

# Collaborative Law and the Use of Settlement Counsel

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## I. INTRODUCTION

Among the most promising and successful developments in the field of dispute resolution in recent years is the growing use of collaborative law and settlement counsel, both of which

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<sup>1</sup> Portions of this article previously appeared in P. Tesler, “Collaborative Law: A New Paradigm for Divorce Lawyers,” *5 Psychology, Public Policy, and Law* 967 (1999), D. Hoffman & J. McGuire, “Lawyers Who Just Say No’ to Litigation,” *Boston Globe*, Focus Section (April 2001); and D. Hoffman, “Collaborative Family Law: Restoring Sanity to the Divorce Process,” *45 Massachusetts Psychological Ass’n Quarterly* 15 (November 2001), and are reprinted here with permission.

involve a commitment by attorneys to refrain from litigation and devote their full attention to achieving settlement.

The collaborative law movement -- starting in Minneapolis in 1989 and then spreading to San Francisco, Dallas, Cincinnati, nearly half of the states in the U.S., and at least eleven Canadian cities -- involves a commitment by lawyers on both sides of a case to use a non-adversarial problem-solving approach and to withdraw from the case if they fail. [For a detailed introduction to the practice of collaborative family law, see Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (ABA Press, 2001). Regarding the use of collaborative law in settings other than family law, see Doug Reynolds & Doris Tennant, "Collaborative Law: An Emerging Practice," 45 *Boston Bar Journal* 1 (November/December 2001); Robert W. Rack, Jr., "Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation," *ABA Dispute Resolution Magazine* 8 (Summer 1998).]

The process of collaborative law is straightforward. Each party is represented by counsel. Both the parties and their attorneys agree, contractually or through a stipulation filed in court, to attempt to settle the matter without litigation or even the threat of litigation. They promise to take a reasoned stand on every issue, to keep discovery informal and cooperative, and to negotiate in good faith.

The key to a collaborative law agreement is that if either party seeks court intervention, both attorneys must withdraw from representation. Exceptions are made by agreement for certain standstill agreements and emergency motions. In addition, the parties and counsel agree that (a) all documents prepared in connection with the collaborative process, such as correspondence and settlement proposals, are inadmissible in any future proceeding, and (b) all mutually hired experts and their work product are off-limits for use in the subsequent proceedings, unless both parties agree otherwise. If settlement efforts fail, the collaborative attorneys may assist in getting their successor counsel up to speed, but neither the original attorneys nor any attorneys in their firms are permitted to receive further compensation for the case.

The practice of using settlement counsel is closely related to collaborative law. Settlement counsel are lawyers who specialize in negotiation and settlement techniques, while their colleagues (often, but not always, in the same law firm) focus on litigation strategies. The primary difference between collaborative law and the use of settlement counsel is that the latter and his or her firm are not disqualified from advising the client if settlement talks fail.

## II. COLLABORATIVE LAW

### § 41:1 Origins of Collaborative Law

The practice of collaborative law began in 1989, when Stuart Webb, a Minneapolis family lawyer, became fed up with the destructive effects of divorce litigation and decided to leave the courtroom for good. Webb founded the Collaborative Law Institute (CLI), a non-profit family law group that provides attorneys in the Twin Cities area with advice and training on collaborative law practice. The Institute now lists over 40 family law attorneys among its

members, and serves as a referral service for parties who wish to settle their disputes through collaboration.

Another collaborative family law group was formed in the early 1990s in the San Francisco Bay area, and in Cincinnati, the Collaborative Law Center expanded the discipline into areas of practice beyond family law. In many other cities in the U.S. and in Canada, groups of lawyers have completed a collaborative law training and formed collaborative law groups. In Texas, collaborative law is recognized by statute [Texas Statutes, 77th session, HB 1363 (effective September 1, 2001)], and in California, a Superior Court judge has created a Collaborative Law Department to review family law settlement agreements. [See P. Tesler, "Donna J. Hitchens: Family Law Judge for the Twenty-First Century," 2 *The Collaborative Quarterly* 1 (October 2000).]

## § 41:2 Collaborative Family Law

Collaborative law has achieved its greatest success in the area of family law. Several thousand family law attorneys currently practice collaborative law with reports of success in the vast majority of cases in which it is used. It is hardly surprising that family law should provide fertile ground for the growth of collaborative law. Many people who are facing divorce dread the prospect of lawyers turning the dissolution of their marriage into the kind of battle depicted in "War of the Roses." In fact, there are many sound reasons why a divorcing couple might value a civilized process in which the lawyers as well as the clients are committed to seek individualized "win-win" solutions to meet the legitimate needs of both parties. Those reasons often include the following:

- the intention to conduct oneself with integrity during the breakdown and restructuring of highly significant intimate personal relationships;
- the desire to maintain friendship with the former spouse after divorce;
- ethical or religious beliefs about fairness, appropriate dispute-resolution procedures, forgiveness, and personal accountability;
- the hope that an out-of-court settlement will conserve financial and emotional resources;
- the belief that working outside the court system for dispute resolution permits greater privacy and control over the outcome;
- the belief that higher quality, more creative, and more individualized solutions to divorce issues can be crafted outside a litigation-driven process;
- the wish to insulate children from the anger, fear, stress, and chaos commonly associated with litigated family law proceedings;
- the desire to preserve the most positive postdivorce relationship available to the parties in order to enhance the quality of postdivorce coparenting of children; and
- the desire to avoid the damaging effects on the postdivorce extended family that often can accompany adversarial dispute resolution.

## § 41:3 Comparison with Mediation

Family law attorneys concerned about the ever-present risk of carnage for divorcing couples in the court system were the originators of mediation as a means for facilitating dispute resolution entirely outside the court system. Although mediation remains an excellent dispute resolution modality for many couples, it has some inherent characteristics that make it an unacceptable choice for other divorcing couples aspiring to reach agreement outside the context of litigation, including: <sup>2</sup>

1. *The lack of built-in advice and advocacy during negotiations.* Often in family law mediation, the parties meet together with a single neutral mediator. In this popular model, any attorneys who are present remain outside the mediation process, providing advice and counsel only after the fact. This role has been compared to that of a paid sniper: the lawyer's responsibility is to question after the fact whether informed consent is present. This means probing every aspect of the proposed settlement for weaknesses, to determine whether the client really understands and accepts the mediated outcome. Of course, the parties' lawyer could participate in the mediation process, but mediators seldom encourage attorneys to attend mediation sessions because (a) they often view lawyers as an impediment to the open communication that mediation seeks to foster, and (b) they are concerned that the focus of the mediation will shift, if lawyers are present, from an amicable, interest-based negotiation to a hostile, positional negotiation.

