

Model Collaborative Participation Agreement

(For use under the Uniform Collaborative Law Act)

The undersigned parties, _____ and _____, hereby agree that it is their
NAME OF PARTY NAME OF PARTY

intention to resolve through a collaborative law process under the Uniform Collaborative Law Act the following collaborative matter(s):

[List the nature and scope of each matter that the parties will attempt to resolve.]
[Add additional provisions not inconsistent with the Uniform Collaborative Law Act that the parties agree to include.]

In the collaborative law process hereunder _____ will be represented by
NAME OF PARTY

_____, and _____ will be represented by _____.
NAME OF LAWYER NAME OF PARTY NAME OF LAWYER

SIGNATURE OF PARTY DATE OF SIGNATURE

SIGNATURE OF PARTY DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the
NAME OF LAWYER NAME OF PARTY

Collaborative law process hereunder.

SIGNATURE OF LAWYER DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the collaborative
NAME OF LAWYER NAME OF PARTY

name of lawyer name of party law process hereunder.

SIGNATURE OF LAWYER DATE OF SIGNATURE

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Guide to the Collaborative Participation Agreement ***(For use under the Uniform Collaborative Law Act)***

INTRODUCTION

This GUIDE is intended to assist in the use of the accompanying model Collaborative Participation Agreement. The section references are to the Uniform Collaborative Law Act (Act) approved by the Uniform Law Commission.

LAWYER’S OBLIGATIONS PRIOR TO PROSPECTIVE PARTY’S SIGNING AGREEMENT

Before a prospective party to a collaborative law participation agreement signs the agreement, the Act requires the lawyer to:

- (1) assess with the prospective party whether a collaborative law process is appropriate for attempting to resolve the matter(s) at issue [Section 14(1)and(2)];
- (2) advise the prospective party that participation in a collaborative law process is voluntary and that any party has the right unilaterally to terminate the process with or without cause [Section 14(3)(B)];
- (3) advise the prospective party that the collaborative law process will terminate if after signing an agreement a party initiates a proceeding in a court or other tribunal [Section 14(3)(A)];
- (4) advise the prospective party that except in limited circumstances the lawyer will be disqualified from representing the party in any subsequent proceeding related to a collaborative matter covered by the agreement [Section 14(3)(C)]. The Act also requires that the lawyer make reasonable inquiry into whether the prospective party has a history of a coercive or violent relationship with another prospective party. If the lawyer reasonably believes that to be the case, the lawyer may not begin the collaborative process unless the prospective party so requests and the lawyer reasonably believes the safety of the party can be protected during the process [Section 15].

REQUIRED PROVISIONS OF THE AGREEMENT

The Act lists in Section 4 the minimum requirements for a collaborative law participation agreement to be valid. Section 4(a)(1) and (2) require the agreement to be in a signed “record” (which is defined in Section 2(12) and which will customarily be a writing). Section 4 also lists several required provisions of the agreement. It is critical that these required provisions be included in the agreement. An agreement that fails to meet the requirements of Section 4 is not a valid collaborative law participation agreement under the Act, creating the risk that important substantive provisions of the Act will be held inapplicable if they come into issue in later proceedings (e.g., the disqualification rules of Section 9 and the privilege rules of Section 17).

The agreement must “state the parties’ intention to resolve a collaborative matter through a collaborative process under this [act]” [Section 4(a)(3)]. Individual enacting states would substitute the appropriate statutory sections of that state for the bracketed word “act”. The purpose of this requirement

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of the collaborative law participation agreement is to insure that the parties are making a deliberate decision to opt into a collaborative law process under the Act, and to differentiate a collaborative law process under the Act from other types of cooperative or collaborative behavior or dispute resolution involving parties and lawyers.

The agreement must describe the nature and scope of the collaborative matter. [Section 4(a)(4)] It is important that this description be specific since it circumscribes the lawyer disqualification provision of Section 9, which applies to proceedings “related to the collaborative matter.” The description of the “matter” is also central to the privilege provisions of Section 17, which apply to collaborative law communications. A “collaborative law communication” is defined in Section 2(1) as a statement made for purposes of conducting a “collaborative law process”, which is defined in Section 2(3) as a procedure intended to resolve a “matter” without intervention by a tribunal.

