

## **Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation**

By David A. Hoffman<sup>1</sup>

In the 1980s the world of family law in the United States, recently transformed by the advent of no-fault divorce, began another dramatic transformation. Instead of relying solely on the courts and family law attorneys to structure the terms of their divorces, divorcing couples began using mediation in greater numbers. The promise of mediation was obvious: in addition to creating a safe place for a difficult conversation, mediation fostered an interest-based, problem-solving approach to their negotiations, helped parents develop cooperative strategies for co-parenting, and gave the parties a direct role in shaping their future. It also provided parties with the help of a neutral professional who was committed to helping both parties.

Mediation did not eliminate the need for lawyers but often left them on the sidelines of these negotiations. For many divorcing couples, diminishing the role of counsel was advantageous because it reduced the risk that their lawyers would ratchet up the level of antagonism between the parties. The parties in divorce mediations were usually encouraged to get the advice of counsel before signing their divorce agreement,<sup>2</sup> but the cost associated with relegating lawyers to the sidelines was substantial: the parties were deprived of real-time legal advice, which the mediators – because of their role as impartial facilitators of negotiation – were not supposed to provide even if they themselves were lawyers.

In 1989, the founder of the Collaborative Law ("CL") movement, Stuart Webb, was serving as a divorce mediator in Minneapolis and found the process unsatisfactory for many couples because he believed they needed legal advice while they were negotiating. Webb sensed that the mediation playing-field was not level for these couples (often because of differences in their sophistication about financial matters), and he felt that he was not permitted – as a mediator – to level it, even though he was also an experienced family law attorney. CL provided a solution because it brought collaboratively trained lawyers directly into the process of negotiation, thus giving the parties not only real-time legal advice but also direct involvement in the process and opportunities for face-to-face communication about difficult issues.

### **A. Collaboration without Firing the Lawyers**

Like mediation, CL offers the parties and counsel the opportunity to create a safe place for a difficult conversation, but at a cost. The cost is that if negotiations fail, and

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<sup>1</sup> I received invaluable editing and research assistance from my colleague, Nicole DiPentima, at Boston Law Collaborative, LLC, and very helpful suggestions from Israela Brill-Cass, Ken Dehn, John Lande, and Lynda Robbins. The views expressed in this chapter, however, are my own, as are any mistakes. Comments and responses are most welcome: [DHoffman@BostonLawCollaborative.com](mailto:DHoffman@BostonLawCollaborative.com).

<sup>2</sup> See D. Hoffman & K. Tosh, "Coaching from the Sidelines: Effective Advocacy in Divorce Mediation," 17 *Mass. Family L. J.* 85 (1999).

litigation ensues, the parties must engage new counsel – this requirement is set forth in the CL participation agreement that the parties and counsel sign at the outset of the process. However, some clients are not willing to take the risk of losing their chosen counsel, for a variety of reasons. For example, some clients have such negative feelings about the legal profession that, once they have found a lawyer they want to work with, they are reluctant to take the risk that they will have to find yet another such lawyer. For other clients, the concern is that their soon-to-be-ex-spouse will exploit or sabotage the CL process, or may simply be unable or unwilling to collaborate, and therefore both parties will be put to the expense of hiring and educating new counsel, with that cost coming out of scarce marital resources.

It is hardly surprising that many clients have posed the following question to their collaboratively trained lawyers: "Why is it that we cannot agree to collaborate without agreeing to fire our lawyers?"

For some lawyers, the answer to that question is "you can." These lawyers might suggest using an agreement that is virtually identical to a CL participation agreement, but without the provision requiring the withdrawal/disqualification of counsel.<sup>3</sup> An example of such an agreement can be found in the forms created by the Mid-Missouri Collaborative and Cooperative Law Association ("MMCCCLA")<sup>4</sup> or Boston Law Collaborative, LLC.<sup>5</sup>

For purposes of this chapter, I have chosen the term "Cooperative Negotiation Agreement" ("CNA") to describe such agreements. Some describe the use of such agreements as the practice of "cooperative law." Not all CNAs are alike but they ordinarily have some or all of the following components: (a) voluntary information sharing; (b) respectful communications; (c) the use of an interest-based, problem-solving style of negotiation; (d) direct involvement of the clients in the negotiation, through four-way meetings or by other means; (e) maintaining the confidentiality of the negotiation process; (f) disincentives (not including the disqualification of counsel) to the use of litigation; and (g) in a divorce case, a freeze of marital assets during the negotiation process and, if there are children, consideration of the children's best interest as an essential ingredient in the negotiations.<sup>6</sup>

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<sup>3</sup> It appears that the first example of an organized group of lawyers promoting law principles was the Association of Family Law Professionals in Lee County, Florida, which now has approximately 100 members and has used this model since the early 1990s. See J. Lande & G. Hermann, "Fitting the Forum to the Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases," 42 *Family Court Rev.* 280, 284 & n.32 (2004)

<sup>4</sup> See sample agreements at <http://www.mmcccla.org/forms.htm>

<sup>5</sup> See sample agreements at <http://www.bostonlawcollaborative.com/resources/forms-statutes-rules-and-articles/collaborative-law-forms.html>

<sup>6</sup> Many of these elements are discussed as possible elements of a 'negotiation protocol' in J. Lande, "Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results," 21 *Alternatives to High Cost of Litig.* 149 (2003).

The purpose of this chapter is to discuss the origins of this concept, the advantages and disadvantages of CNAs, the ethical issues associated with the use of CNAs, and cases in which CNAs have been used.

## B. Background

Several overlapping developments in the world of dispute resolution – in both family and non-family cases – have led to the use of CNAs.

First, as litigation has become more costly, complex, and time-consuming, a broad range of private dispute resolution methods has developed. The leading text in this area – particularly in the area of family law – was the 1979 article "Bargaining in the Shadow of the Law: The Case of Divorce," by Robert Mnookin and Lewis Kornhauser, which appeared in the *Yale Law Journal*.<sup>7</sup> The article described and legitimized a system of negotiation in which courts provide an essential role, even though very few cases are resolved there, by providing guideposts and benchmarks that enable the parties to make informed choices about settlement terms. Mediation has become the most widely used form of private dispute resolution, in both family and non-family cases, in the years since "Bargaining in the Shadow of the Law" was published. However, other forms of ADR (alternative dispute resolution) – such as arbitration, case evaluation, and CL – have also greatly expanded the range of options for the private resolution of conflict. In the United States, ADR is now taught in virtually every law school, and ADR programs exist as an adjunct to virtually every state and federal court system.