2. *The emotional and other imbalances between spouses trying to bargain face-to-face in one of life's most stressful passages.* The mediator faces difficult challenges when (as often happens) one spouse or the other is overwhelmed with grief, fear, anger, guilt, or vengefulness. Similar problems arise when one spouse is a financially sophisticated negotiator and the other is comparatively ill-informed and inexperienced in negotiating, or when one spouse is manipulative or dishonest in the mediation process. If the mediator cannot level the imbalance, an unfair agreement may result. If, however, the mediator does step in to remedy the problem, one or both spouses may perceive a bias or lack of neutrality that can end the mediation.

3. *The tension between the mediator's emphasis on compromise and the consulting attorney's emphasis on informed consent.* Because consulting attorneys in a mediation have no direct responsibility for bringing the parties to agreement, and because their role is to probe for weaknesses, omissions, and lack of informed consent, their involvement can be structurally destabilizing to the success of a mediation, regardless of how positive the individual attorney's attitude toward mediation may be. The problem is exacerbated if the mediator fails to bring the attorneys into the process early on or lacks the ability to work effectively with lawyers. The lawyers can be depicted as troublemakers who are uncommitted to the goal of settlement and who raise merely technical issues that derail the settlement process. This tension can lead some clients to eschew legal advice entirely.

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<sup>2</sup> See P. Tesler, "Collaborative Law: A New Approach to Family Law ADR," 2 *Conflict Mgmt.* 12 (1996).

At the same time, mediations that do not include the advice of independent counsel for each party somewhere in the process present very serious problems. The agreement may be challenged later by one or both parties on grounds of lack of fully informed consent to its terms. It may be unfair. The agreement may fail to resolve all issues, because the parties were unaware of a legal right overlooked by the mediator as well. Mediated agreements that have not had independent review by attorneys can be vulnerable to attack on many grounds later on, or even if not attacked in court, can lead to later disagreements because of failure to anticipate or resolve all issues. Review by counsel does not guarantee a perfect agreement, but it does enhance the likelihood that all issues are addressed fairly.

4. *The lack of licensing, regulation, or uniform standards of competency for mediators.* At present, in many states, anyone can hold themselves out as a mediator. No specific training or credential is required. Mediators may be retired judges, lawyers, mental health professionals, accountants, or businesspeople. They may have a great deal of training or very little. They may or may not be skilled. Training and credentials do not guarantee skill, but they do provide a threshold of minimum competency. Although national organizations of professional mediators have been working for some time toward a national training requirement of 40 to 60 hours as a minimum for professional mediators, there are not yet consistent, reliable licensing or credentialing procedures in place throughout the states. Consequently, it may be more difficult for clients to be sure they are working with a qualified, effective mediator than it may be for them to find other high-quality professional services associated with divorce. Superb mediators can be found in and around every urban area, but unsophisticated clients can also be lured by less capable would-be mediators. This problem is far less serious than it was 10 years ago, but until states enact uniform credentialing and training statutes, unqualified mediators can still practice with impunity.

#### § 41:4 The Collaborative Law Process

In brief, the collaborative law process works as follows:

1. Both parties entering a collaborative law dissolution process commit to selecting counsel on both sides who willingly bind themselves to pre-arranged ground rules. Ideally, the clients choose attorneys who have a prior history of working cooperatively and effectively as opposing or collaborative counsel. The importance of mutual trust between the attorneys cannot be overstated, partly in light of the “perceived general decline in lawyers’ values, ideals, and morals.” [See S. Daicoff, “Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,” 46 *Am. U.L. Rev.* 1337, 1344-45 (1997).]

2. Everyone signs an agreement or stipulation (i.e., an agreement that is eventually filed with the court in the divorce and becomes a court order) about how the process will be conducted. The process, as set forth in the agreement or stipulation, remains in effect as long as all participants conduct themselves in good faith [a sample Stipulation is included as Appendix 10 at the end of Part IV of this Practice Guide].

3. During the process, the attorneys remain advocates for their respective clients within all bounds of professional responsibility, but they share a formal commitment to keep the process honest, respectful, and productive on both sides.

4. The process continues only as long as no one threatens litigation as a means of conducting negotiations or takes any steps to bring the matter into the court's litigation process. The attorneys also discuss openly the range of likely outcomes if the matter is litigated [clients need to understand the court alternative for informed consent, which is an essential element in a legally binding contract]. However, the discussion about likely litigation outcomes is only one stream of information drawn upon in collaborative negotiations. In conventional adversarial proceedings, it tends to dominate the thinking of both clients and attorneys.

5. If the process breaks down, either because of bad faith or because a party feels obliged to turn to the courts for relief, both attorneys must withdraw, and thereafter both lawyers are disqualified from further representation of either party against the other. (Although departing collaborative law counsel may assist in the orderly transition to litigation counsel, the financial and emotional costs of starting over with new representation are usually significant. This factor can keep parties working toward resolution; without it, they might find themselves in an avoidable trial.)

6. All experts and consultants are retained jointly within the collaborative law model, work as a team with the collaborative attorneys, and are similarly disqualified if the process breaks down. Since the emergence of collaborative law in the legal field, the movement has converged in some locales with a parallel development among mental health professionals working with divorcing families, called Collaborative Divorce. In the Collaborative Divorce model, which emerged in the San Francisco Bay area and is attracting attention nationally, a team including two communications skills coaches (usually a male and a female mental health professional), a neutral child development specialist skilled in divorce issues, and a financial neutral (normally a specially trained CPA or financial planner) work together with the parties and their collaborative lawyers. The Collaborative Divorce approach expands the range of potential clients for whom collaborative law is an option because the Collaborative Divorce team can work with strong emotions, poor communications skills, very unequal knowledge of financial matters, and similar problems that might make it difficult for clients to participate otherwise in a collaborative process.

