. Attached to this outline are the standard form Collaborative Law Participation Agreement approved by the Collaborative Law Institute of Texas, the Expectations of Conduct and a brief outline comparing characteristics of the collaborative and litigation process.

A. In the Collaborative Law Process the Focus Is Solely on Settlement

If most cases settle why not use a settlement process rather than a litigation process to settle the case? The collaborative law process is designed with the principle goal of helping people increase the chances that they will reach a settlement and settle in a way that is less destructive financially and emotionally to the parties and any children that may be involved. In the litigation process the whole process, in some fashion, is arranged in and around preparing for a trial that ultimately may not occur. Settlement is certainly a part of the litigation process but settlement is not the core principle which grounds the rules of procedure and evidence.

B. In the Collaborative Law Process Everybody is More Likely To Be On the Same Page

Perhaps one of the greatest benefits of the formal collaborative law process is that when the formal collaborative law participation agreement is signed there is no doubt that the parties and their lawyers are serious about settling the dispute. Signing a formal collaborative law participation agreement commits the parties to obligations of full disclosure and commits the lawyers to withdrawing in the event the process is terminated. This is a serious commitment to attempt to settle from both the parties and their lawyers. In the litigation process each party's commitment to settling the case may be different, undisclosed or misperceived and this can lead to numerous strategic errors.

The formal collaborative law process helps avoid strategy mistakes caused by one of the parties focusing on settling while the other side is focusing on trial preparation and trial strategy.

C. The Collaborative Law Process Creates a Road Map for Settlement vs. Just Making It Up As You Go Along

The collaborative process follows a six step process to resolve conflict; 1) establishing ground rules by signing the collaborative law participation agreement; 2) determining each party's goals interests and concerns; 3) gathering information each party may need or want to be in a position to negotiate; 4) brainstorming settlement options and solutions; 5) evaluating those options and solutions; and, 6) negotiating and selecting from the available options the option that best meets as many of the parties' shared and competing goals as possible.

In the litigation settlement process there is no formal "road map" or process to follow for settlement discussions – things usually happen when one party or the other decides to try to make things start happening. The lack of a "road map" can lead to problems in the settlement process because the parties are not "on the same page" about even how or when to approach settling the dispute. This can lead to misperceptions, misunderstandings and problems. Sometimes it is helpful for parties in distress to know what is going to happen and when things are going to happen. Having a road map helps people know what to expect and when to expect it.

D. War General/Diplomat Strategy Mistakes Reduced

One of the biggest strategy challenges a lawyer faces in the litigation process is trying to wear two hats at one time. In the litigation process even if the parties are intent on settlement the lawyer none the less has to in some fashion keep their "war general" hat on. One of the biggest strategy mistakes a lawyer can make is

trying too hard to settle when they should be preparing for trial or pushing too hard to prepare for trial when they should be exploring settlement options. It is hard to balance wearing the war general and diplomat's hat at the same time. It is hard to serve the two masters of dispute resolution – trial and settlement – at the same time.

It is hard to both fully prepare for trial and keep everyone relatively calm to pursue settlement options. Put another way there is no friendly way to depose the husband's girlfriend. In the collaborative law process the focus is solely on settlement. This allows the advocate to focus everything they do on increasing the likelihood of settlement without being worried about being caught short at the courthouse because of a failure to request or respond to formal discovery.

E. The Collaborative Law Process Has Aggressive Emotion Management Tools

1. Use of communications facilitators or neutral mental health professionals

The collaborative law process often stresses and encourages the use of a "team" approach to the negotiating process. Part of this team is a communications facilitator. This person is a mental health professional who is trained in helping people manage their emotions and communicate more constructively in an emotional atmosphere. There is a saying or concept that "men are from Mars and women are from Venus." When men and women get divorced and when there are emotional issues in that divorce, husband and wife or mom and dad may communicate as if they are a lot further away from each other than Mars and Venus.

Lawyers have little or no formal training in how to help people deal with overwhelming emotions. Much of what lawyers do as a matter of routine affects people in an emotional way that is often unintended by the lawyer. For years lawyers have been struggling to help clients through an emotional process while for the most part being untrained and unqualified to address emotional issues that confront and at times overwhelm clients.

Some say family law is ten percent legal/financial and ninety percent mental/emotional. If this is so, why not bring someone into the settlement process that is actually trained and skilled at managing the emotions of the parties and their lawyers in the negotiating process?

Having a communications facilitator involved in the settling process can be invaluable. They can serve to enforce the communications ground rules, help the parties manage emotional eruptions that develop during the settlement process and help both the parties and their lawyers communicate more effectively with each other.

2. Use of Neutral Non-Testifying Financial Experts

Many times using a neutral financial expert can help avoid situations where legitimate, useful settlement options are rejected simply because it's "his" idea or "his lawyer's" idea. There is a lot of messenger killing in the divorcing process. Sometimes a spouse can better hear a financial idea or financial reality if it is delivered by a neutral voice instead of from one of the parties or their lawyers. Additionally using a neutral financial expert can help defuse or reduce arguments concerning financial issues such as value, characterization, taxation, discount rates, rates of return and other financial issues.