Second, the practice of negotiation has been transformed in the last twenty-five years by the growing use of interest-based, rather than positional, bargaining. This approach to negotiation was described in the path-breaking book *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher, William Ury, and Bruce Patton.<sup>8</sup> First published in 1981, and now translated into 25 languages, *Getting to Yes* introduced the ideas of (a) separating the people from the problem, (b) using principled benchmarks for arriving at agreement on contested issues, (c) assessing each party's BATNA (best alternative to a negotiated agreement) when considering settlement options, and (d) communicating about the parties' underlying interests so that mutually advantageous exchanges can occur. Prior to the publication of *Getting to Yes*, negotiation theory and practice focused primarily on competitive techniques for gaining advantage; Fisher, Ury and Patton opened the door for a more cooperative approach.

Third, the American Bar Association's publication of the book *Unbundling Legal Services*, by Forrest Mosten, in 2000, validated a new approach to lawyering, based on the recognition that some clients might not want – or might not be able to afford – the full range of services that lawyers offer.<sup>9</sup> Clients who use 'unbundled' legal services may want to be actively involved in handling their case and may seek only one (or more) of

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<sup>7</sup> See R.H. Mnookin & L. Kornhauser, "Bargaining In the Shadow of the Law: The Case of Divorce," 88 *Yale L.J.* 950 (1979).

<sup>8</sup> See R. Fisher, W. Ury & B. Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991) (2d ed.)

<sup>9</sup> See F. S. Mosten, *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte* (American Bar Association 2000) and Chapter \_ of this book.

the following legal services: advice, research, drafting, negotiation, review/editing of contracts or agreements, or a court appearance. Mosten introduced the idea of unbundling in 1993, and it has been embraced in a variety of settings, including some legal services offices which, because of the lack of funding, cannot provide the full range of legal representation to all clients. Another important manifestation of unbundling has appeared in the area of family law, in which a number of lawyers have begun limiting their practices to advice and negotiation and refer their clients to other counsel if a court appearance is needed.

Finally, CL, which is a prime example of unbundling, has grown dramatically since 1990, when the movement's founder, Stuart Webb, began representing clients solely for the purpose of negotiation. (CL is described more fully in chapter \_\_\_ of this book.) During the past fifteen years, thousands of lawyers and other professionals have been trained in collaborative negotiation techniques and tens of thousands of divorces have been negotiated with the use of CL participation agreements. As noted above, in the CL process, the parties and counsel sign a participation agreement in which all agree that, if litigation is needed, (a) the lawyers will withdraw and new counsel will be hired, and (b) current counsel will be disqualified from further involvement in the case. The purpose of the withdrawal/disqualification provision is to align everyone's economic incentives toward settlement. There are other important features of the process, which are discussed in chapter \_\_\_, but it is worth mentioning at least one of those in this chapter: for proponents of CL, a major part of the value of the process comes from the greater trust that can be created in negotiations because the parties do not have to fear that they will one day face their spouse's lawyer in adversarial proceedings in court, and this trust enables the parties to achieve deeper levels of communication and resolution, which are difficult to attain in other processes.

### **C. Cooperative Alternatives to Collaborative Law**

CNAs were developed as a means of accomplishing the vital goals of the CL process while at the same time allowing the parties to continue with their counsel if negotiations fail. A sample CNA, included as an appendix to this chapter, is virtually identical to a CL participation agreement with two exceptions: (a) the withdrawal/disqualification provision is omitted, and (b) the agreement includes both a 60-day cooling-off period and mandatory mediation before the parties are permitted to file papers in court, unless there are exigent circumstances (such as domestic violence or a danger to the parties' children). There is no magic in these particular terms – for example, a CNA could just as easily specify a longer or shorter cooling-off period, or specify case evaluation instead of mediation, or omit such terms altogether.

The defining characteristic of a CNA is that it takes the form of a legally enforceable contract to express the parties' intentions to resolve their conflict amicably through the use of cooperative negotiation techniques. Unlike a CL participation agreement, there is no single essential ingredient – no *sine qua non*, such as the withdrawal/disqualification provision, other than the commitment to cooperate in trying to achieve a negotiated resolution of the matter.

One of the characteristics that CNAs share with CL participation agreements, and for that matter with mediation agreements, is the parties' willingness to establish

explicit protocols for negotiation. In other words, CNAs, CL, and mediation are all examples of a larger ADR phenomenon, in which the parties negotiate about how the negotiation process will be conducted. This is not an entirely new phenomenon – for example, in the world of business, companies often negotiate for bargaining rights and negotiate the terms on which those bargaining rights can be used.

Some family law attorneys have developed a set of negotiating principles that are merely precatory – i.e., non-binding – but are intended to promote principled, cooperative bargaining. An example of such principles can be found in the materials published by the Divorce Cooperation Institute ("DCI") in Milwaukee.<sup>10</sup> (A copy of DCI's principles is attached as an appendix to this chapter.) However, for purposes of this chapter, the focus will be on cooperative principles that are embodied in enforceable agreements.

One might question whether, and to what extent, even written and signed commitments to cooperate – e.g., to share information, communicate respectfully, and engage in interest-based negotiation – are legally enforceable. In order to succeed in court, a legal claim for breach of contract must establish one of two things – that the non-breaching party either (a) has suffered compensable, monetizable damages that were caused by the breaching party, or (b) is entitled to injunctive relief (such as an order to go to mediation) because of the likelihood of harm that cannot be remedied by an award of money damages. In the case of a failed divorce negotiation, if one party went immediately to court without adhering to the terms of a CNA, the non-breaching party could make the argument in the divorce action that s/he is entitled to payment of the money that s/he spent needlessly on a cooperative negotiation process, the terms of which were violated by the other party. There are also cases in which courts have awarded injunctive relief and ordered the parties to participate in mediation or other forms of alternative dispute resolution.<sup>11</sup> Moreover, wholly apart from the ability to obtain an injunction or recover monetary damages in court, there are advantages to embodying the commitments contained in a CNA in a signed document that transcends legal enforcement, such as (a) achieving a higher level of clarity about how the parties will conduct their negotiations, and (b) causing the parties to take those commitments more seriously because they have affixed their signatures to them.

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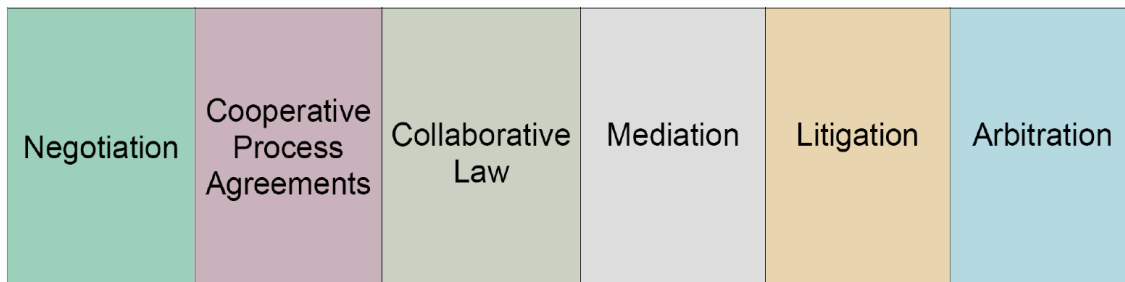
<sup>10</sup> See forms published at <http://www.cooperativedivorce.org/index.cfm>.