7. In some versions of the model, the parties can agree to submit designated, narrowly limited issues for third-party decision by an arbitrator or privately retained judge (such as the value of a business or home, or the school a child would attend), as long as the parties agree that doing so does not compromise the integrity of the collaborative process. Likewise, a mediator could be employed for help with a specific issue. In order to be consistent with continuing the collaborative process, such an issue would have to be difficult for the parties to decide, and yet not so emotionally charged that the very process of presenting each side's views might damage their ability to engage in collaborative decision-making thereafter on other issues. For parties who, despite good faith efforts, nonetheless reach an impasse, this option can open up the logjam without also opening the floodgates of litigation and without permitting the threat of litigation to become a legitimate negotiation technique in the collaborative process.



8. The negotiations are usually conducted in four-way meetings, held at intervals determined by the parties and counsel. Often counsel will choose to alternate their offices as the locale for the meetings. Some collaborative attorneys use a system in which one of the lawyers at each meeting takes notes and distributes them after the meeting to the other collaborative attorney. The process usually requires several meetings, involving a voluntary exchange of documents and in some cases consultation with jointly hired experts on financial, child-related, or valuation issues. Between four-way meetings, collaborative counsel may meet separately with his or her client. In some cases, the parties will create interim agreements to preserve the status quo or to handle front burner issues, such as an interim parenting schedule or the manner in which certain expenses will be paid until a formal marital settlement agreement is reached. Once the issues under discussion have been resolved, one of the lawyers will prepare a first draft of the agreement, and drafts are exchanged and discussed as needed until it is ready for filing with the court.

9. Both sides agree that collaborative law counsel will withdraw if they mistrust the good faith of their own clients.

These formal written commitments made at the start of the process have a profound effect on the state of mind of the parties and their attorneys, becoming powerful “carrots” and “sticks” and encouraging immediate engagement in good faith problem solving on all sides. Additionally, since far more of the process takes place in the presence of, and with the active participation of both parties, suspicion and paranoia decline dramatically.

Since everyone agrees in advance that “win-win” solutions are the preferred goal, the process encourages imaginative lateral thinking at a high level among all four participants from the start. None of these effects is impossible to achieve in a traditional settlement negotiation, but nothing about the traditional litigation-driven lawyer-client relationship fosters these effects in the way or to the degree that collaborative law does. Moreover, mediation can evoke similar high-level trust and good faith bargaining, at least where there is a level playing field between the parties, but only collaborative law can liberate in quite this manner the sometimes remarkable creative energy of two lawyers working together in the same room with two clients toward agreed goals through an agreed process that explicitly precludes litigation.

#### § 41:5 Collaborative Law as a Paradigm Shift

Although the foregoing describes the procedural “bare-bones” of collaborative law, the real power of the model emerges from the profound changes in role and behavior that occur when the lawyer enters fully into the spirit of a collaborative representation. The clear commitment by everyone that decisions ordinarily will not be made by a third party alters dramatically how each participant engages in negotiations. Each participant bears full personal responsibility, from the start, for generating creative alternatives that might meet the legitimate needs of both parties. That is the sole agenda. If the lawyers cannot sustain creative problem solving, the process grinds to a halt and terminates, and the lawyers have failed. In litigation-driven settlements, unilateral resort to a third-party for a decision remains at all times an equally

acceptable issue-resolving mechanism, and the attorney's personal responsibility for keeping the focus on settlement is diminished, sometimes subtly and sometimes very obviously. In contrast, where resort to the courts means termination of the collaborative process, the very thought processes of the lawyers change dramatically.

When lawyers think differently, they behave differently, and counsel their clients differently. Like other lawyers, collaborative lawyers advise their clients about the law, how to prioritize goals, and how to achieve the best outcome. They do so, however, in a context in which a fair and reasonable settlement is the client's highest priority. In this process, settlement is measured not only in terms of quantifiable numeric measures, but also in terms of the impact of on all aspects of the client's anticipated quality of life for years to come.

All lawyers have an ethical obligation to help his or her client achieve the best possible outcome. While financial outcome is of great importance to most clients, collaborative lawyers also pay attention to the numerous relational, ethical, emotional, and other human concerns that most people value highly but which other lawyers routinely overlook or reject as irrelevant. This focus on human values may include work and social events, graduations, births, deaths, and marriages at which former spouses may meet again and again over their lifetimes. [This larger view of the lawyer's role and the client's interests, particularly relating to children, is discussed in *In the Name of the Child*, by Janet Johnston & Vivienne Roseby (1998)]

A collaborative law case proceeds in as many diverse ways as any other legal representation but, at the same time, there are key points in the representation which the skilled collaborative attorney behaves in ways unique to the collaborative process. These ways have the effect of creating and reinforcing the collaborative "container" (i.e., framework) in which the divorce process unfolds. In dialogue with the client, the collaborative attorney, like any good family law counsel, helps shape the client's "story" into goals and priorities, communicates information about the law and the negotiation process that the client needs at each stage, and does the other tasks that any lawyer must do in any divorce representation. In addition, however, the collaborative lawyer also

- brings the client to an understanding of the uniqueness of collaborative law and its place on the continuum of dispute resolution alternatives;
- invites the client to self-select his or her own optimum placement on that continuum, in light of the client's self-knowledge and understanding of the spouse;
- assesses the appropriateness of collaborative law for the client and spouse;
- assesses and reassesses the client's capacity to commit to the good faith undertakings of a collaborative law agreement and to follow through on such a commitment;
- models for the client from the start of the representation the paradigm shift associated with collaborative representation;
- puts in place tools for future management of anger, grief, fear, and conflict in the collaborative process;
- makes use of those tools to keep a functional "container" around the parties as they work out their agreements and disagreements;



- requires the client to refine demands into well-considered interest-based goals before bringing any issue to the collaborative table;
- encourages the parties wherever appropriate to take more responsibility, rather than less, for the process as well as the outcome; to work with consultants and one another outside the presence of the lawyers; to speak directly with one another outside the four-way meetings if they are able to do so productively; and, in general, to use only as much professional assistance as they actually need;
- attends consciously to ceremonial aspects of the divorce process as a life passage, by building in “markers” of where the parties are in the process and by reinforcing successes achieved in the process; and
- draws into the collaborative law process neutral consultants as needed to help resolve specific issues, develop information, or develop clients’ skills in particular areas.