3. Use of Neutral Non-Testifying Child Specialists

In the collaborative law process the parties routinely involve a mental health professional trained in children's issues to help the parties come up with a workable parenting plan. In the collaborative law process this mental health professional will not testify for or against either party. This helps reduce emotions by creating an atmosphere that is less blame oriented and more problem solving oriented. This helps the expert and the parties focus on finding a plan that will work for the children rather than focusing on each party's faults or assessing blame for the situation with the children.

F. The Collaborative Law Process Creates a Less Emotionally Volatile Atmosphere

1. The Parties Follow Expectations of Conduct

In the collaborative law process the parties commit to follow written "expectations" of conduct" aimed at keeping communications during the negotiating process civil, respectful and constructive. The effect of even having these rules and discussing them between the parties helps defuse the emotional atmosphere at the negotiating table. In the litigation process, discussing or agreeing to such rules if done at all is usually done in a less explicit manner.

2. The Parties and Emotions Are More Removed from the Courthouse

Because the parties cannot rush to the courthouse when they run into impasses this allows for a cooling off period to allow parties to more fully consider their options instead of making an emotional decision that puts them in front of a judge three days later. Sometimes cases are set on an irreversible course of destructive litigation because of a temporary hearing that started over a small fire that quickly dissolves into a raging forest fire.

3. The Requirement that the Collaborative Lawyers Cannot Later Litigate Defuses the atmosphere dramatically

In the collaborative law process the lawyers involved cannot litigate against each other or the parties. This requirement has the effect of enormously defusing the emotional and egotistical tension in the

room. Although tensions and egos can get strained in the collaborative process the collaborative lawyers will never be able to actually fight each other or attack the other party in court. This has the general effect of making both the lawyers and parties approach each other in a more collaborative and conciliatory fashion. Additionally because the involved lawyers will not be able to personally carry out any courtroom strategy or tactic, when courthouse options or likely results are discussed, they are discussed in a less personal and less emotionally threatening way.

G. Fees and Effort Efficiently Used

1. No funds spent on procedural issues and trial preparation

In the collaborative law process the parties do not pay their lawyers to comply with all the procedural rules that govern discovery and the rules of evidence. The parties do not spend money for their lawyers to interview witnesses, prepare direct and cross examinations or practice opening and closing statements that never get used.

2. All Time Spent on Trying to Support Settlement

The money that the parties do spend on their attorneys is all oriented towards actions related to trying to settle the case. They do not pay for trial preparation expenses that may never be used.

H. The Collaborative Law Process Creates a Better Atmosphere for Creative Brainstorming

In general the negotiation atmosphere created in a collaborative case is by design less volatile and less threatening. A goal of the process is to create a safe process to express and resolve conflict. In general it seems that there is a greater possibility of creative thinking and creative problem solving when people are working in calmer, more emotionally stable atmosphere than an unstable one.

Negotiations in the litigation process can be more fear based. In the litigation process the threat of a courthouse showdown or a confrontational deposition is more imminent. There is virtually nothing about the litigation process that causes people to feel more relaxed, less vulnerable or safer. While fear based negotiations can certainly inspire settlement to avoid confrontation, possible creative solutions may be overlooked in a more heated emotional environment.

When attempting to settle in the litigation process, the language the lawyers and parties use is often very different than in the collaborative process. In the litigation process negotiations are more likely to be conducted with an “us vs. them” or “gotcha” attitude and using battlefield metaphors and language during the negotiation process. This adversarial attitude and mentality is often polarizing and can make achieving settlement more difficult. While the parties in the collaborative process are adversaries and have

competing interests, the process itself attempts as best as it can to encourage cooperation and collaboration to discuss and solve problems. The litigation process by its nature is adversary and negotiations in that process are more likely to become adversarial and polarizing.

I. The Collaborative Process has a Better Schedule

Meetings in the collaborative process are all scheduled by agreement. There will never be a situation where a judge is ordering a mediation or hearing during a lawyer’s family vacation or during a client’s important business meeting. The scheduling of meetings in the collaborative process are agreed upon by all parties and their attorneys.

J. The Full Disclosure Assurances of the Collaborative Law Process Help Reduce the Risk of Getting Snookered

Collaborative law participation agreements are required by statute to include provisions providing for the “full and candid exchange of information between the parties and their attorneys...”Tex. Fam. Code 6.603(c) and 153.0072(c). The form collaborative law participation agreement approved by the Collaborative Law Institute of Texas has numerous provisions requiring full disclosure. Included in that form collaborative law participation agreement are provisions that:

- Require a party’s attorney to terminate the collaborative law process if a party insists on refusing to disclose relevant information.

- Awards to the innocent party 100% of any community assets that are later found to have been intentionally not disclosed.

The requirement of full disclosure exists without having to be triggered. In other words even if the other side does not ask for the information the information must be disclosed if a party putting him or herself in the other party’s shoes would want to know the information prior to making a settlement decision.

In the litigation process there are rules governing disclosure but they are vastly different than in the collaborative law process. Full disclosure is not an assurance of the litigation process. In the litigation process full disclosure often depends on first complying with the rules of discovery and procedure. In the litigation process parties are required to disclose information that has been requested in the proper manner and is not subject to some procedural or evidentiary objection. Parties trying to settle in the litigation process often forgo formal discovery and without formal discovery there are usually no affirmative duties of full disclosure imposed or

required of the parties unless other agreements are made.