<sup>11</sup> See, e.g., *AMF Inc. v. Brunswick Corporation*, 621 F. Supp. 456, 462 (E.D.N.Y. 1985). See also *Haertle Wolf Parker, Inc. v. Howard S. Wright Construction Co.*, 1989 LEXIS 14756 (D. Or. 1989) (holding that "a contract providing for alternative dispute resolution should be enforced, and one party should not be allowed to evade the contract and resort prematurely to the courts"). But see S. Warshawsky, "Gilmer, the Contractual Exhaustion Doctrine, and Federal Statutory Employment Discrimination Claims," 19 *The Labor Lawyer* 285, 305-14 (2004) (discussing cases in which courts have failed to enforce contractual grievance procedures in the workplace prior to filing discrimination claims in court). See generally J. Coben & P. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006) (surveying cases in which mediation issues were litigated).

#### D. Advantages and Disadvantages of CNAs

In divorce cases, as in many other cases, when attorneys first meet their clients, they engage in an initial triage process in which the lawyers, with the help of the clients, try to assess which process will best suit the clients' needs and interests. For those cases in which some form of cooperative negotiation is the preferred option, the two primary choices have been mediation or CL, and now CNAs provide a third option. In assessing the advantages and disadvantages of each process, it is crucially important that clients are able to make well-informed choices. It is hardly surprising that each of the options available to clients has its proponents and detractors. The role of professionals, however, is to give their clients unbiased advice that is independent of their own views about promoting the greater use of one type of process or another.<sup>12</sup>

In considering the options available to divorcing couples, professionals must bear in mind that cooperative solutions are not suitable for everyone. The full range of options extends from, at one end of the spectrum, those requiring minimal third-party involvement (such as the "kitchen-table negotiation" in which the parties work out the essential terms of their divorce on their own and ask a lawyer to incorporate them into a divorce agreement) to more adversarial methods, such as neutral case evaluation, arbitration or even trial, with a wide variety of cooperative, collaborative, or mediative processes occupying the middle zones of the spectrum. Even in those cases where adversarial representation is needed, however, there are opportunities to mitigate the cost and delay associated with the process by entering into agreements to cooperate in information sharing and affording each party a fair opportunity to present the merits of the case for decision.<sup>13</sup>



A Spectrum of Dispute Resolution Options

Among the advantages of CNAs are the following: (a) clients are not required to "reinvent the wheel" by hiring new counsel if negotiations fail, and (b) if the agreement

<sup>12</sup> In an in-depth longitudinal study of CL cases in the United States and Canada, Prof. Julie Macfarlane found that there was a tendency on the part of CL practitioners to promote the use of CL in their discussions with clients – in some cases without a full discussion with the client about the risks inherent in the process. See J. Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases," published by Ministry of Justice, Canada (2005), available at <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/index.html>.

<sup>13</sup> For a proposal advocating for the use of such agreements, see M. Perlmutter, "Cooperative vs. Competitive Strategies: Rewriting the Unwritten Rules of Procedure," 2000 *Tex. B.J.* 848 (2000).



calls for a cooling-off period and mandatory mediation or neutral case evaluation, these provide additional incentives to resolve the case amicably. In addition, CNAs commit the parties to a set of norms and practices which foster information sharing, interest-based negotiation, respectful communication, and confidentiality – all of which give the parties a greater opportunity to resolve their dispute without destroying their relationship. Among the disadvantages is the possibility that the negotiations could be less amicable because the lawyers retain the option of going to court.

A comparison of CNAs with the advantages and disadvantages of CL is also useful.<sup>14</sup> Among the advantages of CL are the following (a) as noted above, both the lawyers and counsel have a strong financial incentive to reach a settlement, and (b) for both the clients and counsel, knowing that the lawyers in the CL process will never appear in court may foster an atmosphere of trust. Among the disadvantages is the concern that clients might feel pressured to settle because the cost of hiring new counsel could be prohibitive.

In one organization of family law practitioners – the Mid-Missouri Collaborative and Cooperative Law Association ("MMCCLA") – clients are offered both CL and CNAs as an option.<sup>15</sup> The MMCCLA web site also discusses the advantages and disadvantages of the two processes.

There are a number of advantages that CNAs and CL participation agreements have in common, such as encouraging transparency about the parties' interests, reducing the transaction costs associated with divorce, and fostering direct and respectful communications between the parties. One of the biggest advantages of these two processes is the opportunity for extensive face-to-face contact in four-way meetings between each of the parties and his/her opposing counsel. These meetings create opportunities to counteract the natural tendency of the parties to assume the worst about the intentions of the attorney representing their soon-to-be-ex-spouse. Thus, four-way meetings, conducted with ground rules that the parties negotiate and agree on, can increase the feeling of safety and trust in even those negotiations where lawyers are heavily involved. In divorce mediation, counsel are often coaching from the sidelines – i.e., not present in the mediation sessions – and one of the downsides of those arrangements is that they may breed mistrust of the opposing lawyer.

There are also disadvantages that CNAs and CL participation agreements have in common in comparison with mediation. For example, the involvement of lawyers in negotiation sessions may create a more adversarial feeling than would be present in mediation, even if the lawyers are collaboratively trained and doing their best to observe

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<sup>14</sup> For an excellent comparison and discussion, see J. Lande & G. Hermann, "Fitting the Forum to the Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases," 42 *Family Court Rev.* 280 (2004); and J. Lande, "Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law," available at <http://www.law.missouri.edu/lande/publications.htm#ccl>

<sup>15</sup> The term "Cooperative Law" is used by some practitioners to describe a process in which CNA's are used. There is some possibility of confusion in using this term, inasmuch as it is also used to describe the body of substantive law concerning housing cooperatives and agricultural cooperatives.

the agreed-upon norms of collaborative negotiation. In addition, mediation provides an opportunity for divorcing parents to try out new modes of direct communication and to work on relationship issues, which may be easier to address in the more private setting of mediation as compared with the four-way meetings used in the CL process or with CNAs.

There is one other important comparison to keep in mind when discussing options with clients – namely, the advantages of having a CNA, or any written protocol for negotiation, in the first place, as compared with no agreement at all. It is not uncommon for clients, opposing parties, and/or opposing counsel to question the need for such a document. "Why," they might ask, "can't we just shake hands and agree to handle this negotiation in a cooperative manner?" In addition to the advantages discussed above (e.g., clarity, compliance, and enforceability), a CNA can provide specific terms – such as a 'cooling off' period, or mediation as a required step before either party can go to court, and these terms might not get spelled out with clarity or even be considered in a handshake deal.<sup>16</sup>

Another important consideration in all of these processes in which the primary focus is a negotiated agreement is the opportunity to bring mental health professionals and financial professionals into the process as coaches and subject matter experts. This can be done with mediation, CL, or CNAs. The use of a team of professionals has been pioneered by the Collaborative Divorce movement,<sup>17</sup> but these techniques are sometimes used in mediation or cases involving CNAs.