Also important to the lawyer disqualification provision of Section 9 is the identification of the collaborative lawyer who represents each party, which is a required provision under Section 4(a)(5). Each collaborative lawyer must sign a statement confirming the lawyer representation of a party in the collaborative law process. [Section 4(a)(6)]

ADDITIONAL PROVISIONS OF THE AGREEMENT

Section 4(b) of the Act provides that the parties may include in a collaborative law participation agreement additional provisions not inconsistent with the Act. Thus collaborative lawyers may continue to include any provisions that they have customarily used in their participation agreements, so long as they are not inconsistent with the Act.

The Act explicitly refers to a number of additional provisions that the parties may wish (but are not required) to include in their collaborative law participation agreement. The following sections of the Act include such references.

(1) Section 16 provides that communications made in the collaborative law process are confidential to the extent agreed by the parties. The Act (in Section 17) creates evidentiary privilege for collaborative law communications but leaves it to the parties to reach by agreement any broader confidentiality limits they wish to establish. In case of breach, such confidentiality agreements would be enforceable by usual contract remedies (not by the Act).

(2) Section 19(f) provides that the privileges under Section 17 do not apply if the parties have agreed in advance in a signed record (usually a writing) that all or part of a collaborative law process is not privileged. Such an opt out agreement of the parties will not apply to collaborative law communications made by nonparty participants (e.g., experts) unless they received actual notice of the agreement before the communications were made.

(3) Section 12 provides that during the collaborative law process, on request of another party, a party shall make disclosure of information related to the collaborative matter. However, the section permits the parties to define the scope of disclosure, which could be done by an additional agreement in the collaborative law participation agreement.

(4) Section 5(i) provides that a collaborative law participation agreement may provide methods of concluding a collaborative law process additional to those methods specified in Section 5(c) (resolution of all or part of the collaborative law matter; termination).

(5) Sections 10(b)(2) and 11(b)(1) contemplate that a collaborative law participation agreement may provide that, in the case of a low income party or a government entity party, after a collaborative law

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process concludes, another lawyer in a law firm with which a collaborative lawyer is associated may continue to represent the party in a matter related to the collaborative matter. Such an agreement, among other requirements, is necessary in order that the exceptions to the disqualification of lawyers in an associated firm which are provided in Sections 10(b) and 11(b), shall apply.

As noted above, the Uniform Collaborative Law Act requires only a limited number of provisions to be included in the collaborative law participation agreement. Important consequences of entering into the agreement are provided by substantive law provisions of the Act. A prime example is Section 9, which provides the disqualification requirement for collaborative lawyers, which is a fundamental defining characteristic of collaborative law. A substantive law provision of the Act (e.g., lawyer disqualification) may, if the parties wish, also be included as a provision of the collaborative law participation agreement so long as it is not inconsistent with the substantive law provision.

The parties are also free to supplement the required provisions under the Act with any additional provisions that meet their particular needs and circumstances, so long as they are not inconsistent with the Act. [Section 4(b)] Collaborative parties and their lawyers today cover a wide range of topics in their participation agreements. Discussed below are a sampling of some of the subjects that are often addressed by provisions in participation agreements.

Goals

Many participation agreements identify goals of the collaborative process, such as avoiding litigation and the likely negative economic, social and emotional consequences therefrom. Collaborative parties sometimes identify values they intend to employ in pursuing their goals, including honesty, cooperation, integrity, dignity and respect for the other parties.

Commitment

The Act requires the parties to state in the collaborative law participation agreement their intention to resolve the matters at issue through a collaborative process. The parties' commitment is often elaborated near the end of participation agreements by a statement to the effect that the parties understand the terms of the agreement and commit themselves to using the process to resolve their differences fairly and equitably.

Collaborative Process

It is common practice for participation agreements to describe the structure of meetings that will be utilized in the collaborative process. Joint face-to-face meetings are commonly provided for, but participation agreements sometimes include alternative venues, such as conference calls or video conferencing, in appropriate circumstances. The participation agreement might describe the interest-based negotiation process by which goals and issues are identified, facts are gathered, options are developed and analyzed, and agreements are negotiated. Also included might be negotiation principles, such as agreements to negotiate in good faith, to take reasonable positions, to be willing to compromise, to refrain from using threats of litigation, and the like.

Communications

To promote effective communications, the participation agreement might state that communications should be respectful and constructive. To promote resolution of the issues acceptable to both parties, the agreement might state that each party is encouraged to speak freely and to express his or her needs and desires. Participation agreements sometimes include "ground rules" that apply to

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discussions between the parties outside of joint meetings, such as prohibiting unannounced telephone calls or surprise visits.

Children

When children are involved, participation agreements often include agreements by the parties to attempt to reach amicable solutions that promote the children's best interests and to refrain from inappropriately discussing legal issues in the presence of or with their children.

Lawyers' Role and Fees

To clarify the role of lawyers, participation agreements sometimes state that the respective lawyers are employed by and represent only the party who retained them. The agreement may also describe the basic functions of lawyers in the collaborative process, such as advising and assisting client in gathering and understanding relevant documents, informing client of the applicable law, assisting client in preparing for collaborative meetings, facilitating interest-based negotiations. While each party will have a separate contract with his or her lawyer regarding fees, sometimes the participation agreement contains an agreement by the parties to make funds available to pay both lawyers.

Role of Professionals

Participation agreements sometimes include a statement of the role of professionals who may be called on to assist in the collaborative process. These might include financial professionals, coaches, mental health professionals, child specialists, mediators or experts in other fields. In such cases the participation agreement may reference separate agreements or other arrangements made by the parties for the services of such professionals.

Under the Act a professional who assists in the collaborative law process is called a "nonparty participant." The Act does not require nonparty participants to confirm their participation by a signed statement in the collaborative law participation agreement. If the parties and their lawyers think it desirable, professionals could confirm their participation by a signed statement, in much the same manner as the lawyers are required by the Act to confirm their representation of the parties.

Neutral Experts

Frequently the parties and their lawyers prefer that experts participating in the collaborative process be jointly hired and neutral. The participation agreement may specify that experts are to be jointly retained unless otherwise agreed by the parties. Such agreements will customarily provide that reports, recommendations and other documents generated by the neutral experts shall be shared with all the parties and their lawyers. The participation agreement might also state whether the experts' communications and work product will be subject to a confidentiality agreement of the parties.

Preservation of Status Quo

Participation agreements often include a commitment that neither party will unilaterally make significant changes regarding finances, insurance or children. Examples of such agreements are provisions that neither party will unilaterally dispose of property, change beneficiaries on a life insurance policy, alter other insurance provisions, move the children or incur additional debts for which the other party may be responsible.

Withdrawal by Collaborative Lawyer for Abuse of Process

Participation agreements sometimes provide that a lawyer may withdraw if his or her client withholds relevant information, misrepresents important facts, or otherwise acts in a way that could result

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in an abuse of the collaborative process. Such a provision does not obviate applicable ethics standards, such as rules that require confidential lawyer-client communications to be protected and withdrawal of representation to be done in such a way as to avoid prejudicing a client's interests.

Discharge or Withdrawal of Collaborative Lawyer / Moratorium on Conclusion of Collaborative Process

The Act provides that the collaborative process is not terminated upon a lawyer's discharge or withdrawal if, within 30 days, a successor collaborative lawyer is retained and the collaborative law participation agreement is amended accordingly.[Section 5(g)] Parties may wish to provide in the participation agreement what may and may not be done during the 30 day period. For example, the parties might agree to maintain the status quo, to refrain from commencing any court action (other than in emergency circumstances), or to maintain the agreements already reached unless explicitly rejected by a party.

Cautions

Participation agreements commonly include cautionary statements to try to insure that the parties understand the collaborative process. Cautions might include statements that there are no guaranteed results from the collaborative process; that each party is expected to participate actively in the process by asserting his or her interests and considering the interests of the other party; and that while the process is designed to assist in communication and in reaching an amicable settlement, it will not necessarily eliminate the underlying issues between the parties.

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