

CL Agreements for Business Cases

By David A. Hoffman and Juliana Hoyt

Several weeks ago a client sent us an email message expressing astonishment that we would ask him to sign an agreement that required him to treat the party on the other side of the case with respect. The agreement was a standard Collaborative Law (CL) process agreement. The case arose from a bitter dispute over the sale of a piece of commercial real estate. The party on the other side of the case was the client's sibling.

Neither of us was prepared for the client's reaction. To be sure, there are provisions in the standard CL process agreement that give pause to some clients – primarily, the disqualification of counsel. What we learned from this case, however, is that some clients in a business dispute (even close relatives) are more willing to sign a CL agreement that is stripped to the essentials and makes no commitments regarding 'integrity,' or 'cooperation,' or similar values. Why? Because the dispute has eroded any confidence that the other party will participate in such a manner.

In response to this case, we have prepared a stripped-down version of the CL agreement, using language that is more customary in the resolution of business disputes. This version is not what some MCLC members have referred to as 'CL-lite' – a process in which the parties and counsel agree to a cooperative negotiation, with many if not all of the hallmarks of a CL process but without a signed agreement regarding the disqualification of counsel. The agreement below does require disqualification. It also includes more legal 'boiler plate' than the typical CL Agreement but less discussion of the parties' good intentions. Like any sample agreement, this one requires customizing to fit the circumstances of the parties. We also offer the following notes that may be useful in considering whether you might wish to use this form of agreement and, if so, what changes you might make.

a. Good faith negotiation (sections 1 and 4 of the agreement). While we have eliminated provisions dealing with such lofty goals as 'an atmosphere of cooperation,' we have retained the concept of good faith negotiation. This term is often used in contracts, and courts are accustomed to making determinations of whether parties have participated in negotiations in good faith. In our view, a legally enforceable commitment to taking the CL process seriously – which in our view requires good faith negotiation – is necessary in order to avoid situations where the CL process is used cynically by one party to disadvantage the other. There is, of course, case law implying a duty of good faith and fair dealing in any commercial contract, and there are statutes prohibiting unfair and deceptive acts or practices in certain kinds of business dealings. Accordingly, parties involved in a commercial dispute generally do not balk at a requirement of 'good faith,' even if they know that it is a difficult provision to enforce. They may balk, however, at the provision that "each Party will be expected to take reasoned positions in all disputes." Why? Because, from the clients' standpoint, if the party on the other side of

the case were reasonable, they would not need lawyers, a CL-process, or any type of process. In our view, this provision, as written, is merely precatory and therefore can be eliminated without eviscerating the CL process, so long as the provision requiring good faith negotiation remains.

b. Information exchange (section 3). This agreement, like the customary CL agreement, calls for voluntary production of relevant information, without any request from the other party. This may be more cooperation than some clients are prepared to commit to, especially in situations where trust is gone or has been absent from the start. Clients may have a legitimate concern in a business case as to whether particular information is ‘relevant’ or may differ in their willingness to volunteer information. Therefore, the agreement also requires the parties to provide information and documentation when specifically requested. In this way, the agreement honors the voluntary disclosure sought by the Collaborative Law process, but also provides a mechanism to hold parties responsible to respond when requests for more information are advanced by others. If the obligation to make voluntary, un-requested disclosure of information is problematic, the first sentence of this provision can be eliminated.

c. Temporary agreements (section 6). In many disputes the parties enter into interim agreements to preserve the status quo or to deal with other front-burner matters that, if not resolved quickly, may undermine that parties’ ability to negotiate successfully. For example, a tolling agreement stops the statute-of-limitations clock and may be needed to give the parties some breathing room. An escrow agreement puts disputed funds in safe hands. We have included a provision that allows the parties to enforce such agreements even if the CL process fails.

d. Experts (section 7). We have encountered considerable resistance to the disqualification of experts. The major purpose of disqualifying attorneys is to remove any economic incentive to block settlement; experts, however, lack the influence that lawyers have over the settlement process. Accordingly, there may be some clients who want to strike the language regarding disqualification of experts, or at least those that are not hired jointly. This may be particularly important in communities where the pool of available and qualified experts is small, or where the parties’ resources are thin.

e. Modification (section 13). It is important to remind clients that CL agreements can be modified, if all parties and their counsel agree in writing. This gives the Parties the confidence that, if CL fails, they can jointly agree to use materials such as memos, data, proposals and agreements, prepared as part of the collaborative process, to streamline any subsequent litigation. Clients must recognize, however, that some CL attorneys will decline to appear in court under any circumstances, even if the parties on both sides of the case wish them to do so. Therefore, the all-important provision regarding disqualification of counsel must be taken very seriously.