The bottom line in comparing the advantages and disadvantages of the parties' various options is that there is no substitute for independent, unbiased professional advice in making the choice. There are so many variables in each case that it is virtually impossible to prescribe a set of factors that would work as a matrix for the successful triage of all cases. And even with the best professional advice, there is an irreducible element of uncertainty in predicting how the mix of skill, experience, objectives, and interpersonal chemistry between and among the lawyers and clients will affect the process of negotiation, and therefore professionals will often be surprised to find that cases that seem like excellent candidates for cooperative or collaborative processes become highly contentious, just as there are seemingly contentious cases that surprise professionals with amicable resolutions. With the high percentage of cases that are resolved by settlement as opposed to trial (virtually all studies and estimates place the settlement rate at 95% or more<sup>18</sup>), there is little likelihood that clients choosing *any* of

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<sup>16</sup> For an excellent discussion of the advantages of written protocols for negotiation, see J. Lande, "Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results," 21 *Alternatives to High Cost of Litig.* 149 (2003).

<sup>17</sup> For a description of Collaborative Divorce, see P. Tesler and P. Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues and Move on with Your Life* (2006).

<sup>18</sup> See, e.g., M. Galanter, "The Vanishing Trial" An Examination of Trials and Related Matters in Federal and State Courts," 1 *J. Empirical Leg. Stud.* 459, 462-63 (2004). Although the data collection in the state courts appears to be less comprehensive than in the federal courts, anecdotal reports suggest that cases filed in state courts have similarly high settlement rates. See also P. Murray, "The Disappearing Massachusetts Civil Jury Trial," 89 *Mass. L. Rev.* 51, 54



these processes – mediation, CL, or the use of a CNA – will wind up going to trial instead of reaching a settlement. There does not appear to be enough data at this point to show whether any one of these processes – mediation, CL, or the use of a CNA – produces a lower risk of going to trial compared to one of the other processes. With an overall rate of trials of substantially less than 5%, answering that question seems less important than figuring out how to triage cases effectively and choose the best process for each case, so as to shorten and smooth the path to settlement.

### **E. Lessons from the Practice of Collaborative Law**

The use of CNAs builds on experience gained from mediation and CL, not only in creating a legally enforceable structure for the negotiations, but also in the practices, norms, and protocols for the successful handling of negotiations. The practices discussed in this section, which derive primarily from the customs of CL, do not exhaust the subject but instead exemplify some of the better known practices.<sup>19</sup> Experience has shown that, regardless of whether the parties are using a CNA, a CL participation agreement or no written protocol for their negotiations, the practices described below foster more effective negotiations.

1. Meeting of counsel. Even before the negotiations begin, the lawyers meet to discuss the case and renew, or begin, their professional relationship. Such meetings cultivate cordiality, trust, and cooperation.

2. Use of four-way meetings. The primary engine for collaborative and cooperative negotiations is the four-way meeting. Ordinarily, the parties and counsel meet at one lawyer's office and then the next time at the other lawyer's office. But if one lawyer's office is substantially less convenient than the other lawyer's office, all of the meetings might occur at the latter's office. In some highly contentious cases, the parties may find that they aggravate each other to such an extent that four-way meetings are counterproductive, and therefore some version of shuttle diplomacy may be needed. When four-way meetings are used, the participants usually agree in advance on who will provide refreshments of some kind. (Food not only keeps the participants well fueled, but also promotes a caring and cooperative atmosphere.)

3. Review and signing of participation agreement. If the parties wish to execute a CNA (or a CL participation agreement), one of the first items on the agenda is to review carefully the provisions of the agreement that the parties are going to sign. Experience has led some practitioners to postpone the signing of a CNA or CL participation agreement until the second four-way meeting, in case it turns out that the

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(2004) (reporting that, in the year 2000, jury trials were conducted in only 2.65% of civil cases in Massachusetts Superior Court).

<sup>19</sup> For a fuller discussion of this topic, see R. Ousky and S. Webb, *The Collaborative Way To Divorce: The Revolutionary Method That Results in Less Stress, Lower Costs, and Happier Kids - Without Going to Court* 106 (2006); J. Ryan, R. Shields & V. Smith, *Collaborative Family Law: Another Way to Resolve Family Disputes* 82, 87, 88 (2003); P. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* 106, 109-17 (2001); *Collaborative Law: A New Model for Dispute Resolution* 40, 41, 43, 44, 46 (S. Gutterman, ed. 2004).

discussions at the first meeting are so contentious as to warrant serious concern about the likelihood of success in using a CNA or a CL process.

4. Setting agendas and taking notes. Like a business meeting, a four-way meeting in a divorce case is likely to be more successful if the attendees agree in advance on an agenda and, to the extent possible, stick to it. A common practice is for counsel to exchange draft agendas prior to the meeting, and for the lawyer who is not hosting the meeting to take notes. After the meeting is over, the note-taker usually turns the notes into a memo summarizing the meeting, and distributes them to the parties and counsel for review, comments, and, if needed, editing for completeness and accuracy. The memo serves to remind the parties and counsel of tasks or action items that each has agreed to undertake in preparation for the next negotiation session.

5. Interim agreements. In order to preserve the status quo, or to deal with front-burner issues that need to be addressed immediately, the parties and counsel often negotiate and execute interim agreements. In some cases, the interim agreement states that it is "without prejudice" – i.e., not binding as part of the final outcome of the case. In other instances, however, the parties may wish to make the interim agreement binding – e.g., an advance distribution of marital assets that the parties can spend or invest as they see fit.

6. Use of jointly retained experts. In keeping with the *Getting to Yes* principle of using neutral and objective benchmarks for the resolution of disputed issues, lawyers in a CNA or CL process often use jointly retained experts, usually on a non-binding basis, when addressing such issues as real estate or business valuation, the best interests of a child for purposes of custody or parenting plans, or the value of a pension.

7. Division of labor. When agreement has been reached on all, or substantially all, of the disputed issues, ordinarily one attorney does the first draft of the parties' agreement, while the other attorney takes on the job of preparing the papers necessary for a court filing to present the agreement. This has the effect of distributing the cost of legal services more evenly and avoiding the appearance that one side or the other is driving the process.