The full disclosure obligations of the collaborative process do not guarantee absolute full disclosure in all cases; however, on the whole, the obligations and assurances of full disclosure required by the process create an atmosphere where the parties are attempting to insure they have provided full disclosure. In the litigation process a goal of at least one of the parties may sometimes be to search for legal and ethical ways to avoid being required to fully disclose critically relevant information.

K. The Collaborative Process Often Leads to a Better Quality Deal for the Parties

The collaborative law process expressly focuses on interest based negotiations. A significant part of the collaborative process involves probing the parties to understand their goals, interests and concerns. Negotiations are centered on trying to achieve settlement options which best serve the shared and competing goals, interests and concerns of the parties.

An example often used in the collaborative process to illustrate this point is the story of two ladies fighting over a dozen oranges in the town market. A wise old Judge appears and quickly solves the dispute by awarding each lady half a dozen oranges. Both ladies then become furious with the wise old Judge. Before dividing the oranges the judge did not take the time to ask the ladies why they were fighting over the oranges. It turns out that one of the ladies wanted the meat of the oranges to make juice and one lady wanted the rinds of the oranges to make a pie. Had the judge simply asked each of the ladies what their goals, interests and concerns were he would have quickly been able to arrive at a solution where both ladies were totally satisfied.

While interest based negotiations are often a part of negotiations in the litigation process the collaborative law process embraces this concept as a core concept of the entire process. Many times by focusing on the differing interests and concerns of the parties a “win/win” resolution can be more easily discovered than by focusing on what a court or jury will or will not do with a certain set of facts.

L. The Collaborative Law Process Has More Solution Oriented Tools and Processes for Children’s Issues

In the litigation process when mental health professionals work with the parties or their children in either a therapeutic or forensic capacity they are likely to be called as a witness for or against one of the parties if the case ends up being tried. This can often interfere with therapy or problem solving because the parties may be more focused on painting the other side as bad or themselves as good rather than focusing on

finding solutions to their children’s problems. In a litigation environment establishing who is to blame for problems is often the central focus of a dispute.

In the collaborative law process the focus is not on establishing blame – the focus is on solving problems. Because neutral child experts in the collaborative law process cannot be called to testify for or against anybody, the parties and the therapist are better able to focus on problem solving instead of fault finding. The role of a therapist working with children’s issues in a collaborative case is not to function as a judge or jury but to function as a facilitator.

The problem solving orientation of the collaborative law process is often especially helpful where children are concerned. In the litigation process because the parties are never more than a few days away from a possible courthouse confrontation they have to be constantly concerned on some level about how they are going to attack their opponent and defend themselves. This blame oriented mentality is often tremendously distracting from trying to find solutions for children in distress.

M. The Collaborative Law Process Sets Up a Better Negotiating Table

In the collaborative law process the accepted and encouraged way of doing business is for all of the parties and any team members to be present for all settlement discussions. This allows the attorneys to communicate directly with the other party. This direct form of communication allows the lawyers to learn from and communicate directly with the decision maker instead of having to use the other party’s lawyer as a conduit.

In the litigation process face to face settlement negotiations are more likely the exception rather than the rule. The tendency is to conduct either caucus style mediations or settlement meetings that keep the parties and/or their lawyers separated from each other.

For a negotiator, there is no better substitute for getting direct access to the party you are negotiating with. With direct access you can more effectively advocate your client’s objectives and interests and you can more accurately understand the interests and objections of the other party

N. In the Collaborative Law Process the Parties are in Control of the Dispute, Not the Lawyers, and There is Less Risk of a Fight Between the Lawyers Overshadowing the Fight Between the Parties

In the collaborative law process the parties by design are put in ultimate control of the negotiation process. In the litigation process the court’s imposition of litigation oriented deadlines may by necessity create situations where the parties lose control of the negotiations and the lawyers are forced to make

decisions which may limit or diminish the control of the parties over their dispute. For instance, a lawyer running up against a discovery deadline may insist on taking a controversial deposition for trial even though that deposition may destroy or diminish certain settlement opportunities.

Additionally in the litigation process the lawyers are more likely to get in a disagreement with the other lawyer that gets dealt with by bombarding that lawyer and his or her client with discovery requests, temporary hearings or procedural motions. In such a situation the parties may feel and be trapped in a dispute that is more between their warring lawyers than it is between the parties themselves.

O. The Collaborative Law Process Is More Private than the Litigation Process

Because there are no court hearings, depositions or document requests to third parties in the collaborative law process there is a better chance the parties' dispute will stay private and confidential. Privacy is a huge concern of many clients and the confidentiality provisions of the collaborative law participation agreement and the private nature of the process itself help the parties better achieve the privacy they often desire.

P. The "Team" Approach to the Collaborative Law Process is Better Engineered for Dispute Resolution

Many collaborative law attorneys encourage their clients to use the "team" approach to the collaborative law process. Under the team approach a neutral mental health professional serves as a "communications facilitator" and a neutral financial professional serves as a neutral financial expert for the case. Using these neutral professionals provides the negotiating process with a neutral voice and perspective throughout the process. The presence of a neutral voice in the process often helps avoid or resolve impasses and helps redirect and diffuse conflict away from the parties involved and at the problem in dispute.

The usual role of the neutral mental health professional is to manage the emotional issues of the case, keep the parties and lawyers communicating constructively and help the parties work through issues involving their children or other emotionally charged situations.