In a typical collaborative law representation, any of the following professionals might be involved:

- a financial consultant to teach money management skills to the less sophisticated spouse, assist with gathering and analyzing records, prepare financial disclosure forms, assist with budgeting decisions, and in some instances project the long-term cash flow and net worth attendant on various settlement options;
- a CPA to advise on tax issues, help with financial aspects of various settlement proposals, trace sources of capital investments, value business interests, and so on;
- an insurance consultant to plan for life, health, and other kinds of post-divorce insurance coverage;
- appraisers for real estate, antiques, cars, boats, household effects, jewelry, collectibles, and so on;
- a vocational consultant to help generate career alternatives for a spouse who has been out of the workforce;
- a child development specialist to advise the parties on shared parenting issues; and
- communications skills coaches for both spouses if they have difficulty expressing themselves clearly and nonadversarially in negotiations.

This list is illustrative, not exhaustive. In a conventional divorce representation, when these professional resources are needed, the parties typically hire adversarial experts in each category who add another level of cost and contentiousness to the divorce process. In collaborative law practice, the consultants and experts are hired jointly as neutrals within the collaborative process.

§ 41:6 What is Different About Collaborative Law?

It is easy to describe the basic elements of collaborative law and even some of the new behaviors and considerations required of the lawyers who practice in this new model. That being so, many lawyers, on hearing about collaborative law for the first time, make erroneous assumptions about how easy collaborative law is to do. Some assume that good intentions -- that is, recognizing collaborative law as a good idea and making the decision to work this way -- are all that is needed. Others assert, "Oh, I already do that -- I've done it for years." In each case, there is a failure to see how profoundly different a lawyer's behavior becomes after learning how to do collaborative law well and after experiencing the resulting shift in consciousness and role definition. Successful practitioners agree that collaborative lawyering requires learning significant new skills and behaviors and unlearning even more.

Argument and adversarial behaviors permeate our lives as Americans, the most litigious people who have ever lived on the planet. So suffused is our culture with the fight as metaphor and as behavior, that our very ability to think clearly is compromised. Because it is the air they breathe, invisible and difficult to grasp, lawyers have a hard time even seeing, much less altering, the degree to which automatic adversarial thinking and behaviors limit their ability to provide creative representation to clients.

Lawyers serve as guides and teachers for their clients entering the unfamiliar terrain of the legal system. Many of these clients have never hired a professional person or entered a courtroom before. As Austin Sarat and William Felstiner have observed, "The information provided by lawyers shapes in large measure citizens' views of the legal order and their understanding of the relevance, responsiveness, and reliability of legal institutions." [See A. Sarat & W. Felstiner, "Law and Strategy in the Divorce Lawyer's Office," 20 *Law & Soc'y Rev.* 93 (1986).]

The unexamined adversarial paradigm absorbed from the Western collective unconscious, and honed in law school, shapes the conventional divorce lawyer's every contact with the client, impressing on the client's complex story a litigation-driven template for what happens, when it happens, and what is relevant or irrelevant to that process. In so doing, the typical adversarial lawyer brings to the process a perspective on interpersonal relations that one commentator on legal education has described as "ethically and emotionally insensitive, amoral, and often cynical." [See P. Spiegelman, "Integrating Doctrine, "Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web," 38 *J. of L. Educ.* 243-70 (1988).]

Both research and anecdotal experience indicate that other ways of divorcing serve many couples far better than does the public court system and legal representation shaped by the inexorable progress toward trial. Lawyers who fail to examine the existence and powerful effects of their adversarial "default setting," and who fail to change their ways of thinking and practicing before attempting to work in the new paradigm of collaborative law, are likely to run into certain problems and create others. Practitioners and theoreticians agree that the power of the collaborative law model depends greatly on the ability of the lawyers doing this work to rethink the role of the lawyer and the nature of the lawyer-client relationship -- in other words, on the ability of the lawyer to shift fully into the new paradigm of collaborative representation.

A considerable amount of work is required of the lawyer who wishes to develop competence with this new practice. Not only must he or she learn new lawyering skills, but, to the extent that it is necessary to reverse extremely deep-seated knee jerk reactions, the lawyer

must also undertake to some degree an inner process of consciousness-raising and even personal transformation. This is not a task that every family lawyer is willing to embrace or able to accomplish.

In conventional legal practice, lawyers negotiate and litigate, and otherwise interact mainly with other lawyers. There is little or no occasion to learn essential collaborative skills: managing face-to-face conflict between and among clients and lawyers in the context of open communications, keeping clients focused on enlightened self-interest rather than narrowly defined self-interest, teaching clients interest-based rather than positional bargaining, and sustaining creative lateral thinking when apparent impasse stalls negotiations. Nor are conventional family lawyers particularly aware of the potentially damaging impact that unreconstructed lawyering habits themselves often have on the clients and the collaborative process.

#### § 41:7 The Importance of Collaborative Law Training

In collaborative law groups throughout the U.S. and Canada, collaborative law training is a requirement for membership in the group. Effective collaborative lawyers rely on the following important skills and concepts that generally do not form the repertoire of most conventional family lawyers:

- a sophisticated understanding of the psychodynamics of divorce for both adults and children;
- a sophisticated understanding of child development and of the impact of divorce on the development of children;
- a working understanding of the dynamics of transference and counter-transference in the attorney-client relationship and in marital relationships;
- skill in interest-based bargaining techniques, including use of the best and worst alternative to negotiated agreement;
- familiarity with the spectrum of conventional and alternate dispute resolution methods;
- understanding of the types of clients who are well-served and less well-served by each dispute resolution method, and of how and when to present this information to clients;
- training and experience in the management of the clients' anger, grief, anxiety, and fear during the negotiation process;
- mastery of techniques for working collaboratively with other professionals, including the other attorney, within the duty of zealous representation of the client and the attorney-client privilege;
- understanding of the difference between immediate vs. long-term goals and interests of the client, and an ability to bring the client to an appreciation of the difference; and
- understanding of how to structure a collaborative representation to enhance outcomes, including agenda-planning and goal setting, agenda management, conflict management, use of story and metaphor, and other practical techniques.

