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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

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 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

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 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 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.

Model Collaborative Participation Agreement
(For use in jurisdictions that have not adopted the Act)

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

intention to resolve through a collaborative process, without the intervention of a court or other tribunal,

the following matter(s):

[List the nature and scope of each matter that the parties will attempt to resolve.]

Beginning and Concluding the Collaborative Process

The parties agree that the collaborative process under this collaborative participation agreement begins when the parties sign this agreement and that it concludes (1) upon resolution of the collaborative matter(s) as evidenced by a signed writing, or (2) upon termination of the collaborative process.

The parties agree that a party may request a court or other tribunal to approve a resolution of all or part the collaborative matters, as evidenced by a signed writing. It is agreed that such a request, if made with the consent of the parties, does not conclude the collaborative process.

Termination of Collaborative Process

The parties agree that participation in the collaborative process is voluntary and that any party has the unilateral right to terminate the process, with or without cause, at any time. Termination of the collaborative process occurs (1) when a party gives written notice to other parties that the process is ended, or (2) when a party begins a judicial or other adjudicative proceeding related to a collaborative matter without the agreement of all parties, or (3) when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

Notwithstanding the previous provision, the parties agree that the collaborative process continues if not later than 30 days after a discharge or withdrawal of a collaborative lawyer, the unrepresented party engages a successor collaborative lawyer and the parties consent in writing to continue the process and amend this agreement to identify the successor collaborative lawyer and the successor collaborative lawyer confirms in writing his or her representation of a party in the collaborative process.

Disclosure of Information

The parties agree that during the collaborative process the parties shall make timely, full, candid, and informal disclosure of information related to the collaborative matter(s) without formal discovery. The parties further agree that they shall promptly update information that has materially changed.

Lawyer Disqualification

The parties agree that a collaborative lawyer who represented a party under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated, shall be disqualified from representing a party in a court or other proceeding related to the collaborative matter(s) under this collaborative process. The parties agree that they will not engage for such purpose a collaborative lawyer under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated.

Notwithstanding the collaborative lawyer disqualification provision, the parties agree that a collaborative lawyer, or a lawyer in a law firm with which the collaborative lawyer is associated, may represent a party to request a tribunal to approve an agreement resulting from the collaborative process, or to seek or defend an emergency order to protect the health, safety, welfare or interest of a party, if a successor lawyer is not immediately available to represent that person. However, when that party is represented by a successor lawyer, or when reasonable measures are taken to protect the health, safety, welfare or interest of that party, the collaborative lawyer disqualification provision shall apply.

Collaborative Communications

The parties agree that in any court or other proceeding they will not request, subpoena or summons a collaborative lawyer, a collaborative party, or a nonparty participant in the collaborative process to make disclosure or to testify as a witness regarding a communication made during the collaborative process, unless during the proceeding the agreement under this paragraph is expressly waived by all parties in writing. In the case of communications by a nonparty participant in the collaborative process, the waiver of the agreement under this paragraph shall be effective only if the nonparty participant also expressly agrees to the waiver. A nonparty participant is a person, other than a party and the party's collaborative lawyer, that participates in the collaborative law process, including any person retained by the parties for professional services during the collaborative process or any person who is present at a collaborative process session.

Additional Provisions

[Add additional provisions not inconsistent with the provisions hereunder that the parties agree to include in the agreement.]

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 collaborative process
NAME OF LAWYER NAME OF PARTY
hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

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

process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

Guide to the Collaborative Participation Agreement
(For use in jurisdictions that have not adopted the Act)

INTRODUCTION

This GUIDE is intended to assist in the use of the accompanying model Collaborative Participation Agreement (AGREEMENT) in jurisdictions that have not adopted the Uniform Collaborative Law Act (Act). Although the Act itself will not be applicable, an agreement based on the carefully considered provisions of the Act might be a useful model for Collaborative practitioners in jurisdictions that have not adopted the Act.

Under the Act the required provisions of a collaborative participation agreement are few in number. However, important consequences of entering into a collaborative participation agreement as defined in the Act are provided as substantive law provisions and do not depend on the agreement of the parties. Since the model AGREEMENT is intended for use in jurisdictions that have not adopted the Act, these substantive law provisions of the Act are included in the AGREEMENT as agreements of the parties. The evidentiary privileges for collaborative communications established by the Act, however, are dependent on legislative action and cannot be created by agreement. One of the principal arguments in support of the Act (or other statutory provisions establishing evidentiary privileges) is that the evidentiary privileges promote candor in the collaborative process and thereby increase its chances of success in resolving the issues.