The usual role of the neutral financial expert is to gather, analyze and explain financial information, prepare inventories, prepare spreadsheets, assist the parties in evaluating the short and long term financial effects of settlement proposals and help in generating financial solutions. Sometimes financial information that has been prepared by a neutral financial expert will be more easily accepted or trusted because the

information is coming from a neutral instead on one of the parties or their lawyers.

Because these professionals are neutrals they provide the negotiating process with a neutral voice throughout the process. Many times a solution can be seen or suggested by a neutral that cannot be seen by the parties who are engrossed in their own perspectives. Additionally, sometimes a suggestion for resolving the dispute can be more easily heard by the parties when it comes from a neutral voice rather than one of the parties or their lawyers.

Having neutral professionals in the middle of the parties' dispute as part of the collaborative process gives conflict somewhere to go. Having neutral professionals involved throughout the process is somewhat like having a mediator involved throughout the settlement process instead of just towards the end of that process. A neutral can serve a role as a "referee" and also can suggest compromises or options that consider the concerns of both parties from a disinterested perspective.

II. CONCLUSION

The collaborative law process is not appropriate for all cases and certainly is not a perfect or fool proof process. However, for parties who have both real conflict and a desire to settle their differences without going to court, the collaborative process in many cases will be better able than the litigation process to increase the chances that the dispute will be resolved in an acceptable way without having to endure the difficulties encountered when family members litigate against each other in open court.

APPENDIX A
Approved Form

The Collaborative Law Institute of Texas, Inc. has approved this form for use by its members and other lawyers practicing collaborative law. Provisions may be changed or omitted as desired by the parties or lawyers. The Institute makes no warranties regarding the use of this form.

COLLABORATIVE LAW
PARTICIPATION AGREEMENT

PURPOSE

[PARTY 1] and [PARTY 2] (the “parties”) have chosen to use Collaborative Law to resolve their family differences. [PARTY 1] has engaged [LAWYER 1] and [PARTY 2] has engaged [LAWYER 2] as collaborative lawyers. The parties and their lawyers acknowledge that the essence of collaborative law is the shared belief that it is in the best interests of parties and their families to commit themselves to avoiding litigation.

We adopt this conflict resolution process, which relies on honesty, cooperation, integrity and professionalism geared toward the future well-being of the restructured family. Our goal is to eliminate the negative economic, social and emotional consequences of litigation. We commit to the collaborative law process to resolve the parties’ differences with the goal of achieving a resolution that is acceptable to both parties under the circumstances.

COMMITMENTS

We commit to a collaborative problem-solving process which is based on:

1. Identification of the values, goals and interests of each party;
2. The parties’ empowerment to make decisions;
3. Full and complete disclosure of relevant information;
4. The collaborative lawyers’ assistance to their respective clients in identifying issues, analyzing relevant information, developing options, and understanding their consequences; and
5. The lawyers’ commitment to adherence to the Protocols of Practice for Collaborative Family Lawyers promulgated by the Collaborative Law Institute of Texas, Inc.

COMMUNICATIONS

We agree to effectively and honestly communicate with each other. All written and verbal communications between us will be respectful and constructive. Settlement meetings will be focused on those issues necessary to the constructive resolution of the matter. The parties agree not to engage in unnecessary discussions of past events.

To maintain an objective and constructive process, the parties agree to discuss settlement of issues with each other only in the settlement conference setting, unless they agree otherwise. Either party may request termination of a settlement discussion at any time, and such a request shall be immediately honored. Settlement issues will not be discussed at unannounced times by telephone calls or appearances at the other party’s residence or place of employment. The lawyers will meet together to plan agendas for settlement meetings and to draft or review documents, but no agreements will be made by the lawyers on behalf of the parties.

We shall maintain a high standard of integrity and shall not take advantage of each other or of known mistakes, errors of fact or law, miscalculations or other inconsistencies, but shall identify and correct them.

Include the next two paragraphs if a minor child is involved:

The parties acknowledge that inappropriate communications regarding their dispute can be harmful to their child. Communication with the minor child regarding disputed issues will occur only as agreed by the parties and their lawyers.

Our goal is to reach an agreement that promotes the best interests of the child. No party will seek a custody evaluation while the matter is in the collaborative law process. No collaborative lawyer will interview the minor child unless both parties agree, and the child's therapist or neutral child specialist, if any, approves.

ALLIED PROFESSIONALS, EXPERTS AND ADVISORS

Unless otherwise agreed by the parties in writing, if allied professionals, experts or advisors (hereinafter referred to as "consultants") are needed, we will engage them jointly as neutrals. We may engage consultants for purposes of valuation, cash flow analysis, tax issues, parenting issues, and any other issue that requires expert advice and/or recommendations. The parties will agree in advance how consultants' fees will be paid. Unless the participants and consultants agree otherwise in writing, the consultants engaged are disqualified from testifying as witnesses, expert or otherwise, and their writings are inadmissible in any judicial proceeding between the parties. This disqualification does not apply to individuals engaged by the parties to assist them in other matters independent of the collaborative law process, such as preparation of tax returns and estate planning. Nothing contained herein precludes a collaborative lawyer from consulting with other professionals as necessary to better understand the factual and legal issues presented in the case.

Consultants may communicate with the parties, their lawyers, other consultants engaged in the collaborative law process, and any lawyers consulted for an opinion during the collaborative law process.

OTHER LEGAL OPINIONS

The parties agree no party shall engage a litigation lawyer so long as the collaborative process continues, except for the limited purpose of giving a private opinion as to the potential outcome of the dispute in an adversarial proceeding. If at any time prior to or during the collaborative process a party privately secures an opinion from another lawyer, including a litigation lawyer, on a specific issue(s), the party agrees to disclose the identity of such lawyer to all participants. If the opinion was sought prior to the signing of this Participation Agreement, then the party represents that the identity has been disclosed to all parties before this Agreement was signed. If the opinion is sought during the collaborative process, the party agrees to disclose the identity before the party's initial consultation with the lawyer and promptly inform all participants of the occurrence of each consultation the party has with such lawyer. The party should give any lawyer offering an opinion on any issue(s) all information necessary to give informed advice, including reports of neutral experts whose services have been engaged in the collaborative process. The parties agree the work product and opinion given by such privately engaged lawyer are attorney-client privileged and are not required to be disclosed to the other participants in the collaborative process.

The parties agree a lawyer privately engaged to offer an opinion, and any other lawyer associated in the practice of law with that lawyer, are disqualified from testifying as fact or expert witnesses, except as pertains to attorney's fees. Such lawyer(s) is not prohibited from representing the consulting party in any adversarial proceeding between the parties, unless the parties agree otherwise in writing.

If all the parties jointly seek a second opinion from a lawyer, including a litigation lawyer, then the opinion is to be disclosed to all participants, and the lawyer is to be considered a neutral expert and is disqualified.

The parties agree the work product, opinions, mental impressions, and the facts upon which they are based, of a consulted lawyer are not discoverable and are inadmissible in any adversarial proceeding regarding the dispute or in any other adversarial proceeding between the parties to this dispute, unless the participants and consulted lawyer agree otherwise in writing.

FULL DISCLOSURE

We agree to make such full and candid exchange of information as is necessary to make a proper evaluation of the case, including, but not limited to, full disclosure of the nature, extent, value of - and all developments affecting – the parties’ income, assets and liabilities, and all relevant matters concerning the parties’ child. Any material change in information previously provided must be promptly updated. The parties authorize their respective lawyers to fully disclose all information which in the lawyer’s judgment must be provided to other participants in order to fulfill this commitment.

No formal discovery procedures will be used unless specifically agreed to in advance. However, the parties may be required to sign a sworn statement making full and fair disclosure of their income, assets and debts (a sworn inventory and appraisal). Affidavits may be utilized to confirm specific matters, such as the unavailability of certain information, or the existence or non-existence of documents or tangible things.

CONFIDENTIALITY

The parties agree to maintain the confidentiality of any oral or written communications relating to the subject matter of the dispute made by the parties or their lawyers or other participants in the collaborative law process, whether before or after the institution of formal judicial proceedings. The collaborative law process is a form of settlement conference involving compromise negotiations. All communications, whether oral or written, and conduct of any party, lawyer, or consultant in the collaborative process constitute compromise negotiations under Rule 408, Texas Rules of Evidence, and are, therefore, inadmissible. The parties agree that any oral communication or written material used in or made a part of the collaborative law process will only be admissible or discoverable if it is admissible or discoverable independent of the process. This paragraph does not apply to reports of abuse or neglect required by law, formal discovery, sworn documents prepared in this matter, a fully executed collaborative law settlement agreement or evidence of fraud.

A party and/or his or her collaborative lawyer is free to disclose all information to a lawyer hired to render a second opinion for that party in the collaborative law process or to that party’s successor collaborative lawyer. In the event the collaborative law process is terminated, a party and/or his or her collaborative lawyer are free to disclose all information to that party’s litigation lawyer.

As in other legal matters, this provision does not prohibit disclosure by a collaborative lawyer or allied professional of case information for educational purposes without disclosing the identities of the parties, nor does it prohibit participation by a party in educational forums or media interviews to discuss the collaborative law process.

AGREEMENTS

The parties may agree to the entry of temporary orders as in other family law matters. Upon request of either party, the Code of Conduct set out in Exhibit "A" attached hereto shall be filed with the court as mutual temporary injunctions. Further, whether entered as temporary injunctions or not, the parties agree to abide by the terms of Exhibit "A" until it is modified by court order or written agreement. We understand that this Code of Conduct shall remain enforceable as a contract between the parties and may be the basis for a claim against the party violating its terms in the event of termination of this process. In such event, the collaborative lawyers shall withdraw as lawyers of record and, if required, shall consent to the substitution of the litigation lawyers.

Any written agreement, whether partial or final, which is signed by both parties and their respective collaborative lawyers, may be filed with the court as a collaborative law settlement agreement in accordance with Texas Family Code § 6.603 and/or § 153.0072 and/or Rule 11, Texas Rules of Civil Procedure. Such an agreement is retroactive to the date of the written agreement and may be made the basis of a court order. The collaborative lawyers shall cooperate in preparing the documents necessary to effectuate the parties' agreement. Either or both collaborative lawyers shall be permitted to appear in court to have agreed judgment(s) entered.

LEGAL PROCESS

Suspension of Court Intervention. The parties and the lawyers agree that court intervention shall be suspended while the parties are using collaborative law procedures. Seeking court intervention for a judicially-imposed decision regarding a disputed issue automatically terminates the process.

Court Proceedings. The lawyers' representation is limited to the collaborative law process. Once the process is terminated, neither lawyer can participate in the pending matter in any manner nor can either lawyer subsequently represent either party in a proceeding against the other.