Law school education as it presently exists simply does not prepare a lawyer to do this kind of work. Nor does on-the-job training as a family law litigator suffice. To practice collaborative law well, lawyers must learn psychological theory (including child development, family dynamics, the dynamics of grief and bereavement, defense mechanisms, transference and counter-transference, some exposure to differential diagnosis criteria for mental illness and character disorders) as well as some new psychological and communications skills (nondirective interviewing and counseling skills, active listening, reframing, conflict management) and thorough mastery of negotiating theory and technique. Most lawyers remain unaware of this important body of information and skills. Although lawyers should not try to be therapists for their clients, the field of psychology clearly has much to offer that can help collaborative lawyers do a better job of working with family law clients than is currently characteristic of family lawyers.

#### § 41:8 Advantages of Collaborative Law

Clients and attorneys stand to gain substantial advantages by using the collaborative approach. First and most importantly, collaborative law creates an atmosphere of cooperation, making it easier for parties to retain amicable relationships after the dispute is resolved. Without the risks of a possibly one-sided result in court, parties are more likely to stay focused on negotiation, and therefore tend to be less adversarial. Not surprisingly, collaborative law has taken root most readily in the area of family law, where disputants generally have the greatest incentive to remain on speaking terms.

Second, collaborative law creates stronger incentives for settlement. For the attorney, failing to settle means losing the client's business on the case, and for the clients on both sides of the controversy, it means the additional expense associated with selecting and educating new counsel. As a result, collaborative law generally leads to settlements at a lower cost than traditional representation. One family lawyer estimates that handling a divorce using a collaborative law stipulation (i.e., both sides are bound) costs about one third the price of traditional divorce representation.

A third important advantage of collaborative law for both client and practitioner is that it promotes a team-based approach to the divorce process. Mental health professionals and financial advisors – whose advice is often needed but usually provided from the sidelines, if at all – can play an integral part in the process with the lawyer-client team, attend “four-way” meetings, and help participants address issues from a more broader perspective.

#### § 41:9 Disadvantages of Collaborative Law

Of course, not every lawyer is ready to embrace collaborative law; many prefer the rigors of the courtroom. Likewise, not every case is suitable for collaborative law. Divorce clients are not good candidates for collaborative law if they are:

- Still in denial about the divorce;
- So angry at the other spouse that a four-way meeting would be unproductive;

- Unable to adhere to guidelines for collaborative communications (e.g., constantly interrupting or engaging in name-calling);
- Afraid of the other spouse because of his/her abusive or domineering behavior; or
- Unwilling to share the necessary information.

Even for appropriate clients, collaborative law poses certain risks. First, collaborative law can result in more expense if the process breaks down and the clients need to retain new lawyers. Second, without court involvement, either party to the divorce can delay the process by dragging out the negotiations, either intentionally or unintentionally. Third, court involvement offers greater protection from a spouse who intends to hide financial assets or secretly move them to a separate account (although collaborative law attorneys typically require the clients to sign an agreement freezing the marital assets during the negotiations, the violation of a court order usually results in harsher penalties and thus provides more of a deterrent to financial misconduct).

#### § 41:10 Ethical Issues

The practice of collaborative law also presents certain ethical questions. Some might wonder, for example, whether a lawyer can fulfill his or her obligation to represent a client “zealously,” as required by the canons of legal ethics, if he or she has irrevocably agreed not to litigate on the client’s behalf. However, a lawyer and a client may determine what zealous advocacy means by spelling out in advance the ground rules for the lawyer’s representation of the client. Under the Model Rules of Professional Conduct, “the terms upon which representation is undertaken may exclude specific objectives or means.” [British “solicitors,” as distinct from “barristers,” have been doing this for centuries.]

Collaborative lawyers are as zealous and devoted to their clients’ interests as non-collaborative lawyers. The difference is that collaborative law attorneys and their clients have decided on a set of objectives different from those in a non-collaborative law case (where the goal is usually to obtain the greatest possible advantage, even at the expense of the other party). In collaborative law, attorneys focus on a broader set of goals – such as enhancing the long-term relationship of the parties with each other and with their children and treating each other respectfully during the divorce process.

The crucial ethical obligation for a collaborative law attorney is to fully inform the client and provide him or her with an objective opinion of the advantages and disadvantages of collaborative law. Even for those lawyers who believe strongly in the collaborative law process, the canons of ethics require candid advice to the client concerning the risks associated with this form of practice.

#### § 41:11 The Use of Collaborative Law in Other Practice Areas

Although collaborative law currently is used predominately in the field of family law, hundreds of non-family law attorneys in the U.S. and Canada have received collaborative law training and are seeking opportunities to expand the use of collaborative law. In Cincinnati, the Collaborative Law Center, founded in 1997, has been a leader in pursuing such opportunities. The Center's web site ([www.collaborativelaw.com](http://www.collaborativelaw.com)) lists more than 100 attorneys, the majority of whom are listed in the categories of employment law and other civil law matters. Notwithstanding the large number of non-family law attorneys, the majority of collaborative law cases have been divorces and other family law matters. However, the growing number of non-family law attorneys who have embraced collaborative law in Cincinnati has begun to create momentum for increasing the use of collaborative law in employment and business cases. In Massachusetts, the Collaborative Law Council has formed a Business and Employment Law section that has developed training and marketing materials.

One of the disincentives for the use of collaborative law in substantial business, employment, and tort matters is that litigation is often highly profitable, enabling a law firm to leverage the time of associates and paralegals. Even when law firms pursue settlement vigorously, they have little incentive to withdraw from the case when litigation looms, and are loathe to refer major business clients to other firms. The offices of in-house counsel, however, may provide fertile ground for the growth of collaborative law in the world of business.

These competing interests were explored by the co-founder of the Cincinnati collaborative law group:

“. . . [p]rogress in other arenas has been slower, however, in part because of the need to train enough lawyers--a critical mass in any given practice area for clients to be able to each hire Collaborative Lawyers in a case. We have about 30 employment lawyers trained now so they are up and at least walking.

It's also clear that businesses are eager for this. In fact, we had an interesting experience when we first started shopping the idea around a few years ago to focus groups of lawyers in different areas of practice. We heard from the partners in the big litigation firms that they would be quite reluctant to take a collaborative case for a big corporate client for fear that an impasse would force them to send that good client down the street to another firm.

Taking that risk was nearly unthinkable. When we met with the corporation lawyers, however, they were enthusiastic. When we asked what they thought their retained law firms would think about it, they reminded us that they did the hiring and would expect those firms to provide Collaborative Law representation when they asked for it. Several of those in house corporation lawyers have taken the training and are outspoken in their interest and this has brought lawyers from those same big firms to the Collaborative Law training.”