INFORMED CONSENT

Before parties enter into a collaborative participation agreement it is important that they understand the distinctive features of the collaborative process and consider whether it is appropriate for them in attempting to resolve their issues. The Act requires the lawyers to make certain disclosures about the collaborative process and to discuss its appropriateness with prospective parties to a collaborative participation agreement. Although the Act will not be in force in jurisdictions in which the model AGREE MENT under discussion is intended for use, the Act's requirements (summarized below) are a useful guide to good practices designed to insure that there is informed consent by parties about to enter into a collaborative process.

Before a prospective party signs a collaborative participation agreement the lawyer should:

(1) provide the prospective party with information about the benefits and risks of a collaborative process as compared with other issue resolution alternatives, and assess with the prospective party the appropriateness of a collaborative process for resolving the prospective party's issues;
(2) advise the prospective party that the AGREEMENT provides that participation in a collaborative process is voluntary and that any party has the right unilaterally to terminate the process with or without cause;
(3) advise the prospective party that the AGREEMENT provides that collaborative process will terminate if after signing the agreement a party initiates a proceeding in a court or other tribunal;

(4) advise the prospective party that the AGREEMENT provides that the lawyer, or any lawyer in a law firm with which the collaborative lawyer is associated, will be disqualified from representing the party in any subsequent proceeding related to a collaborative matter covered by the AGREEMENT. The lawyer should also 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 there is such a history, the lawyer should not begin the collaborative process unless the prospective party so requests and the lawyer reasonably believes that the safety of the party can be protected during the process.

PROVISIONS OF THE AGREEMENT

Included in the AGREEMENT are both provisions that the Act requires to be in the collaborative participation agreement and provisions that the Act states as substantive law, not dependent on the agreement of the parties.

The following features of the AGREEMENT track the required provisions under the ACT:

Signed writing

The AGREEMENT is in a writing signed by the parties. The collaborative lawyers are not parties and should not join in the AGREEMENT as parties. By simply confirming their representation of the parties, as the AGREEMENT directs, the collaborative lawyers avoid questions about their professional obligations to their clients which have sometimes arisen when they have signed a collaborative participation agreement as parties.

Commitment

The AGREEMENT states the parties' intention to attempt to resolve the matters at issue through a collaborative process. By agreeing to use a collaborative process to attempt to resolve their differences, the parties are committing to try to avoid adversarial legal proceedings.

The AGREEMENT directs that the nature and scope of each matter at issue be described. It is important that this description be specific since it will circumscribe the lawyer disqualification provision of the AGREEMENT, which is applicable to subsequent proceedings "related to the collaborative matter(s)". The description of the matter(s) will also be important to the scope of an agreement that communications related to collaborative matter(s) made during the collaborative law process will not be offered in evidence in any proceeding, as well as to the scope of any agreement that such communications shall be confidential.

Identification of collaborative lawyers

The AGREEMENT identifies the collaborative lawyers who will represent the parties in the collaborative process. This provision is important for purposes of the application of the lawyer disqualification provision.

Confirmation of representation by collaborative lawyers

The AGREEMENT directs each collaborative lawyer to sign a statement confirming that he or she is representing a party (designated by name) in the collaborative process.

The AGREEMENT tracks important substantive law provisions which under the ACT do not depend on the agreement of the parties. Remedies that may be available for breach of these agreements

are the usual remedies for breach of contract, including damages and the equitable remedy of specific performance. Resort to remedies for breach of contract will not be likely in the case of agreements relating to the conduct of the collaborative process, such as agreements concerning how conferences are to be conducted and the disclosure of information. If a party is concerned that such agreements are not being complied with, the party is free to terminate the collaborative law process, which may be the most effective deterrent to breach of the agreements. In the case of agreements relating to the conduct of the parties following conclusion of the collaborative process, however, contract remedies may be the only recourse, but may not be as efficacious as the substantive law provisions of the Act. (See discussion below of agreements regarding collaborative lawyer disqualification and agreements about the offer of evidence regarding collaborative communications in a court or other proceeding.)

The following provisions of the AGREEMENT track important substantive law provisions of the Act that do not depend on the agreement of the parties:

Beginning and concluding the collaborative process

The AGREEMENT includes an agreement by the parties that the collaborative process begins when the parties sign the AGREEMENT and concludes upon resolution of the collaborative matter(s), evidenced by a signed writing, or upon termination. This provision is included in the Act as a matter of substantive law and is designed to make it administratively easy for parties and tribunals to determine when a collaborative process begins and ends. Establishing with certainty the beginning and ending of a collaborative process is important for purposes of application of agreements for confidentiality of communications made during the collaborative process, and agreements not to seek disclosure or testimony regarding such communications in a court or other proceeding related to the collaborative matter(s).

The requirement of a signed writing to define the conclusion of the collaborative process allows parties to consent to have court orders entered resolving a portion of the matters without concluding the collaborative process for resolution of the remaining matters. For example, presenting uncontested settlement agreements to the court for approval in divorce proceedings would not conclude the collaborative process, and thus an agreement to keep collaborative communications confidential, or an agreement not to offer collaborative communications in evidence in any proceeding, would continue to cover communications made while additional matters are negotiated. The term “signed writing” is broad and would include a letter stating that that the process is concluded sent to all parties after a judgment is entered and all of the necessary follow-up to finalize the matters is concluded.

The parties, if they wish, may provide in their collaborative participation agreement additional methods of concluding a collaborative process. The Act so provides as a matter of substantive law.

Termination of the collaborative law process

The AGREEMENT provides that the parties agree that participation in the collaborative law process is voluntary and that a party may unilaterally terminate the process, with or without cause, at any time. The right to terminate is one of the fundamental defining characteristics of collaborative law, and it is provided in the Act as a matter of substantive law that does not depend upon agreement of the parties. In jurisdictions that have not adopted the Act, the right to terminate must be expressly agreed to in the collaborative law participation agreement.

The AGREEMENT states three ways in which termination of the collaborative law process may occur. These methods of termination are included as substantive law provisions in the Act but, again, must be provided by way of agreement in jurisdictions that have not adopted the Act.

The AGREEMENT allows for continuation of the collaborative process even if a party and a collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative lawyer is engaged within 30 days under conditions and with documentation which indicate that the parties want the collaboration to continue.

Disclosure of Information

The AGREEMENT provides that the parties shall make timely, full, candid disclosure of information related to the collaborative matter(s), without formal discovery. Voluntary informal disclosure of information related to the matters at issue is a defining characteristic of collaborative law and is included as a substantive law provision of the Act.

The parties may, if they wish, limit or otherwise define the scope of required disclosure in their collaborative participation agreement. The Act so provides as a matter of substantive law.

Lawyer Disqualification

The requirement that a collaborative lawyer is disqualified from representing a collaborative party after the collaborative process concludes is a fundamental defining characteristic of collaborative law. In the Act the lawyer disqualification is stated as a matter of substantive law. In a jurisdiction that has not adopted the Act or otherwise enacted the disqualification requirement by statute, collaborative lawyer disqualification must be established by agreement. In case of breach the party relying on the lawyer disqualification agreement will be limited to the remedy of damages unless the court, in its discretion, will specifically enforce the disqualification agreement.

In the AGREEMENT, as in the Act, the lawyer disqualification provision is extended (so-called "imputed disqualification") to lawyers in a law firm with which the collaborative lawyer is associated. The Act allows the parties in the collaborative law participation agreement to modify the imputed disqualification for lawyers in a law firm which represents low income clients without a fee. If the parties to the AGREEMENT wish to include such a modification of the lawyer disqualification provision, they should do so in advance by an explicit provision in the AGREEMENT. In drafting the provision collaborative lawyers may find it helpful to refer to the Act's provision designed to isolate the collaborative lawyer from participation in the proceeding in which a member of that lawyer's law firm is representing the collaborative party.

In the AGREEMENT, as in the Act, exceptions to the lawyer disqualification provision are made that allow a collaborative lawyer (or a lawyer in a law firm with which the collaborative lawyer is associated) to continue to represent a party to (1) seek or defend an emergency order to protect the health, safety, welfare or interest of a party and (2) to request a tribunal to approve an agreement resulting from the collaborative law process. Because the AGREEMENT provides that requesting a tribunal to approve a resolution of all or part of the collaborative matters does not conclude the collaborative law process, the latter exception to the lawyer disqualification provision is necessary to allow the collaborative lawyer to continue to represent the party in that proceeding.

Collaborative Communications (Communications made during the Collaborative Process)

The Act creates evidentiary privileges against disclosure of collaborative law communications in legal proceedings. Protection of confidentiality of communications is central to collaborative law, since parties may otherwise be fearful that what they say or do during collaborative sessions may be used to their detriment in later judicial proceedings. Without protection of confidentiality, parties (as well as collaborative lawyers and nonparty participants such as professional experts) may be reluctant to speak frankly and to freely exchange information during the collaborative process.

The evidentiary privileges for collaborative law communications established by the Act are dependent on legislative action and cannot be created by agreement. As an alternative, the AGREE MENT attempts to protect the confidentiality of collaborative communications by agreement. It includes a provision that in any proceedings related to the collaborative matter(s) the parties agree that they will not require disclosure of, or offer as evidence, communications made during the collaborative process. To the extent that a court or other tribunal is willing to treat the parties as bound by this provision of their agreement, the effect is similar to that of an evidentiary privilege. However, in some situations, such as litigation between persons who were not parties to the collaborative process, a collaborative party may be called to testify as to collaborative communications and may not be allowed to refuse to testify on the ground of the agreement between the collaborative parties.

The AGREEMENT provides that during a proceeding related to the collaborative matter(s), the parties may waive their agreement not to require disclosure of, or offer in evidence, communications made during the collaborative process. This provision is equivalent to the waiver of privilege provision of the Act. In the case of communications by nonparty participants in the collaborative process the AGREEMENT, like the Act, provides that the waiver must also be expressly agreed to by the nonparty participant. Requiring waiver by nonparties as to their own communications is designed to facilitate the candid participation by experts and others who might be reluctant to take part in the collaborative process if they are subject to being called as witnesses in later proceedings.

If one party seeks to call his or her collaborative lawyer as a witness in later proceedings between the parties, it is likely that the other party would see this as a possible disadvantage and would refuse to waive the agreement on this subject. Some commentators have suggested that in some states it might be a violation of the Rules of Ethics for a lawyer to refuse to testify contrary to the wishes of his or her client who, together with the other collaborative party, has waived the agreement not to offer the testimony of the collaborative lawyer. In states in which it would not be a violation of the Rules of Ethics, collaborative lawyers may wish to include a waiver provision regarding their collaborative communications similar to that regarding collaborative communications of nonparty participants. Such a provision could be added at the end of the Collaborative Communications paragraph in the AGREEMENT, as follows: “In the case of communications by a collaborative lawyer in the collaborative process, the waiver of the agreement under this paragraph shall be effective only if the collaborative lawyer also expressly agrees to the waiver.”

ADDITIONAL PROVISIONS

The Act recognizes that after enactment of the Act collaborative lawyers will probably wish to continue to use in, their collaborative law participation agreements provisions that they have customarily

included. Thus the Act expressly provides that parties may include in a collaborative law participation agreement additional provisions not inconsistent with the Act.

Parties in jurisdictions that have not adopted the Act are free, of course, to include any provisions they wish. Collaborative lawyers who choose to utilize the model AGREEMENT, will want to avoid creating questions of interpretation by insuring that any additional provisions included are not inconsistent with provisions of the AGREEMENT.

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 in provisions included in collaborative 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 there from. Collaborative parties sometimes identify values they intend to employ in pursing their goals, including honesty, cooperation, integrity, dignity and respect for the other parties.

Commitment

The AGREEMENT states the parties' intention to attempt to resolve the matters at issue through a collaborative process. This commitment is often elaborated near the end of the participation agreement 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 communication, 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 discussions between the parties outside of joint meetings, such as prohibiting unannounced telephone calls or surprise visits.

Confidentiality of Collaborative Communications

It is sometimes agreed by the parties that communications related to collaborative matters made during the collaborative process are confidential and may not be disclosed to third parties. It should be noted that such an agreement is different from the evidentiary agreement included in the AGREE MENT (and the evidentiary privilege in the Act), which apply to attempts to introduce collaborative law communications in evidence in a court or other proceeding. Those provisions do not apply to discussion of collaborative communications with third parties, which the parties may wish to limit by a separate confidentiality agreement. In case of breach, such confidentiality agreements would be enforceable by usual contract remedies.

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' Roles 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 function 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 or other arrangements made by the parties for the services of such professionals. Under the Act a professional who assists in the collaborative 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. In the 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 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 the parties otherwise agreed. Such agreements will customarily provide that reports, recommendations and other documents generated by the neutral experts shall be shared with all parties and their lawyers. The participation agreement may also state whether the experts' communications and work product will be subject to a confidentiality agreement of the parties and/or to an agreement by the parties not to offer communications in evidence in a court or other proceeding.

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 in an abuse of the collaborative process. Such a provision does not obviate applicable ethics rules, such as rules that require the confidentiality of lawyer client communications be protected and that withdrawal of representation 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

Both the Act and the AGREEMENT provide 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 participation agreement is amended accordingly. 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 any 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.