No motion or document will be prepared or filed which would initiate court intervention, other than a Petition for Divorce and an Answer. If necessary, service of citation will be accepted by the parties' respective lawyers. No hearing shall be set thereafter, other than to enter agreed orders and judgments.

Termination by Party. A party who has decided to terminate the collaborative law process shall notify his or her lawyer in writing. That party's lawyer shall then give prompt written notice to the other party through his or her lawyer and to the court. Upon notice of termination of the process to the other lawyer, there will be a 30-day waiting period (unless there is an emergency) before any court hearing to permit each party to engage another lawyer and make an orderly transition. All written agreements shall remain effective until modified by agreement or court order. Either party may bring this provision to the attention of the Court in requesting a postponement of a hearing.

If a party chooses to terminate the collaborative process by seeking court intervention for a judicially-imposed decision, both lawyers shall immediately withdraw from the representation. Neither collaborative lawyer (including any lawyer associated in the practice of law with the collaborative lawyer) may serve as a litigation lawyer in this case or in any other matters between the parties thereafter. Each lawyer will cooperate in transferring the file to a new lawyer.

Termination by Lawyer. If a party refuses to disclose information, including the existence of documents, which in the lawyer's judgment must be provided to other participants, answers dishonestly any inquiry made by a participant in the collaborative law process, or proposes to take an action that would compromise the integrity of the process, and the party persists after counseling by the lawyer, the collaborative law process must be terminated. Under any of these circumstances, if the offending party refuses to terminate the collaborative process, each party acknowledges that his/her respective lawyer has a

duty to terminate the collaborative law process on behalf of the client, and each party authorizes his/her lawyer to terminate the process in the name of the client by written notice to all participants and the court.

Withdrawal of Lawyer. If the process is terminated, whether by a party or a lawyer, both lawyers shall immediately withdraw from the representation. If there is no termination of the process, either collaborative lawyer may withdraw unilaterally from representation by giving three days' written notice to his or her client and the other collaborative lawyer, unless substituted by a successor lawyer in which case no such notice is required. Notice of withdrawal of a collaborative lawyer does not necessarily terminate the collaborative law process; however, in order for the process to continue, the party whose lawyer has withdrawn must engage a new collaborative lawyer who will agree in writing to be bound by this Participation Agreement. If the party whose lawyer has withdrawn chooses to represent himself or herself, the collaborative law process terminates and the other lawyer must withdraw.

BOX: The following optional section may be used in divorce matters:

REPRESENTATION AS TO PROPERTY

It is understood and agreed that the final documents reflecting the parties' financial settlement shall include the following, or similar, provisions, if either party requests the inclusion thereof:

Representations and Disclosures. The parties represent to each other that the property listed represents all of the property in which either of them may have an interest.

Separate Property. Any property which is not listed or described and which is later determined to be the separate property of a party shall be and remain the separate property of that party.

Property and Liabilities Mistakenly Omitted. Any mistakenly omitted property which is not listed or described and is later determined to be the community property of the parties, shall be subject to future division by the court. Any mistakenly omitted liabilities which are later determined to have been the joint liabilities of the parties shall be subject to future allocation by the court.

Property and Liabilities Intentionally Omitted. Any community assets later determined to be have been intentionally and fraudulently undisclosed by a party are set aside 100% to the other party. Any liabilities determined to have been intentionally and fraudulently undisclosed by a party are allocated 100% to the party who incurred the debt.

BOX: Insertion of one of the following paragraphs is optional:

MEDIATION

To avoid termination or to further facilitate the collaborative law process, the parties agree to mediate in good faith with [NAME OF MEDIATOR], a mediator who has received training in the collaborative law process [on or before _____, 20___, or before such other date as the parties may hereafter agree].

OR

Before the parties decide to terminate the collaborative law process for any reason, the participants agree to mediate in good faith with a mediator who has received training in the collaborative process.

LAWYERS' FEES AND EXPENSES

The parties understand that the lawyers and consultants are entitled to be paid for their services. The parties agree to make funds available from their community or separate estates, as needed, to pay these fees. The parties understand that, if necessary, one party may be asked to pay all fees (including fees of the other party's lawyer) from community property managed solely by him or her (e.g., his or her salary) or from separate funds. The parties agree that, to the extent possible, all lawyers' fees and expenses (including consultants' fees) incurred by both parties shall be paid in full prior to entry of a final judgment.

USE OF LEGAL INTERNS AND LAWYERS AS OBSERVERS

The parties agree that legal interns and other lawyers may observe one or more joint sessions in this collaborative law process, provided the observers agree to sign a written observation agreement preserving the confidentiality of any such observed session. The observer will not participate in the joint sessions except as an observer. Such observing shall be at no charge to the parties.

UNDERSTANDINGS

The parties understand that each collaborative lawyer is independent from the other and each represents his or her client only in the collaborative law process. The parties further understand that each collaborative lawyer is an advocate for his or her client only. No legal duty, by contract or otherwise, is owed to a party by the other party's collaborative lawyer. No lawyer-client relationship exists between one party's collaborative lawyer and the other party by virtue of this Participation Agreement or the collaborative process.

The parties acknowledge the following: There is no guarantee that the collaborative process will be successful in resolving the matter. The process cannot eliminate concerns about the differences that have led to the current conflict. The parties are expected to assert their own interests and their respective collaborative lawyers will help each of them to do so. The process, even with full and honest disclosure, can involve intense good-faith negotiation, but best efforts will be used to create proposals that meet the interests of both parties. Compromise may be needed to reach a settlement of all issues. Although the likely outcome of a litigated result may be discussed, the threat of litigation will not be used.

The parties understand that by agreeing to this process, they are giving up certain rights, including the right to conduct formal discovery (other than sworn inventories and appraisements), the right to participate in adversarial court hearings and other procedures provided by the adversarial legal system, unless the process is terminated. The terms of this agreement may be modified only by written agreement signed by all participants. However, the prohibition against either lawyer and any lawyer associated with that lawyer representing their client in contested matters against the other party may not be modified. Both parties and their respective collaborative lawyers hereby pledge to comply with and to promote the spirit and letter of this agreement. Both parties and their collaborative lawyers acknowledge that they have read this agreement, understand its terms and conditions, and agree to abide by them.

Signed on _____.

[PARTY 1]

[PARTY 2]

Street Address
City, State, Zip Code

Street Address
City, State, Zip Code

[LAWYER 1]
Lawyer for [PARTY 1]
SBN #
Street Address
City, State, Zip Code
Office Phone
Fax Number

[LAWYER 2]
Lawyer for [PARTY 2]
SBN #
Street Address
City, State, Zip Code
Office Phone
Fax Number

EXHIBIT "A"

CODE OF CONDUCT

Either party may:

1. Make expenditures and incur indebtedness for reasonable and necessary living expenses for food, clothing, shelter, transportation, entertainment, education and medical care.
2. Make expenditures and incur indebtedness for reasonable lawyers' fees and consultants' fees and expenses in connection with this matter.
3. Make withdrawals from accounts in financial institutions only for the purposes authorized by this agreement.
4. Engage in acts, make expenditures, incur indebtedness, make investments, and acquire, sell and transfer assets, as is reasonable and necessary to the conduct of either party's usual investment activities, business and occupation, subject to all such activities being fully disclosed and accounted for to the other party.

The parties agree not to:

1. Communicate with the other party in an offensive manner.
2. Place telephone calls without a legitimate purpose of communication.
3. Destroy, remove, conceal, encumber, transfer, or otherwise harm or reduce the value of the property of one or both of the parties.
4. Falsify any writing or record relating to the property of either party.
5. Damage or destroy the tangible property of one or both of the parties, including any document that represents or embodies anything of value.
6. Tamper with the tangible property of one or both of the parties, including any document that represents or embodies anything of value, thereby causing monetary loss to the other party.
7. Sell, transfer, assign, mortgage, encumber, or in any other manner alienate any of the property of either party, whether personalty or realty, and whether separate or community, except as specifically agreed to in writing or as specified in this agreement.
8. Incur any indebtedness, including but not limited to borrowing against any credit line or unreasonably using credit cards or cash advances against credit or bank cards, except as specifically agreed to in writing, or as specified in this agreement.
9. Make withdrawals from any checking or savings account in any financial institution for any purpose, except as specifically agreed to in writing, or as specified in this agreement.
10. Spend any sum of cash in the possession or subject to the control of either party for any purpose, except as specifically agreed to in writing, or as specified in this agreement.
11. Withdraw or borrow in any manner for any purpose from any retirement, profit-sharing, pension, death, or other employee benefit plan or employee savings plan or from any individual retirement account or Keogh account, except as specifically agreed to in writing.
12. Enter any safe-deposit box in the name of or subject to the control of either party, whether individually or jointly with others, unless the parties accompany each other and jointly enter the box for the sole purpose of inventorying or dividing its contents by mutual agreement.
13. Withdraw or borrow in any manner all or any part of the cash surrender value of life insurance policies on the life of either party, except as specifically agreed to in writing.
14. Change or in any manner alter the beneficiary designation on any pension, retirement plan or insurance policy, except as specifically agreed to in writing.
15. Cancel, alter, fail to renew or pay premium, permit to lapse or in any manner affect or reduce the value of the present level of coverage of any life, disability, casualty, automobile, or health insurance policies insuring the parties' property or persons, except as specifically agreed to in writing.