[Robert W. Rack, Jr., “Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation,” *ABA Dispute Resolution Magazine* 8 (Summer 1998).]

The risk that Rack describes impacts large firms to a greater extent than very small firms. Large firms are better equipped to handle large-scale complex litigation. Accordingly, when a solo practitioner or a lawyer in a small firm encounters a case for which it lacks appropriate litigation staffing, collaborative law creates an opportunity for both the client and the attorney.



Without collaborative law, the entire matter -- including preliminary negotiations that might resolve the case -- would ordinarily be referred elsewhere.

Employment cases are particularly well suited for a collaborative law approach, because they are often handled initially by in-house counsel for the employer, and they often arise in situations where neither the employee nor the employer will benefit from the publicity associated with litigation. In many business cases, too, collaborative law can preserve relationships that litigation would likely tear asunder, thus enabling business partners to do business together in the future. For the same reason, trusts and estates matters -- particularly those involving disputes between and among family members -- are excellent candidates for collaborative law, as are high-stakes intellectual property disputes. [See, e.g., T. Arnold, "Collaborative Dispute Resolution: An Idea Whose Time Has Come," (2000) at [www.mediate.com/articles/Arnold.cfm](http://www.mediate.com/articles/Arnold.cfm).]

### III. SETTLEMENT COUNSEL

In business, employment, probate and personal injury matters, among others, lawyers often encounter situations in which they consider settlement to be the preferred solution, but would be reluctant to make a commitment that would preclude their entire firm from continuing representation of the client if settlement talks failed. In situations of that kind, certain lawyers -- calling themselves settlement counsel -- have developed a specialty of focusing exclusively on settlement, while allowing colleagues inside or outside their firm to proceed on a separate litigation track.

The logic behind this specialization is akin to the logic behind collaborative law. By directing their attention to settlement, lawyers are likely to ask different questions, focus on broader issues, and develop more creative options for settlement than if their attention was focused on defeating the opposing party by exposing and exploiting every weakness in the opposing party's case.

In a recent experiment, lawyers were divided into two groups. One group was asked to prepare for a deposition and the other group to prepare for a settlement meeting, based on identical facts involving the break up of a business partnership. The settlement lawyers "focused more on the relationships and interests of the parties, while litigation counsel looked more for facts on which to build a theory of the case." This reorientation was found to be similar to that of collaborative lawyers:

"This new model change the purpose and focus of all inquiry, thought, and discussion: (1) from past to future; (2) from facts to relationships; (3) from faultfinding to restructuring relationships; and (4) from positions to interests."

[See D. Reynolds & D. Tennant, "Collaborative Law: An Emerging Practice," 45 *Boston Bar Journal* 1, 2 (December 2001).]

Like collaborative law, the settlement counsel concept can be traced to the growing use of mediation and other ADR methods to resolve business and other litigation matters. As more lawyers become trained as mediators and arbitrators, they tend to develop greater skill at interest-based negotiation and designing dispute resolution processes.

Among the leading proponents of the use of settlement counsel are lawyers who serve as neutrals as well as advocates. [See W. Coyne, “The Case for Settlement Counsel,” 14 *Ohio State Journal on Dispute Resolution* 367 (1999).] They are well schooled in all of the varieties of modern dispute resolution practice, including not only mediation but also such processes as mini-trials, the use of neutral experts, case evaluation, and med-arb. [For more information on these forms of dispute resolution, see Chapters 24, 37, and 38 of this Practice Guide]. These dispute resolution-trained lawyers also employ such tools as risk analysis to examine possible outcomes, and consider the use of apology in appropriate cases where an apology is warranted. [See e.g., Essay \_\_\_ in Chapter 26 of this Practice Guide.] In short, they hone as wide an array of settlement tools as the litigator hones the tools of courtroom battle.

Of course, most experienced lawyers consider themselves to be skilled at settlement, and since 95% or more of civil litigation matters are estimated to be resolved without trial, such a conclusion seems justified. However, the value that settlement counsel add is achieving a fair and durable settlement early in the process, before the parties have spent vast sums on pretrial discovery, summary judgment motions, and preparations for trial.

The following is an example of such a case, where

“[S]ettlement counsel was brought in to help resolve insurance claims involving the underground storage of natural gas in New England. Large volumes of natural gas had been stored in the summer for winter use. When the company started to retrieve the gas, it was gone. The company claimed it had migrated to adjoining property; the insurance company claimed the gas was still there. Litigation loomed. The case was projected to be a battle of experts with years of discovery and months of trial. Settlement counsel arranged for an experts’ roundtable discussion as part of a voluntary information exchange. No depositions were taken and all relevant documents were produced voluntarily. The case quickly settled.”

[See D. Hoffman & J. McGuire, “Lawyers Who Just Say No’ to Litigation,” *Boston Globe*, Focus Section (April 2001).]

In this case, both parties benefited from early settlement because of the reduction of transaction costs and the use of information sharing as a technique for arriving at a fair and well-informed settlement. Settlement counsel also focus, however, in appropriate cases on value-creating strategies such as (a) broadening the range of interests in play (e.g., a future business deal) or (b) identifying a useful exchange based on differing interests (e.g., one party valuing a cash deal because of liquidity concerns but willing to provide assurances of confidentiality that are important to the opposing party).

The skills and knowledge of the effective settlement counsel make him or her an effective problem-solver. This is one of five roles William Coyne discerns as the most common models of attorney behavior:

(1) Champion – the Clarence Darrow or Perry Mason figure who does not settle cases, but instead tries them.

- (2) Hired Gun – the Champion’s “evil twin,” who seeks to win at all costs, exploits, stonewalls, exhausts the other side, and abhors settlement.
- (3) Litigator – a lawyer who sees settlement as the ultimate objective but only after deploying the tools of litigation to improve the client’s bargaining position or, in any event, wear down and weaken the other side.
- (4) Healer – a lawyer who values settlement not only for its practical benefits but its uplifting ones as well, and therefore does not promote early settlement because of the time needed for deeper exploration and resolution of the conflict.
- (5) Problem-solver – a model that is gaining popularity but lacks the visceral appeal of the Champion or Hired Gun; the problem-solver cuts to the chase, looking to identify the parties’ goals and interests and satisfy them as quickly and inexpensively as possible.