f. ADR methods (sections 18 and 19). In our view, there is nothing inconsistent about providing for mediation in a CL agreement as an impasse-breaking measure. Arbitration, however, is a different story. Unlike mediation, which is, at bottom, simply

facilitated negotiation, arbitration is essentially private adjudication. To be sure, arbitration is a useful process for the resolution of many, if not most, business disputes, and binding arbitration usually saves clients time and money, as compared to court battles. However, if the attorneys in the CL case are not disqualified from participating in any such arbitration, their economic incentive to promote settlement is reduced. Accordingly, while a well-designed arbitration provision may protect many CL values (such as confidentiality and cost management), we recommend that CL counsel be disqualified from arbitrating. The parties can, of course, agree otherwise if they wish to modify their CL agreement in writing after an impasse is reached.

In our view, constructing an agreement that, from the outset, permits the CL attorneys to represent the parties in arbitration would transform the contract from a CL agreement to an arbitration agreement with “CL-lite” as an important added feature. One further note: our proposed arbitration provision calls for the use of a convening institution, such as the American Arbitration Association. Although this may be somewhat more costly than a non-administered arbitration (because of the AAA administrative fee), in our view those costs are offset by the savings associated with a well-managed arbitration process.

Conclusion. Like CL itself, the agreement below is a work in process. We offer this draft agreement in the hope that it will promote discussion of this important part of collaborative law practice, and that it may prove a useful tool in expanding the use of CL from family cases to business and employment cases. We hope that readers will share with us comments, suggestions for improvements, and their own versions of a CL process agreement that may be suitable for business and other types of cases. Copies of the agreement below may be downloaded at www.BostonLawCollaborative.com, and the authors will send electronic copies of the document by email if readers experience any difficulty downloading it.

COLLABORATIVE LAW PROCESS AGREEMENT FOR BUSINESS AND EMPLOYMENT CASES

AGREEMENT made by and between _____ and _____
(collectively, the “Parties”).

PREMISES

The following sets forth the background of this Agreement:

A. A dispute has arisen between _____ and _____
concerning _____ (the “Dispute”).

B. The Parties wish to resolve the Dispute and any other claims or potential claims which either Party has or may have against the other without resort to litigation through the Collaborative Law Process, and they have entered into this Agreement for that purpose.

AGREEMENTS

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. No Court Intervention. By choosing the Collaborative Law process, the Parties are committing themselves to making a good faith effort to resolve the Dispute without court intervention. All lawyers, accountants, appraisers, and other consultants retained by the Parties will be directed to work in a good faith manner to assist the parties in resolving issues without resort to litigation.

2. Disqualification of Counsel and Experts. If a Party or a lawyer files a court document in connection with the Dispute (other than a settlement agreement or other documents necessary for the uncontested resolution of this matter or a joint motion to stay any currently pending proceeding), both lawyers will be disqualified from representing their clients in such proceeding. "Court document" includes a request for emergency (ex parte) orders. Except upon written agreement of the Parties to the contrary, all consultants will be disqualified as witnesses and their work product will be inadmissible as evidence in the case if it ceases to be a Collaborative Law case.

3. Information Exchange. The Parties agree to disclose relevant information and data regarding the matters in dispute. In addition, the Parties agree to give complete and timely responses to all requests for documents and other information relevant to the resolution of the Dispute.

4. Good-Faith Negotiation. The Parties understand that the process will involve vigorous good-faith negotiation, in which each Party will be represented solely by his/her/its own attorney. Each Party will be expected to take reasoned positions in all disputes.

5. Confidentiality. All communications exchanged within the Collaborative Law Process between or among the Parties and their attorneys will be confidential and without prejudice. The Parties agree that, if subsequent litigation occurs:

a. No Party will introduce as evidence in Court information disclosed in connection with the Collaborative Law Process, except documents otherwise discoverable under applicable law.

b. No Party will disclose to the Court any settlement offers, or responses to settlement offers, made during the Collaborative Law Process.

c. No Party will ask or subpoena either lawyer or any of the experts, appraisers, or consultants used in connection with the Collaborative Law Process

to testify in any court proceedings with regard to matters disclosed during the Collaborative Law Process.

d. No Party will require 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.

The Parties agree that these provisions regarding confidentiality shall apply to any subsequent litigation, arbitration, or other process for dispute resolution.

6. Agreements – Enforceability. If the Parties reach a temporary agreement on any matter during the Collaborative Law process, the agreement will be put in writing and signed by the Parties and their lawyers. If any Party withdraws from the Collaborative Law Process, the written temporary agreement shall be enforceable and may be presented to the Court as a basis for an order, which the Court may make retroactive to the date of the written agreement. Once the final agreement is signed, and the Collaborative Law Process is concluded, if a Party violates said agreement, it may be presented to the Court for enforcement.

7. Experts and Consultants. In selecting consultants as part of the Collaborative Law Process, the Parties will consider retaining joint experts and consultants. In the event each Party chooses to retain a separate expert, the experts shall nevertheless be directed to adhere to the letter and spirit of this Agreement.

8. Abuse of the Collaborative Process. Collaborative counsel shall promptly withdraw from the case if s/he learns that his/her client has withheld information material to the resolution of the dispute or otherwise acted so as to take unfair advantage of the Collaborative Law process.

9. Withdrawal of Counsel. If a lawyer decides to withdraw from the case for any reason, s/he shall provide prompt written notice of withdrawal to all Parties and their lawyers. This may be done without terminating the status of the case as a Collaborative Law case. The Party losing his/her lawyer may retain a new lawyer who will agree in writing to be bound by this Agreement, or may continue in the Collaborative Law process without an attorney.

10. Termination of the Collaborative Law Process. If a Party or lawyer decides that the Collaborative Law process is no longer appropriate, and elects to terminate the Collaborative Law process, he or she shall do so by written notice to all Parties and their attorneys. If the case is no longer proceeding as a Collaborative Law matter, the lawyers agree to aid their respective clients in the selection of a new lawyer and transmission of the file to new counsel. The provisions of this Agreement regarding disqualification of counsel, temporary agreements, [mediation, arbitration,] and confidentiality shall survive, notwithstanding termination of the Collaborative Law process.

11. Attorney's Fees. The Parties shall be responsible for the cost of their respective legal fees, and each Party waives any claim against the other Party for payment of same.

12. Entire Agreement. This Agreement constitutes the entire agreement of the Parties as to the subject matter hereof and supersedes all previous oral or written agreements between the Parties as to the subject matter hereof.

13. Modifications. No modification of this Agreement may be made except in a writing signed by the Parties and their counsel.

14. Governing Law. The terms of this Agreement shall be governed by the law of the Commonwealth of Massachusetts.

15. Captions. The captions herein have been inserted solely for convenience of reference and shall in no way define or limit the substance of any provision of this Agreement.

16. Copies. This Agreement may be executed in multiple counterparts, each bearing the signature of one or more Parties. Any copy bearing the signature of the Party to be charged may be deemed an original.

17. Voluntary Execution. The Parties understand the terms of this Agreement and believe its terms to be fair and reasonable. The Parties have had the opportunity to consult with their respective counsel about this Agreement before executing it, and they have entered into it voluntarily and without any coercion whatsoever.

18. [Optional] Mediation. In the event that the Parties and their counsel are unable to resolve the dispute by negotiation, they shall make a good faith effort to resolve the matter with the assistance of a mediator. If the parties cannot agree on the mediator, either party may request the designation of a mediator by _____ [choose one: American Arbitration Association; JAMS; The Mediation Group; president of the Massachusetts Collaborative Law Council; president of the Boston Bar Association, Massachusetts Bar Association, or New England chapter of the Association for Conflict Resolution]. The parties shall share equally the mediator's fee and any administrative fee. Undersigned Collaborative Law counsel shall not be disqualified from participating in the mediation.

19. [Optional] Arbitration. In the event that the Parties and their counsel are unable to resolve the dispute by negotiation [and mediation], either party may submit the Dispute to binding arbitration by a sole arbitrator under the auspices of [choose one: the American Arbitration Association; JAMS; The Mediation Group]. The parties shall share equally the arbitrator's fee and any administrative fee, but shall otherwise bear their own expenses, and judgment upon the Award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Undersigned Collaborative Law counsel shall [shall not] be disqualified from participating in the arbitration. The arbitrator shall determine

the arbitrability of the dispute if it is in controversy. The arbitrator may consider and rule on any dispositive motions submitted by the parties. Except for any stenographer and the arbitrator, attendance at the arbitration shall be limited to the parties and their counsel and witnesses. Except as necessary for purposes of an action to enforce, modify, or vacate the arbitration award, all documents and other information submitted to the arbitrator, including any transcript of the proceedings, shall be confidential and shall not be disclosed to anyone other than the parties and their counsel and financial advisors.

[Name]

Date:

[Name]

Date:

[Name of Attorney]

Attorney for _____

Date:

[Name of Attorney]

Attorney for _____

Date:

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