16. Change any provisions of any existing trust or will or execute a new trust or will without the prior written consent of the other party.
17. Terminate or in any manner affect the service of water, electricity, gas, telephone, cable television, or other contractual services, such as security, pest control, landscaping, or yard maintenance, at the residence of the other party or in any manner attempt to withdraw any deposits for service in connection with those services, except as specifically agreed to in writing.
18. Exclude the other party from the use and enjoyment of his or her respective residence.
19. Enter or remain on the premises of the residence of the other party without the other's consent.
20. Open or divert mail addressed to the other party, except as specifically agreed to in writing.
21. Sign or endorse the other party's name on any negotiable instrument, check, or draft, such as tax refunds, insurance payments, and dividends, or attempt to negotiate any negotiable instrument payable to the parties or the other party without the personal signature of the other party.
22. Take any action to terminate or limit credit or charge cards in the name of the parties or the other party, except as specifically agreed to in writing.
23. Transfer balances between credit cards or open new credit card accounts, except as specifically agreed to in advance in writing by the parties.
24. Pay more than the outstanding balance owed on a credit card or charge account, except as specifically agreed to in writing.
25. Take any action to freeze or put a hold on any account with any financial institution from which the other party has the right to withdraw funds for purposes consistent with the authorizations contained in this agreement.
26. Operate or exercise control over the motor vehicles in the possession of the other party, except as specifically agreed to by the parties.
27. Discontinue or reduce the withholding for federal income taxes on either party's wages or salary, except as specifically agreed to in writing.
28. Destroy, dispose of, or alter any financial records of the parties, including but not limited to records from financial institutions (including canceled checks and deposit slips), all records of credit purchases or cash advances, tax returns, and financial statements.
29. Destroy, dispose of, or alter any relevant e-mail or other electronic data, whether stored on a hard drive or on a diskette or other electronic storage device.
30. Conduct surveillance of the other party's activities, including accessing the other party's emails, computer files and voice mail messages, and including the use of an investigator, detective or other individual paid for or engaged by a party or third party, or use of electronic listening or tracking devices, until this collaborative law process is terminated.
31. Engage the services of a stand-by litigation lawyer so long as the collaborative law process continues, except for the limited purpose of obtaining an opinion in accordance with the provisions of this agreement set out in "Other Legal Opinions."
32. Exercise any stock options and warrants except as specifically authorized in advance by written agreement of the parties.
33. Exercise any general or limited power of attorney, whether or not recorded, granted by one party to the other, except for directives to physicians, living wills, health care or medical powers of attorney, and HIPAA releases.
34. Pay any indebtedness owed by the parties or either of them prior to the date the indebtedness is due, unless agreed to specifically in writing by the parties.
35. Create or contribute to, or reduce the value of or withdraw from or terminate, any trust of any kind or nature except as specifically authorized in advance by written agreement of the parties.
36. Make any gift of any kind or nature, other than usual and customary gifts to family members of either party or mutual friends or their child (ren).

37. Create or contribute to any uniform gifts/transfers to minor act accounts or any trust of any kind or nature, except as specifically agreed to in advance in writing by the parties.
38. File any extension or form with the Internal Revenue Service with regard to federal tax liability for any years of the marriage that limits the other party's choice of filing status, unless agreed to in advance in writing by the parties.
39. File any federal income tax return or amendment to any federal income tax return for any year of the marriage during the pendency of the matter without first providing a true and correct copy of such proposed return to the lawyer of record for the other party at least 14 days in advance of the proposed tender to the Internal Revenue Service. This shall apply whether or not such filing is proposed to be by electronic methods or hard copy filing.

APPENDIX B

Expectations of Conduct

1. Participants will focus on the future and avoid unnecessary discussions of the past. Participants will focus on resolving conflict and not on assessing blame.
2. Participants will listen carefully to the goals that begin every joint session, and will take actions and make decisions in furtherance of the shared goals.
3. Participants will address others in a courteous manner and tone. Participants will not interrupt when another person is speaking. Participants will avoid sarcastic, contemptuous, critical, defensive, or judgmental communication/comments.
4. If a participant feels that progress has ceased or that he/she is about to lose control of himself/herself and say or do something to impede progress, that participant will call for a break. If the break is insufficient to calm the affected participant, the meeting may be terminated.
5. Each participant will speak only for himself/herself. Participants will use “I” instead of “You” sentences.
6. Participants will express their true interests.
7. Participants will be patient with each other and their lawyers. All participants will assume that each participant is acting in good faith and realize that everyone does not move at the same pace. To pull together, each participant must sometimes accommodate by slowing down. Delays can happen, even with everyone acting in good faith.
8. Participants will follow the Agenda for that joint session. If there are other topics that a participant wants to address, he/she shall accomplish same by asking that it be included in the Agenda for the next four-way meeting.
9. Participants will be honest.
10. Participants recognize that arguing is pointless.

APPENDIX C

Litigation Process vs. Collaborative Process Comparisons

Litigation Process Descriptors

Parties in disputes often feel intimidated, fearful, anxious, powerless, out gunned, and not in control.

Process often focused on assigning blame or fault for problems.

Unpredictable and impersonal results.

May get results that you do not want or agree with.

Parties can feel unsafe - subject to cross examination, subpoenas and depositions.

Public.

Inconvenient scheduling - court and other side may determine the parties' schedules.

Filtered process - information often exchanged subject to discovery rules and lawyer/party discretion. Often negotiate indirectly through lawyers.

Much time, money and energy can be spent getting ready for a trial that most likely will never occur. 90% of cases settle but 90% of legal fees are not spent on settlement efforts.

Legal expenses are not all within your control. Other side can force you to spend money on depositions, discovery and hearings that you do not want.

Cannot just "try" litigation.

Collaborative Process Descriptors

Collaborative process affirmatively seeks to make both parties feel safe, respected, in control of their lives and as comfortable as possible while working towards resolution.

Process focused on reaching solutions to problems.

Predictable and personalized results.

There will be no result without your express agreement.

Safe atmosphere - civil, dignified, respectful.

Private and confidential.

Schedules for meetings are by agreement.

Transparent process - same information available to all parties/attorneys at same time. Parties develop options and negotiate for resolution in "four way" meetings.

100% of all time, money and creative energy is spent on settlement efforts - fewer wasted financial, emotional and mental resources.

Legal expenses are discussed and agreed upon. Legal resources and expenses are more efficiently used.

Can try collaboration - if it does not work.