[See W. Coyne, “The Case for Settlement Counsel,” 14 *Ohio State Journal on Dispute Resolution* 376 (1999).]

One should not underestimate financial incentives that tend to favor more aggressive approaches. For the attorney, litigation is almost always more lucrative than settlement. There is also an incentive, given the cultural bias in favor of toughness, to resist settlement in order to convince the client of the lawyer’s undiluted loyalty to the client’s cause [See *e.g.*, Mediation Essay “A” in Chapter 26 of this Practice Guide]. One of the most difficult steps that a lawyer can take with a client is to tell the client that his or her case has problems and should be settled. Most lawyers would prefer that the client hear that message from the other side or from a mediator. [*Id.*] Serving as settlement counsel means talking plain talk -- the good, the bad, and the ugly -- to a client who may or may not be prepared to hear it.

#### § 41:12      Advantages and Disadvantages of Settlement Counsel

The foregoing discussion outlines the major advantages of using settlement counsel -- reducing delay and expense, while at the same time promoting a joint-gains, problem-solving approach to settlement. What are the disadvantages? Primarily, cost. As Prof. Frank Sander put it, “only a lawyer could say, with a straight face, ‘Our firm wants to save you money, so we want you to hire two of us, not just one.’” [J. McGuire, “Why Litigators Should Use Settlement Counsel,” 18 *Alternatives* 1, 3 (June 2000).]

Cases in which the stakes are small may not warrant the additional expense associated with educating two lawyers -- settlement counsel and litigation counsel -- about the matter. In high stakes cases, however, the investment in an additional lawyer is usually worth the risk because the opportunity for savings is substantial.

Moreover, the client’s costs can be mitigated by fee arrangements that reward the lawyers for achieving the client’s goals through settlement. Some firms charge a contingent fee based on the money that the client saves relative to full-blown litigation. Other attorneys have used a “premium billing approach in which the settlement counsel is paid nothing if no settlement

occurs but gets paid a multiple of his/her hourly rate if the case is settled within the parameters established jointly by the lawyer and client.

#### § 41:13          When to Use Settlement Counsel

Deploying settlement counsel at the beginning of a case creates the greatest opportunity for cost savings. However, in many cases, not enough is known about the case at that stage to make a reasoned judgment about settlement. In those cases, it may be important for settlement counsel to work closely with litigation counsel to obtain through informal discovery the information that both attorneys will need in order to do their jobs. A structured, reciprocal information exchange may be the first step in a negotiation that ultimately leads to resolution.

In most case, opportunities for settlement present themselves throughout the life of the case. It has become common in most regions of the U.S. for cases to proceed to mediation at some point in the process. Settlement counsel can serve in mediation as either an advisor or the lead negotiator/advocate; in either capacity, counsel's job is to orient the client to mediation if the client lacks familiarity with the mediation process and to serve as settlement strategist.

The settlement counsel method works best when there is an attorney with a similar role and commitment to settlement on the other side. However, unlike collaborative law, which requires a commitment to the process from both sides, settlement counsel can take on their role unilaterally.

#### IV.      CONCLUSION

Abraham Maslow once said, "He who is good with a hammer thinks everything is a nail." Lawyers have traditionally thought that every dispute should be litigated. The growing use of ADR has created and inspired new roles for counsel in a legal system where multiple options for dispute resolution now exist. Collaborative law and settlement counsel may not be suitable for every case. But they add important tools to the law firm tool box. Moreover, these are tools that substantially broaden the vision of what it means to be a lawyer. Instead of focusing solely on defeating an opponent, settlement counsel and collaborative lawyers consider the possibility that far greater gain for the client can be achieved by focusing on interests instead of positions, relationships instead of blame, and the future instead of the past.

#### V.      REFERENCES

Stuart Webb, "Collaborative Law--A Conversation: Why Aren't Those Divorce Lawyers Going to Court?" *The Hennepin Lawyer*, July-Aug. 1996.

Association for Conflict Resolution, [www.acresolution.org](http://www.acresolution.org).

Collaborative Law Center, founded in 1997, has been a leader in pursuing such opportunities. The Center's web site ([www.collaborativelaw.com](http://www.collaborativelaw.com))

## Appendix

### **COLLABORATIVE FAMILY LAW PARTICIPATION AGREEMENT**

#### **I. GOAL**

We acknowledge that the essence of "Collaborative Law" is the shared belief by participants that it is in the best interests of parties in typical Family Law matters to commit themselves to avoiding litigation.

We, therefore, adopt the Collaborative Law conflict resolution process, which does not rely on a court-imposed resolution, but relies on an atmosphere of honesty, cooperation, integrity and professionalism, geared toward ensuring the future well-being of the participants.

Our goal is to avoid the negative economic, social, and emotional consequences to the participants of protracted litigation.

We commit ourselves to the Collaborative Law Process and agree to use this process to resolve our differences fairly and equitably.

#### **II. PROCESS**

We will make every reasonable effort to settle our case without court intervention.

We agree to give full, prompt, honest and open disclosure of all information pertinent to our case, whether requested or not, and to exchange Rule 401 Financial Statements in a timely manner.

We agree to engage in informal discussions and conferences with the goal of settling all issues.

We agree to direct all attorneys, therapists, appraisers, as well as experts and other consultants retained by us, to work in a cooperative effort to resolve issues, without resort to litigation or any other external decision-making process, except as agreed upon.

We agree that commencing immediately, neither party will borrow against, cancel, transfer, dispose of, or change the beneficiaries of any pension, retirement plan or insurance policy or permit any existing coverage to lapse, including life, health, automobile and/or disability held for the benefit of either party without the prior written consent of the other party or an order of the court.



We agree that commencing immediately, neither party will 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 or an order of the court.

We agree that commencing immediately, neither party will sell, transfer, encumber, conceal, assign, remove or in any way dispose of any property, real or personal, belonging to or acquired by either party, without the prior written consent of the other party or an order of the court, except in the usual course of business or investing, payment of reasonable attorneys fees and costs in connection with the action, or for the necessities of life.

We agree that neither party will incur any further debts that would burden the credit of the other, including but not limited to further borrowing against any credit line secured by the marital residence, or unreasonably using credit cards or cash advances against credit or bank cards or will incur any liabilities for which the other may be responsible, other than in the ordinary course of business or for the necessities of life without the prior written consent of the other or the order of the court.