8. Follow-up meetings and discussions between counsel. Ordinarily, for lawyers, when a case is over, it's over. No more meetings, no more conference calls. It has become common – and indeed a recommended practice – for collaboratively trained lawyers to discuss and 'debrief' the case once it is concluded, in order to learn from what went well and what could have been done better in the negotiation. Usually these conversations do not include the clients but lawyers often seek feedback from the clients separately. It is also a common practice for the lawyers to check in with each other between four-way meetings, by phone or in person, while the case is still pending, in order to assess how the negotiations are proceeding and how the lawyers could enhance the negotiations.

The practices described above are not essential for cases in which a CNA is used, but they have proven to be helpful in supporting a cooperative tenor of negotiation, and therefore should be strongly considered.

## **F. Ethical Issues**

The increasing use of CL has led to a robust ethics debate among legal scholars and the issuance of advisory ethics opinions in seven states (Colorado, Kentucky, Maryland, Minnesota, New Jersey, North Carolina, and Pennsylvania) and by the American Bar Association.<sup>20</sup> The general consensus that can be derived from these ethics opinions is that even though CL departs from the traditional paradigm of adversarial negotiations, there is nothing unethical about the use of CL so long as the clients are making well-informed choices about the process.<sup>21</sup> In addition, the Colorado opinion specifically approves of the use of Cooperative Law by lawyers as being consistent with that state's canons of ethics for lawyers. However, there are specific cautions that emerge from these opinions that deserve particular attention, in particular those that apply to the use of CNAs.

1. Who is the client? One of the opinions (Pennsylvania) raises the question of whether the CL participation agreement creates so many duties to the family as a whole that the family becomes, in effect, the client. It is important for lawyers to recognize that their paramount duty is to the client that has retained them, and that the lawyer's concern about other family members – including the client's children and soon-to-be-ex-spouse – derive from the client's objective of achieving an amicable resolution that also serves the best interests of other family members.

2. Client confidences. Lawyers are required to maintain the confidentiality of information about their clients, but the typical CL participation agreement requires the parties to share information on any matter that is pertinent to their case, and some agreements obligate the lawyer to correct inadvertent mistakes made by the other attorney. One of the basic principles of collaboration is that transparency about the parties' interests will enable the parties to maximize their joint gains from a negotiation. Two of the opinions (North Carolina and Pennsylvania) caution that the client must be sufficiently informed to consent to such limitations on the ordinary duty to protect the client's information.

3. Forgoing the protections of court processes. The Minnesota opinion expresses concern about forgoing the protections afforded to clients by (a) formal discovery procedures and (b) motions for temporary orders that establish judicially enforceable obligations of the parties while their negotiations ensue. Accordingly, lawyers need to advise clients about what they are forgoing in that regard and should (a) consider what safeguards are needed to ensure that their clients are getting full information about the case, and (b) use interim agreements, where needed, to protect the clients' rights during the negotiation process.

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<sup>20</sup> Copies of these ethical opinions are available at <http://groups.yahoo.com/group/CollabLaw/files/%20Ethics%20and%20Judicial%20Opinions%20on%20Coll%20Prac>.

<sup>21</sup> The Colorado ethics opinion is the only one of the seven issued to date that states that lawyers cannot ethically sign a CL participation agreement, although their clients can do so. The ABA opinion (#07-447) takes issue with the Colorado opinion and states that CL is entirely consistent with the Model Rules of Professional Conduct so long as the client gives his or her informed consent to the process.

4. Partisanship and zeal. One of the opinions (Kentucky) focuses on the question of whether the canons of ethics for lawyers require unbridled partisanship by counsel and concludes that they do not. So long as the client gives informed consent to "non-adversarial representation," it is permitted, but the lawyer is still held to a duty of diligence and competence.

5. Independence. Several of the opinions (Kentucky, Maryland, New Jersey, and Pennsylvania) address the question of whether the formation of collaborative law practice groups, in which the lawyers – while retaining independent practices – refer cases to each other create a de facto firm or otherwise create a conflict of interest for the attorneys. The bottom line with respect to these concerns is that such groups are acceptable so long as (a) they do not engage in activities that would constitute the practice of law, and (b) the lawyers do not undertake representation of clients in a case where the lawyers' close relationship would impair their ability to effectively represent the clients. This is a potentially complicated area because one of the elements of collaboration that fosters effective negotiation is that the lawyers know each other well enough that they can cooperate in a negotiation with a high degree of confidence that such cooperation will be reciprocated.<sup>22</sup> The essential element, from an ethical standpoint, is disclosure to the client of the relationship between the attorneys so that the client is making an informed choice of counsel.

6. Screening for appropriateness because of risk of disqualification. Several of the opinions (Kentucky, New Jersey, and Pennsylvania) remind lawyers that they must screen cases for their appropriateness for collaboration. It is not enough that the client expresses a preference for such a process – the lawyer must exercise independent judgment as to whether the use of a CL participation agreement (or, by implication, a CNA) will serve the client's best interests. The Colorado opinion and some commentators have noted that the CL process has the effect of leaving the client vulnerable to having his/her lawyer fired, in effect, by the opposing party if that party decides to go to court.<sup>23</sup> The New Jersey opinion states that the canons of ethics do not permit a lawyer to recommend CL if there is a "significant possibility" that the CL process will not succeed. The opinion states: "given the harsh outcome on the event of such failure [i.e., disqualification], we believe that such representation and putative withdrawal is not reasonable if the lawyer, based on her knowledge and experience, and being fully informed about the existing relationship between the parties, believes there is a significant possibility that an impasse will result or the collaborative process will otherwise fail."<sup>24</sup> Thus it is important for lawyers to consider (a) whether a CL or CNA process will be a waste of the client's time and money, and (b) (a related question) whether entering into a CL process might create undue pressure on the client to settle because of the potentially prohibitive cost of hiring new counsel.

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<sup>22</sup> See Ronald J. Gilson and Robert H. Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 *Colum. L. Rev.* 509 (1994).

<sup>23</sup> See, e.g., J. Lande, "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering," 64 *Ohio State L.J.* 1315 (2003).

<sup>24</sup> New Jersey Advisory Committee on Professional Ethics, Op. 699, 14 N.J.L. 2474 (Dec. 12, 2005).

7. Withdrawal. Three of the opinions (Kentucky, Minnesota, and Pennsylvania) caution that the client must understand, and give informed consent to, the provisions regarding withdrawal from the case. In addition, if a lawyer does withdraw, s/he must do so in a manner that protects the client's interests (e.g., the lawyer must remain involved until a transition to new counsel can be made) and does not misrepresent the reasons for withdrawal.

All but the last two of these concerns are as much a concern when lawyers and clients are considering the use of a CNA as when they are considering the possibility of using CL.

One scholar, Prof. Christopher Fairman, has gone so far as to suggest that the practice of CL warrants the drafting of new rules of legal ethics that apply solely to that form of practice.<sup>25</sup> Prof. John Lande makes a convincing case that such measures are not needed,<sup>26</sup> and they are probably needed even less in connection with the use of CNAs. However, it is essential that lawyers who use CNAs in their cases recognize that they have non-waivable, non-disclaimable duties created by the canons of ethics, and therefore any provision included in a CNA must be consistent with those duties.

### G. Case Studies

As noted above, one of the vital functions that a family law attorney performs is triage – i.e., helping clients make an initial determination of the best process for handling their cases. My experience in making these initial determinations suggests that there are basically three types of cases: (a) those that are clearly unsuitable for mediation or collaboration of any kind and need to be resolved in court (because of, for example, domestic violence, a history of hiding assets or other deception, intractable patterns of bullying by one of the spouses, or emergency financial or child-related issues that the opposing party is unwilling to negotiate); (b) those that are excellent candidates for mediation, a CNA, or CL (because, for example, the parties communicate with each other effectively, are successfully managing co-parenting or other joint decisions, and have a track record of flexibility in their negotiations with each other); and (c) those in-between cases where it is unclear whether the parties can succeed in a non-litigation process. Unfortunately, it is not always easy to tell at the outset which of these three categories is applicable to a given case and, of course, cases change over time – cooperation may vanish, for example, when an issue that the parties had never discussed before suddenly becomes a sticking point.<sup>27</sup> CNAs are often a useful tool for the third category of cases described above.

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<sup>25</sup> See C. Fairman, "A Proposed Model Rule for Collaborative Law," 21 *Ohio State L.J.* 73 (2005).

<sup>26</sup> See J. Lande, "Principles for Policymaking About Collaborative Law and Other ADR Processes: A Response to Professor Fairman," to be published in 22 *Ohio State L.J.* (2007).

<sup>27</sup> To give but one example, in a recent case the parties readily agreed on a broad range of parenting issues, asset division, child support, health insurance, and alimony but their negotiations ran aground on the issue of how remarriage or cohabitation of the parties should affect the support calculations.

There is an increasing number of collaboratively trained lawyers who have decided that they will not go to court under any circumstances. For them, the use of CNAs may be less appealing. However, even if such a lawyer is not willing to go to court, and will refer his/her client to other counsel if litigation is needed, it still may be in the best interest of that lawyer's client for the parties to sign a CNA as opposed to no agreement, for reasons described above (such as the commitment to an interest-based negotiation, or the requirement of a cooling-off period). Moreover, lawyers have an ethical duty to explain to their clients all of the available options – even if one of those options would necessitate hiring other counsel – so that the client can make an informed choice about which process to use.<sup>28</sup>

The first of the case studies below<sup>29</sup> illustrates a situation where CL was used but, in retrospect, it is likely that a CNA would have been preferable. In the second case study, a CNA was used because there was a lack of consensus among the parties and counsel as to whether both parties could sustain a commitment to collaboration. In the third case study, it was clear that the parties were excellent candidates for CL, but they chose a CNA because they did not want to take the financial risk of hiring new counsel if problems developed in their negotiations.

1. Walker and Rosen. In this divorce case, the parties had been separated for several years and had two middle school children. They had a 50/50 parenting plan, with the children spending one week with their father (Walker, my client) and the next week with their mother (Rosen). The parties had read about CL and decided that is what they wanted – the idea of going to court was anathema to them, primarily for cost reasons. The parties had resolved all of the major financial issues – asset division, child support, and a waiver of alimony (the wife earned far more than the husband, and he did not want alimony). The only remaining issues – they thought – were child-related (such as children's vacations, choices regarding summer camp, and extra-curricular activities). What was not readily apparent until after the parties and counsel signed a CL agreement was that Walker and Rosen were like oil and water when it came to communicating about even the simplest of issues. An extraordinary amount of time was spent on such issues as the time of day when each of the parties could contact the children by phone at the other party's home, or how the parties would allocate time with the children on the children's birthdays. The case was eventually resolved by agreement but it took two and a half years; it would likely have taken less than a year if it had gone to court. The intensity of the antagonism between the parties throughout the CL process was so pronounced that it is difficult to say that presenting the issues for decision by a judge would have caused greater bitterness. Moreover, it is not clear that taking the case to court would have been more expensive. The primary reason, in my view, that the parties continued with the CL process is that retaining and educating new counsel (i.e., litigation counsel) would have imposed a financial hardship. Had the parties executed a CNA instead of a CL process agreement, the matter would almost certainly have been resolved more quickly by bringing it to court, and, while the contentiousness of court

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<sup>28</sup> See, e.g., Rule 1.4 of the Massachusetts Rules of Professional Conduct, Comment 5 ("There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation.").

<sup>29</sup> The names of the parties have been changed.

might have exacerbated their conflict, it seems that the parties needed someone to play the role of "decider, since their intense antipathy made compromise of any kind anathema..

2. Brown and Morgan. In this case my client (Brown) had considerable concerns about whether her husband (Morgan) could negotiate cooperatively. But both of them were extremely phobic about the idea of going to court. The marital estate was substantial, and so they could afford to hire new counsel if they had to. However, both expressed a strong preference to have the right to continue with their initial choice of counsel. Because both parties were articulate and well educated, and had read extensively about collaborative processes, I believed that their decision to sign a CNA and proceed in that way was sound. Within six months, however, it became apparent that no agreement was in sight on the issues of alimony and child support. My proposal for case evaluation was alternately accepted and then rejected by Morgan and his counsel. Prolonged delays caused by the parties' demanding careers exacerbated the need for interim support and, when none was forthcoming from Morgan, Brown decided to hire litigation counsel and get court-ordered support. The case – one of the few CL or CNA cases that I have been involved in that did not settle – is still pending. The major lessons I learned from the experience were (a) to be more attentive to the client's insights about her spouse's style of negotiation, and (b) that, regardless of how many years of practice experience one may have, it remains very difficult to predict in advance whether a case will settle, therefore some clients will benefit from retaining access to courts without changing lawyers.

3. Smith and Jones. In this case, my client (Smith) and her husband (Jones) were divorcing after a 25-year marriage. They both wanted a collaborative process and seemed like exceptionally good candidates for one. They were involved in productive couples counseling to discuss how best to co-parent their younger child, and they intended to remain working together in a small business that they co-owned. They clearly respected each other and cared for each other a great deal, despite their decision to divorce, and they communicated effectively. They had considered carefully the advantages and disadvantages of a CL participation agreement and decided on a CNA instead. The primary reason for their decision was that their funds were limited, and they feared having to hire new counsel. They also said they were very pleased with their choice of counsel and did not want to lose the opportunity to work with us. The five four-way meetings that were held in this case were among the most productive, collaborative, and deeply meaningful sessions I have had in 23 years of work in the area of family law. There were a few challenging issues, and one very challenging issue regarding the primary residence of their younger child (the older was in college). But the parties had enormous respect for each other, and the principles contained in their CNA supported their good intentions. At the final four-way meeting, my client asked if someone in my office could take a picture of the four of us, because she wanted it as memento of the good feelings that the process had engendered. (I have never, in the several hundred divorce cases I have been involved in, had such a request and I found it a rewarding reminder of the potential of cooperative negotiations.)

My experience with the use of CNAs is still somewhat limited because it has been little more than two year since I began using them as one of my forms of practice. My experience in the cases described above, and many other cases (involving CNAs,



CL and cases involving neither) suggests that the best predictor of a successful process – involving interest-based problem-solving, respectful communications, and collaborative negotiations – is not whether a particular form of agreement is signed but rather the chemistry, intentions, and skill of the participants. There are some lawyers with whom I seem to have almost invariably amicable and successful negotiations, and not all of them are collaboratively trained practitioners. And there are some well-trained and experienced CL practitioners with whom cases are frequently rocky. My bottom line on this issue is: find me two lawyers who are good at interest-based negotiation, collaborative communications, and have a deep commitment to resolving their cases fairly and amicably, and, if their clients are willing to follow the lead of their attorneys (or perhaps have a similarly collaborative orientation themselves), I believe that a successful negotiation – and possibly even a transformative one – will likely occur.

### **Conclusion**

One of the hallmarks of the dispute resolution movement has been creativity about process issues. In other words, creative lawyers and other professionals involved in helping their clients manage or resolve conflict have applied the same think-outside-the-box approach to designing the *process* that they have brought to bear on the substantive terms of the resolution. To that end, some practitioners have developed new ground rules for cooperation, in order to address what some see as the biggest leap that clients and counsel must take when they are considering the use of CL – namely, the commitment to hire new counsel if negotiations fail. CNAs are not a panacea, but they do offer significant advantages over bargaining without any explicit protocol for the conduct of negotiations. It remains to be seen whether the use of CNAs will become a common method of dispute resolution for divorces and other family cases, as CL and mediation have clearly become, or simply (like case evaluation or arbitration) a technique that sophisticated family law attorneys consider when the major methods do not quite fit. In either event, there appears to be considerable value in adding CNAs to the toolbox that family law practitioners use to help their clients resolve conflict.

### **Appendices**

- Appendix 1 Mid-Missouri Collaborative and Cooperative Law Association – Participation Agreement in Cooperative Law Process
- Appendix 2 Boston Law Collaborative, LLC – Cooperative Negotiation Agreement
- Appendix 3 Divorce Cooperation Institute – Principles of the Process

[David Hoffman is an attorney, mediator, arbitrator, and founding partner of Boston Law Collaborative, LLC, a multidisciplinary firm that provides collaborative law and dispute resolution services. David is also co-founder of the Massachusetts Collaborative Law Council and chair of the Collaborative Law Committee of the ABA Section of Dispute Resolution. He teaches mediation at Harvard Law School.. David is co-editor of *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Dispute Resolution* (Jossey-Bass 2003) and co-author of *Massachusetts Alternative Dispute Resolution* (Butterworth Legal Publishers 1994). He can be reached at [DHoffman@BostonLawCollaborative.com](mailto:DHoffman@BostonLawCollaborative.com).]

## **Appendix 1**

### **Mid-Missouri Collaborative and Cooperative Law Association**

#### **PARTICIPATION AGREEMENT IN COOPERATIVE LAW PROCESS**

This Agreement ("Agreement") is made between \_\_\_\_\_ and \_\_\_\_\_ ("the Parties"). The Parties commit to use our best efforts in a Cooperative Law Process ("the Process") to negotiate and fair and reasonable agreement about \_\_\_\_\_.

We promise to listen carefully to everyone in this Process, provide all information relevant to this matter, try to understand the interests of both Parties (and their loved ones), seek solutions that satisfy the interests of both Parties and any children involved, and treat everyone in the Process with sincere respect. We understand the Process and how it differs from other dispute resolution processes. Therefore, in consideration of our mutual promises, we agree to use the Process as follows.

#### **I. Focus on Direct Negotiation**

By making this Agreement, we agree to work hard to negotiate a reasonable agreement in this matter and to direct our lawyers to do so as well. If we reach agreement in the Process, we will direct our lawyers to file in court the agreement and any other appropriate documents.

#### **II. Lawyers' Duty to Serve Their Own Clients**

A. Each party has retained an independent lawyer to provide legal advice. We understand that each lawyer has a professional duty to represent his or her own client with competence and diligence and that our lawyers represent only their own clients and not the other party. There is no lawyer-client relationship between one Party and the other Party's lawyer. There is no legal duty of one Party's lawyer to the other Party.

B. We will each direct our lawyer to listen carefully to other party and lawyer, try to understand their interests, seek solutions that satisfy the interests of both Parties, and treat everyone in the Process with sincere respect. Each of us will ask our lawyer to advise us privately if they believe that it is in our interest to use a different approach than we want. We understand that our lawyers are trying to represent our individual interests when they consider how others' interests may affect us and when they give advice with which we may not agree.

#### **III. Confidentiality**

Except as we agree in writing, any and all statements made and information provided by Parties and lawyers during the Process shall be considered as settlement negotiations, with all the confidentiality protections provided by law. We agree to broaden this confidentiality protection by precluding the use of any statement or information for any purpose to the extent allowed by law except as follows. Statements

or information cannot be protected as confidential if they (a) assist a criminal or fraudulent act, or (b) give reasonable cause to suspect that a child has been or may be subjected to abuse or neglect. In addition, evidence of a fact disclosed in negotiation that is independently discoverable outside of negotiations is admissible. We agree to be barred and to refrain from disclosing any statement made by any party and from requesting the testimony of any party with regard to statements made during the Process, except as provided above or as we later agree in writing.

#### **IV. Full Disclosure and Information Exchange**

We agree to completely and honestly disclose all relevant documents and information in this matter. At least three days before our first meeting in the Process, we shall each provide to the other the following statements notarized under oath: (1) Statement of Marital and Non-Marital Property and Liabilities, (2) Income and Expense Statement, and (3) copies of any existing documents that substantiate each answer made. After the first meeting, we will give complete responses within agreed upon time deadlines to all requests for other relevant documents and information. Relevant information is information needed to make an informed decision. (In other words, we agree to provide all information that we would want to know if in the other party's position.) We shall not take advantage of each other or of miscalculations or inadvertent mistakes of fact or law. If we or our lawyers discover such miscalculations or other mistakes, we will promptly inform each other and direct our lawyers to do the same.

#### **V. Maintaining a Fair and Reasonable Environment During the Process**

At the beginning of the Process, we will negotiate interim arrangements to maintain a fair and reasonable environment while we negotiate in the Process. We may agree to submit temporary agreements to court. We will begin the Process by discussing the need for interim agreements to achieve the following goals:

- A. Ensure frequent and meaningful contact between parents and children;
- B. Ensure adequate financial support for the care of the children;
- C. Refrain from transferring, encumbering, concealing or in any way disposing of any property, except in the usual course of business or for the necessities of life and then with a full accounting, if requested;
- D. Refrain from harassing, abusing, molesting or disturbing the peace of each other or of any child; and
- E. Maintain without change in coverage or beneficiary designation, all existing contracts of insurance covering the life, health, dental or vision of the children and/or the spouse.
- F. Other interim issues: \_\_\_\_\_.

## **VI. Dealing with Apparent Impasse; Termination of this Agreement**

A. If either of us wants to use litigation or administrative agency action to resolve any issues in this matter, we shall do so only after a ten-day "cooling off" period or in case of an emergency. The cooling off period begins by serving a written notice to the other party (or his or her lawyer). During this period, we will discuss with our lawyers every plausible idea for negotiating an appropriate resolution and we shall discuss the hiring of a mediator to help resolve the problems. Such mediation would be voluntary and take place only by our agreement. We shall share equally the mediator's fee and any administrative costs unless otherwise agreed.

B. If we use the courts or an administrative agency to resolve any issues in this matter, we may litigate in a cooperative spirit under this Agreement or we may terminate this agreement.

C. If we litigate under this Agreement, we will direct our Cooperative lawyers to focus solely on the merits of the issues and avoid tactics that would unnecessarily aggravate the conflict. If we terminate the Cooperative Process, we make no such commitment to litigate in a cooperative spirit.

D. Either of us may discharge a Cooperative lawyer to hire another Cooperative lawyer, who would be bound by all the terms of this Agreement. If we discharge a Cooperative lawyer, we (or our lawyer) shall provide prompt written notice to the other party. The opportunity to retain a new Cooperative lawyer shall be available for a period of thirty days from the date of service of the notice. Failure to retain a substitute Cooperative lawyer within the thirty-day period shall constitute a termination of the Process.

E. We have directed our lawyers to withdraw from the Process if one of them believes that his or her client is withholding or misrepresenting relevant information or otherwise undermining the Process. In this situation, the lawyer will not disclose to the other party or the other party's attorney who decided to terminate the process or the reason for the termination.

F. If the Process is terminated, the provisions of this Agreement related to confidentiality shall continue in effect.

**VII. Acknowledgment**

We have read this Agreement, understand its terms, and agree to comply with it. We understand that by agreeing to this Process, we may give up certain rights, including formal court procedure rules for discovery of information. We understand that there is no guarantee that we will reach agreement in this Process. We voluntarily enter into this Agreement.

Dated: \_\_\_\_\_ Party: \_\_\_\_\_

Approved as to Form by His/Her Lawyer: \_\_\_\_\_

Dated: \_\_\_\_\_ Party: \_\_\_\_\_

Approved as to Form by His/Her Lawyer: \_\_\_\_\_

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## **Appendix 2**

### **Boston Law Collaborative, LLC**

#### **COOPERATIVE NEGOTIATION AGREEMENT**

##### **I. GOAL**

We are committed to negotiating the terms of our divorce cooperatively and avoiding litigation.

In this negotiation we are committed to the principles of honesty, cooperation, integrity and professionalism, geared toward ensuring the future well-being of the participants.

Our goal is to avoid, if at all possible, the negative economic, social, and emotional consequences to the participants of protracted litigation. In addition, the parties wish to avoid the publicity and potential harm to our son that could be caused by litigation.

##### **II. PROCESS**

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

To discourage either party from seeking court intervention, the parties agree to give each other no less than 60 days notice before filing any complaint, motion, or petition in court, in order to provide a "cooling-off" period that will enable the parties to re-assess whether court involvement is needed. During this "cooling-off period" the parties shall make a good faith effort to resolve the matter through mediation. This paragraph shall not prevent either party from seeking court intervention in the event of exigent circumstances.

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 recognize that, while the attorneys share a commitment to the process described in this Agreement, (a) each of the lawyers has an attorney-client relationship solely with, and a professional duty to diligently represent, his or her client and not the other party; (b) as such, each of the lawyers may have confidential and privileged communications with his/her client, and (c) such communications are not inconsistent with a cooperative process.

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.

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, 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.

### **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.

### **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 this 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, our children, attorneys and consultants. We will refrain from disparaging each other to colleagues, mutual friends, and acquaintances. We will treat as confidential all information about the other party's medical, psychiatric, or psychological treatment, and refrain from disclosing any such information (except to our own lawyers, therapists, or others with a need to know).



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

## **VI. EXPERTS AND CONSULTANTS**

If experts are needed, the parties will consider retaining them jointly, ensure their payment, and share their work product. In the event that either party wishes to consult an expert separately, s/he shall do so with his or her own resources and not with jointly held funds.

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

The parties acknowledge that each of our attorneys is independent from the other and represents only one party in this 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 disputed issues. 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 CHILDREN**

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

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

## **IX. CONFIDENTIALITY**

All communications exchanged within this 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 to each other during this process, offers or proposals for settlement, or other statements by any of the parties to the process or their attorneys; and (b) 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. However, non-privileged information which is independently obtained (i.e., not in this process) and admissible shall not be rendered confidential or inadmissible because it is referred to or produced in this process. In addition, neither party will offer as evidence the testimony of either attorney, nor will they subpoena either of the lawyers to testify, in connection with this matter.

**X. VOLUNTARY TERMINATION OF THIS PROCESS**

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

Either attorney may withdraw unilaterally from this 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 this 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 this process or withdrawal of either counsel, the withdrawing attorney will promptly cooperate to facilitate the transfer of the client's file and any information needed for continued representation of the client to successor counsel.

**XI. ABUSE OF THE PROCESS**

We enter this process with the expectation of honesty and full disclosure in all dealings by all individuals involved in the spirit of collaboration.

Each party understands that his/her 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 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 this process.

**XII. 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.

\_\_\_\_\_  
Name of Party  
Date:

\_\_\_\_\_  
Name of Party  
Date:

\_\_\_\_\_  
Name of Attorney  
Attorney for \_\_\_\_\_  
Date:

\_\_\_\_\_  
Name of Attorney  
Attorney for \_\_\_\_\_  
Date:

### **Appendix 3**

#### **Divorce Cooperation Institute**

##### **Principles of the Process**

Both parties and attorneys commit in good faith to do the following:

- Cooperate by acting civilly at all times and by responding promptly to all reasonable requests for information from the other party.
- Cooperate by fully disclosing all relevant financial information.
- Cooperate by obtaining joint appraisals and/or other expert opinions before obtaining individual appraisals or expert opinions.
- Cooperate by obtaining meaningful expert input (e.g., a child specialist) before requesting a custody study or the appointment of a guardian ad litem
- Cooperate in good faith negotiation sessions, including 4-way sessions where appropriate, to reach fair compromises based on valid information.
- Cooperate by conducting themselves at all times in a respectful, civil and professional manner.

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