### **III. CAUTIONS**

The parties understand that there is no guarantee that the process will be successful in resolving our case.

We understand that the process cannot eliminate concerns about the irreconcilable differences that have led to the current conflict.

We understand that we are each still expected to assert our own interests and that our respective attorneys will help each of us to do so.

We understand that there are advantages as well as disadvantages to the Collaborative Law Process. Among the disadvantages are that (a) if the process breaks down, the parties will likely incur additional expense because of the need to hire new counsel; (b) by agreeing not to go to court, the parties cannot use formal discovery procedures and therefore must trust in each other's good faith about exchanging relevant documents and information; and (c) without the ability to use the authority of the court to prevent the transfer or dissipation of marital assets, the parties must trust in each other's honesty with regard to those assets.

### **IV. ATTORNEY'S FEES AND COSTS**

We agree that both parties' attorneys are entitled to be paid for their services, and an initial task in a collaborative matter is to ensure payment to each of them. We agree to make funds available for this purpose.

## **V. PARTICIPATION WITH INTEGRITY**

We will work to protect the privacy and dignity of all involved, including parties, children, attorneys and consultants.

We shall maintain a high standard of integrity and, specifically, shall not take advantage of each other or of the miscalculations or inadvertent mistakes of others, but shall acknowledge and correct them.

## **VI. EXPERTS AND CONSULTANTS**

If experts are needed, the parties will retain them jointly, ensure their payment, and share their work product.

## **VII. NEGOTIATION IN GOOD FAITH**

The parties acknowledge that each of our attorneys is independent from the other and represents only one party in the Collaborative Law process.

We understand that the process, even with full and honest disclosure, will involve vigorous good-faith negotiation.

We will take a reasoned position in all disputes. We will use our best efforts to create proposals that meet the fundamental needs of both of the parties. We recognize that compromise may be needed in order to reach a settlement of all issues.

Although we may discuss the likely outcome of a litigated result, none of us will use the threat of litigation as a way of forcing settlement.

## **VIII. THE CHILD/CHILDREN**

The parties agree to make every effort to reach amicable solutions about sharing the enjoyment of and responsibility for the child/children that promote the child's/children's best interests. The parties agree to act quickly to mediate and resolve differences related to the child/children to promote a caring, loving, and involved relationship between the child/children and both parents.

The parties acknowledge that inappropriate communications regarding their divorce can be harmful to their child/children. They agree that settlement issues will not be discussed in the presence of their child/children, or that communication with the child/children regarding these issues will occur only if it is appropriate and done by mutual agreement, or with the advice of a child specialist. The parties agree not to make any changes to the residence of the child/children without first obtaining the written agreement of the other party.

## **IX. CONFIDENTIALITY**

All communications exchanged within the Collaborative Law Process will be confidential and without prejudice. If subsequent litigation occurs, the parties mutually agree that (a) neither party will introduce as evidence in Court information disclosed during the Collaborative Law Process for the purpose of reaching a settlement, except documents that are otherwise discoverable; and (b) neither party will offer as evidence the testimony of either collaborative attorney, nor will they subpoena either of the lawyers to testify, in connection with this matter; and (c) neither party will subpoena the production at any Court proceedings of any notes, records, or documents in the lawyer's possession or in the possession of one of the consultants.

## **X. VOLUNTARY TERMINATION OF COLLABORATIVE PROCESS**

Either party may unilaterally and without cause terminate the Collaborative Law Process by giving written notice of such election to his or her attorney and the other party.

Either attorney may withdraw unilaterally from the Collaborative Law Process by giving fifteen (15) days written notice to his or her client and the other attorney. Notice of withdrawal of an attorney does not terminate the Collaborative Law Process; to continue the process, the Party whose attorney withdraws will seek to retain a new attorney who will agree in writing to be bound by this Agreement.

Upon termination of the collaborative process or withdrawal of either counsel, the withdrawing attorney will promptly cooperate to facilitate the transfer of the client's matter to successor counsel, if any.

## **XI. ABUSE OF THE COLLABORATIVE PROCESS**

We enter the Collaborative Law Process with the expectation of honesty and full disclosure in all dealings by all individuals involved in the spirit of the collaborative process.

Each party understands that his/her Collaborative Law attorney will withdraw from our case as soon as possible upon learning that his or her client has failed to uphold this Agreement or acted so as to undermine or take unfair advantage of the Collaborative Law Process. Such failure or abuse of the process would include the withholding or misrepresentation of information, the secret disposition of marital property, the failure to disclose the existence or the true nature of assets and or obligations, or otherwise acting to undermine or take unfair advantage of the Collaborative Law Process.

## **XII. DISQUALIFICATION BY COURT INTERVENTION**

We understand that each party's attorney's representation is limited to the Collaborative Law Process, and that neither of our attorneys, nor other attorneys from the same firm, can ever represent us in court in a proceeding against the other spouse in connection with this matter.

In the event that a court filing is unavoidable prior to settlement, both attorneys will be disqualified from representing either client, except for filing and assenting to uncontested motions, stipulations, or petitions to which both parties agree.

Any resort to litigation prior to settlement shall result in the automatic termination of the Collaborative Law Process on the date that either party or his or her attorney unilaterally seeks court intervention, provided however that the provisions of this Agreement relating to disqualification/withdrawal of counsel shall remain in effect.

In the event that the Collaborative Law Process terminates, all consultants and experts will be disqualified as witnesses, and their work product will be inadmissible as evidence, unless the parties agree otherwise in writing.

We acknowledge that, following settlement, our attorneys may represent us as counsel of record for purposes of filing a joint petition for an uncontested, no-fault divorce and at the an uncontested hearing on our divorce.

## **XIII. PLEDGE**

**BOTH PARTIES AND THEIR ATTORNEYS HEREBY PLEDGE TO COMPLY WITH AND TO PROMOTE THE SPIRIT AND LETTER OF THIS AGREEMENT, UNLESS MODIFIED BY WRITTEN AGREEMENT SIGNED BY BOTH PARTIES AND THEIR ATTORNEYS.**

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[Name of Wife]

Date:

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[Name of Husband]

Date:

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[Name of Attorney]  
Attorney for \_\_\_\_\_ [Wife]

Date:

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[Name of Attorney]  
Attorney for \_\_\_\_\_ [Husband]

Date: