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The Uniform Collaborative Law Act's Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process

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THE UNIFORM COLLABORATIVE LAW ACT'S
CONTRIBUTION TO INFORMED CLIENT
DECISION MAKING IN CHOOSING A DISPUTE
RESOLUTION PROCESS

*Forrest S. Mosten**
*John Lande***

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I. INTRODUCTION

The Uniform Collaborative Law Act¹ (“UCLA” or “the Act”) provides a useful framework of issues for parties² to consider when making decisions about the use of Collaborative Practice (“CP”)³ procedures. Section 14 of the Act requires lawyers to obtain parties’ informed consent before parties begin a CP process.⁴ Specifically, lawyers must provide the prospective parties with information that the lawyers reasonably believe is sufficient for the parties to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other

1. UNIF. COLLABORATIVE LAW ACT (2009), in 38 HOFSTRA L. REV. 421 (2010) [hereinafter UCLA]. The Act defines “Collaborative law process” as “a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons: (A) sign a collaborative law participation agreement; and (B) are represented by collaborative lawyers.” *Id.* § 2(3), at 467. Section 4(a) provides:

A collaborative law participation agreement must:

- (1) be in a record;
- (2) be signed by the parties;
- (3) state the parties’ intention to resolve a collaborative matter through a collaborative law process under this [act];
- (4) describe the nature and scope of the matter;
- (5) identify the collaborative lawyer who represents each party in the process; and
- (6) contain a statement by each collaborative lawyer confirming the lawyer’s representation of a party in the collaborative law process.

Id. § 4(a), at 474. These are the minimal requirements, as “[p]arties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this [act].” *Id.* § 4(b), at 474.

Traditionally, Collaborative Practice (“CP”) participation agreements include a “disqualification” provision, which precludes Collaborative lawyers from representing Collaborative clients in contested litigation in the case. *See* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 626-27 (2007). This disqualification provision is the essential feature of CP. *Id.* at 626. Under the UCLA, Collaborative lawyers are disqualified from litigating a Collaborative case as a matter of statute rather than agreement. *See* UCLA § 9(a), at 481 (“[A] collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.”).

2. For convenience, references in this Article to “parties” include prospective parties. Similarly, references to “clients” include prospective clients.

3. This Article follows the convention of capitalizing “Collaborative” when referring to the specific CP process, as distinct from using the word as a generic adjective, which is not capitalized. (Similarly, “Cooperative” is capitalized when referring to the specific Cooperative Practice process.) The Article generally refers to Collaborative “Practice” rather than Collaborative “Law” to reflect the fact that the process often involves a multi-disciplinary team, which may include mental health professionals, financial professionals, and coaches, among others. It focuses particularly on procedures for lawyers because the UCLA establishes specific requirements for lawyers, though these procedures could be adapted by other Collaborative professionals.

4. *See* UCLA § 14, at 484.

reasonably available alternatives for resolving the proposed collaborative matter.⁵

The Act requires lawyers to advise prospective parties about certain issues relating to termination of a CP process,⁶ but otherwise it does not specify what information lawyers must discuss with prospective CP parties.

This Article describes how lawyers can educate clients so that they can make good decisions about using a CP process. The UCLA provides a helpful structure for identifying issues for parties to consider even in jurisdictions that have not enacted it.⁷ The suggestions in this Article are intended as ideas for lawyers to consider rather than mandatory standards of competence that might be used to define the standard of care in malpractice or professional disciplinary proceedings. There is great value in having a flexible process that permits people to tailor it to fit the needs and preferences of parties in each case. As CP develops, lawyers might consider additional ways to improve communication between clients and lawyers, refine participation agreements to reflect the variety of CP models,⁸ develop new ideas for training of Collaborative professionals, provide ideas for marketing CP, and educate clients who are considering or participating in the process.

This Article focuses on some key issues raised by the UCLA and is not exhaustive. We hope that it will stimulate further scholarship, training, research, and other activity in the field to refine and add other strategies and protocols in the future. Part II describes how Collaborative lawyers can learn from the UCLA so that they can generally improve the quality of their service and, specifically, help parties make good decisions in choosing CP or other dispute resolution processes. Part III provides information about the informed consent and screening

5. *Id.* § 14(2), at 484.

6. The Act requires Collaborative lawyers to advise prospective Collaborative parties that the process ends when a party initiates a legal proceeding related to the Collaborative matter, that the party has the right to terminate unilaterally a Collaborative law process with or without cause, and that the Collaborative lawyer generally may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter. *See id.* § 14(3), at 484. For further discussion, see *infra* Part III.D.

7. *See id.* prefatory note, at 443-45. The UCLA establishes minimal requirements for CP and leaves it to practitioners, professional associations, and others to tailor the process to address the parties' needs. *Id.* The prefatory note states: "The act's philosophy is to set a standard *minimum* floor for collaborative law participation agreements to inform and protect prospective parties and make a collaborative law process easier to administer. Beyond minimum requirements, however, the act leaves the collaborative law process to *agreement* between parties and collaborative lawyers." *Id.* at 445 (emphasis added).

8. For a description of various models of CP, see Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, 181-84.

requirements generally. It describes how lawyers should analyze the facts and parties' interests, screen the appropriateness of dispute resolution processes, analyze the reasonably available dispute resolution options, and discuss the Collaborative process with clients. It also suggests ways that lawyers may educate clients generally. Part IV addresses issues in the informed consent process to educate parties specifically about privacy issues including privilege, confidentiality, and full disclosure requirements.

II. USE OF UCLA TO INCREASE COMPETENT AND ETHICAL SERVICE

For lawyers to help clients make good decisions about using CP, the lawyers themselves must have a good understanding of CP. The UCLA constitutes an excellent source for self education, which can lead to better professional practice. Lawyers can use the UCLA in the following ways:

- Study the UCLA and its thoughtful prefatory note.⁹ The Note includes an insightful analysis of key policy issues, such as balancing regulation and party autonomy, lawyers' professional responsibility, need for training of Collaborative professionals, scope of the disqualification agreement, informed consent, disclosure of information, and privilege, among others.¹⁰
- Discuss the UCLA with professional colleagues, considering what it provides and how it will affect each professional's practice, local CP practice groups, and demand for CP services in the community.
- Prepare summaries of key provisions of the Act for dissemination for clients and in the local practice community, including continuing education programs and newspaper articles.
- Perform a "UCLA Impact Review" of all CP materials and documents and consider appropriate modifications to documents such as agendas for initial client consultations and first joint Collaborative sessions, attorney-client engagement agreements, participation agreements, and withdrawal and termination notices.¹¹

9. More than a brief "Note," this forty-two page introduction to the UCLA is a primer of the concepts and authority underpinning CP. *See* UCLA, prefatory note, at 425-66.

10. *Id.* at 445-65.

11. Lawyers should pay particular attention to unwaivable statutory provisions including parties' right to terminate a CP process unilaterally, disqualification of Collaborative lawyers from litigating matters related to the Collaborative case, informed consent requirements, Collaborative lawyers' duties to screen for coercive and violent relationships, and parties' duty to provide full,

- Publicly commit to meet the requirements of the UCLA and reflect this commitment on their websites,¹² brochures, and in-office points of client information.¹³
- Train office staff about the requirements of the UCLA and how they will be implemented in their offices.

These measures, separately and in combination, can increase the competent delivery of CP services, including obtaining clients' informed consent and screening cases for appropriateness.

III. INFORMED CONSENT AND SCREENING

The UCLA requires a discussion between lawyer and client of the benefits and risks of Collaborative law and "other reasonably available alternatives" prior to a client participating in the process.¹⁴ In particular,

timely, and candid disclosure of information. *See* Andrew Shepard, Reporter, Unif. Collaborative Law Act, Uniform Collaborative Law Act (UCLA): Summary of Key Provisions at the Hofstra University School of Law Symposium: Collaborative Law: Opportunities, Challenges, and Questions for the Future (Nov. 20, 2009), *available at* http://www.livestream.com/hofstralaw/video?clipId=flv_cbd754d5-d103-4b4d-80ef-5855a3d29087.

12. Practitioners' websites might include a link to the UCLA. *See, e.g.*, Uniform Law Commission: The National Conference of Commissioners on Uniform State Laws, Collaborative Law, <http://www.nccsl.org/Update/CommitteeSearchResults.aspx?committee=279> (last visited May 25, 2010).

13. For further discussion of client education, see *infra* Part III.E.

14. *See* UCLA § 14(2), at 484. This provision is consistent with a recent ABA ethics opinion which authorizes lawyers to provide CP representation if a client gives informed consent. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007) (discussing ethical considerations in collaborative law practice). For a thorough analysis of the requirement of informed consent for CP, see Mosten, *supra* note 8, at 169-74; John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347 (2010).

David Hoffman observed that many lawyers often do not inform clients about the risks of litigation, but suggests that they should do so. David A. Hoffman, Founding Member, Boston Law Collaborative, LLC, Current State of Collaborative Law at the Hofstra University School of Law Symposium: Collaborative Law: Opportunities, Challenges, and Questions for the Future (Nov. 20, 2009), *available at* http://www.livestream.com/hofstralaw/video?clipId=flv_f3835002-8ca3-4412-8a3e-594e1f44b8d9. Various legal scholars and experts in legal professional responsibility have argued that lawyers should be required to compare litigation with other consensual dispute resolution options. *See, e.g.*, ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 135-45 (2d ed. 2009); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 21 (2d ed. 2006); Robert F. Cochran, Jr., *Educating Clients on ADR Alternatives: The Rules of Professional Conduct Should Require Lawyers to Inform Clients About ADR*, L.A. LAW., Oct. 2002, at 52, 52; Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 897-901 (2001); Mosten, *supra* note 8, at 170. While the UCLA imposes a duty of informed consent on Collaborative lawyers that may not be required of lawyers in other situations, we believe that lawyers normally should obtain clients' informed consent before beginning litigation or other dispute resolution processes.

the lawyer must “assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party’s matter.”¹⁵ These provisions briefly state a requirement in general terms, but competent implementation requires an extensive process.¹⁶ This Part provides detailed guidance for conducting this process.

A. *Analysis of Facts and Parties’ Interests*

In an initial consultation with clients, lawyers should ask about the facts of the matter and the clients’ highest priority goals in handling it.¹⁷ The goals should not only include the desired outcomes but also goals about the process for handling the matter.¹⁸ Process goals might include being treated respectfully, maintaining or restoring good relationships (especially if children are involved), using time and money efficiently, protecting privacy, or addressing some broad underlying interests in addition to resolving a specific dispute, among others.¹⁹ Lawyers should ask clients questions such as:

15. See UCLA § 14(1), at 484. Although the Act does not use the word “discuss,” it seems impossible to do a competent assessment required by the Act without a careful discussion. See *infra* notes 24-25 and accompanying text (citing UCLA prefatory note, describing lawyer’s role as educator and counselor).

16. Custom and tradition have led many clients and lawyers to expect that initial attorney-client consultations should be free of charge. Discussion of informed consent requires a high level of professional skill and an adequate discussion, which can last a substantial period of time. We believe that it is appropriate for prospective clients to pay reasonable fees for such initial consultations, as described to them prior to the consultations.

17. See FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 43 (2000). The process of client counseling itself requires study and practice. See *supra* note 14 and accompanying text. Many law schools have courses in client interviewing and counseling, and there is an international law student client counseling competition (affiliated with the International Bar Association) devoted to developing these skills. See Georgia State University College of Law, Effective Lawyer Client Communication: An International Project to Move from Research to Reform, <http://law.gsu.edu/Communication> (last visited May 25, 2010); The Louis M. Brown and Forrest S. Mosten International Client Consulting Competition, <http://www.clientinterviewing.com/iccc/index.asp> (last visited May 25, 2010). The standards for the Louis M. Brown International Client Counseling Competition reflect good practice in client counseling generally. The Louis M. Brown International Client Counseling Competition, Assessment Criteria and Team Feedback Form, <http://www.clientinterviewing.com/iccc/ICCC%20Assessment%20&%20Feedback%20Form.doc> (last visited May 25, 2010) (listing “Establishing an Effective Professional Relationship,” “Obtaining Information,” “Learning the Client’s Goals, Expectations and Needs,” “Legal Analysis and Giving Advice,” “Developing Reasoned Courses of Action (Options),” “Assisting the Client to Make an Informed Choice,” “Effectively Concluding the Interview,” “Ethical and Moral Issues,” and “Post Interview Reflection Period,” as assessment criteria).

18. MOSTEN, *supra* note 17, at 9-10, 43-44.

19. *Id.* at 42-43.

- How much can clients afford and are they willing to pay to handle the matter?
- Do clients need to resolve matters quickly—or is it important to have the process unfold over a longer period of time?
- How much do clients want to handle the matter on their own and how much of the process do they want to delegate to lawyers and/or other professionals?
- How much are clients interested in reaching agreement and how much would they prefer to have the matter adjudicated by others?
- If the clients want to settle a matter, how willing are they to meet together with the other party to negotiate?
- Would clients be open to using a mediator or neutral coach to assist with negotiation at the outset or if trouble occurs later in the case?²⁰

Lawyers should also assess the same issues from the perspective of the other parties involved in the matter, including how they perceive their interests similarly or differently from the lawyer's clients.²¹ If the other party has retained a lawyer, how is that lawyer likely to approach the matter?²²

B. Screening of Appropriateness of Dispute Resolution Processes

The UCLA requires that both the lawyer and client must assess the appropriateness of CP.²³ The prefatory note describes the lawyer's role as an educator and counselor:

20. *Id.* at 47-49; *see also* Lande & Mosten, *supra* note 14, at 411, 422.

21. *See* Mosten, *supra* note 8, at 184-85. Judge Linda S. Fidnick suggested that three elements of screening are needed before a client starts a CP process: (1) client self-screening, (2) attorney screening, and (3) assessment of the appropriateness of the other party to participate in a CP process. Linda S. Fidnick, Assoc. Justice, New Hampshire Probate & Family Court, The Uniform Collaborative Law Act at the Hofstra University School of Law Symposium: Collaborative Law: Opportunities, Challenges, and Questions for the Future (Nov. 20, 2009), *available at* http://www.livestream.com/hofstralaw/video?clipId=flv_cbd754d5-d103-4b4d-80ef-5855a3d29087.

22. *See* Mosten, *supra* note 8, at 184-85.

23. *See* UCLA § 14(1), at 484 (stating that a lawyer shall “assess with the prospective party factors [related to appropriateness]”). This is consistent with requirements in bar association ethics opinions. *See* Lande & Mosten, *supra* note 14, at 395-97, 400-01 (summarizing ethics opinions requiring lawyers to obtain clients' informed consent and screen cases for appropriateness to use CP). The authorities are clear that in some situations, lawyers are not authorized to undertake a Collaborative representation even if the client gives informed consent. *Id.* at 397-98 (stating that a lawyer may not undertake limited scope representation if it would be “unreasonable” or if a conflict of interest would prevent the lawyer from providing competent and diligent representation).

The act thus envisions the lawyer as an educator of a prospective party about the appropriate factors to consider in deciding whether to participate in a collaborative law process. It also contemplates a process of discussion between lawyer and prospective party that asks that *the lawyer do more than lecture a prospective party or provide written information about collaborative law and other options.*²⁴

The appropriateness of CP (and other dispute resolution processes) depends on many factors, which include:

- How honest and trustworthy are the parties?
- Are there particularly difficult or complex issues?
- How much are the parties willing to respect the other parties' legitimate interests and try to satisfy them?
- How likely is it that a party would try to take advantage of the CP process by pressuring the other party to settle by threatening to withdraw from the process?
- Are there any factors that would undermine the parties' ability to make responsible decisions (such as limited cognitive abilities, coercion or fear, substance abuse, addictions like compulsive gambling, or debilitating mental illness)?
- Would the use of additional professionals adequately address foreseeable problems?
- Are the parties financially and emotionally prepared to litigate if they cannot reach agreement?²⁵

24. UCLA, prefatory note, at 458 (emphasis added).

25. Based on a review of CP books and practice group websites identifying factors that they indicated may be relevant to the appropriateness of CP, we developed the following list summarizing the factors cited in these sources: (a) the motivation and suitability of the parties to participate effectively in a Collaborative process; (b) the trustworthiness of the parties; (c) whether a party is intimidated from participating effectively in the Collaborative process; (d) whether there has been a history of domestic violence between the parties; (e) whether a party has a mental illness; (f) whether a party is abusing alcohol or other drugs; (g) whether the lawyers are suitable for handling the case collaboratively; (h) whether the parties would use professional services in addition to Collaborative legal services; (i) the parties' ability to afford to retain new lawyers if the Collaborative process terminates without agreement; and (j) the parties' views about the risks of disqualification of lawyers and other professionals in the case. *See* Lande & Mosten, *supra* note 14, at 355-70.

The Collaborative Law Committee of the ABA Section of Dispute Resolution is developing a detailed informed consent protocol which provides a checklist of factors relevant to choice of dispute resolution process including specific issues to discuss with clients considering using CP. *See* Collaborative Law Comm., Am. Bar. Ass'n, Suggested Protocol to Obtain Clients' Informed Consent to Use a Collaborative Process 4-5 (Sept. 1, 2009) (unpublished manuscript on file with the Hofstra Law Review), *available at* http://collaborativelaw.us/articles/Informed_Consent_Protocol_9-1-09.pdf. John Lande participated in the drafting of this protocol.

At the Hofstra Conference on Collaborative Law, Dr. Arnold T. Shienvold, a longtime leader in the mediation movement, identified several factors that make CP especially challenging and require clients and professionals to reflect whether CP is appropriate. Arnold T. Shienvold, Partner, Riegler-Sheinvol & Assocs., Current State of Collaborative Law at the Hofstra University

The Act establishes a special requirement for lawyers to screen potential CP cases involving a “coercive or violent relationship.”²⁶ This provision requires lawyers to make a “reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party” before undertaking a Collaborative representation, and must continue to assess this throughout the process.²⁷ If a lawyer “reasonably believes” that there has been a history of a coercive or violent relationship in the case, the lawyer may not proceed in a CP process without the request of an abuse victim and unless the lawyer “reasonably believes” that the victim’s safety “can be protected adequately during a process.”²⁸

School of Law Symposium: Collaborative Law: Opportunities, Challenges, and Questions for the Future (Nov. 20, 2009), available at http://www.livestream.com/hofstralaw/video?clipId=flv_f3835002-8ca3-4412-8a3e-594e1f44b8d9. These include situations where clients see themselves as victims, take little or no responsibility for their actions and decisions, respond primarily with impulsive emotionality, contend that the end justifies the means, and/or are involved in an abusive or coercive relationship. *Id.*

26. See UCLA § 15, at 484-85. Section 15 states:

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer must make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(c) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a process; and

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.

Id. The prefatory note cites several domestic violence screening protocols that lawyers can use. See *id.* prefatory note, at 461-62. This requirement is not limited to divorce and family disputes. See *id.* at 459-60.

27. *Id.* § 15(a)-(b), at 484-85.

28. *Id.* § 15(c), at 485. Although the statutory language refers to the request of a party or prospective party, the prefatory note makes clear that this refers to a victim in such a relationship. See *id.* prefatory note, at 461-62. Rebecca Henry, acting director of the American Bar Association Commission on Domestic Violence, commended the UCLA for its groundbreaking screening requirements and contribution to the understanding of the impact of domestic violence on negotiations between victims and perpetrators. Rebecca Henry, Acting Dir., Am. Bar. Ass’n Comm’n on Domestic Violence, Current State of Collaborative Law at the Hofstra University School of Law Symposium: Collaborative Law: Opportunities, Challenges, and Questions for the Future (Nov. 20, 2009), available at http://www.livestream.com/hofstralaw/video?clipId=flv_f3835002-8ca3-4412-8a3e-594e1f44b8d9.

C. *Analysis of Dispute Resolution Options*

As part of the informed consent process, a lawyer must provide information “about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives.”²⁹ The fact that there are many different dispute resolution processes means that parties have the benefit of many options to choose from. It also creates challenges for lawyers in explaining the various options as they must explain a great deal of complicated information in ways that clients can readily understand.³⁰ To do so, lawyers may find it useful to develop certain routines and then practice giving accurate, concise, and understandable descriptions and comparisons of CP and other dispute resolution processes.³¹ The Act’s prefatory note elaborates on the lawyer’s duty:

An attorney in a counseling situation must advise a client of the risks of the transaction in terms sufficiently clear to enable the client to assess the client’s risks. The care must be commensurate with the risks of the undertaking and tailored to the needs and sophistication of the client.³²

Lawyers should clearly and accurately describe the readily available dispute resolution processes in their community. For parties considering CP, lawyers should normally explain other processes³³ including negotiation solely between parties, negotiation solely between lawyers, negotiation involving parties and lawyers, Cooperative practice,³⁴

29. UCLA § 14(2), at 484.

30. See Lande & Mosten, *supra* note 14, at 402-05.

31. For example, Dr. Arnold T. Shienvold used a metaphor of a highway to contrast Collaborative Law and traditional litigation. Shienvold, *supra* note 25. He described litigation as a super highway on the road to a court destination. Collaborative Law, by contrast, was described as using an access road paralleling the highway. *Id.* In Collaborative Law, the parties stay off the highway unless there is an express desire to terminate the process and move from the access road to highway. *Id.* He also used images such as bumps in the road and a pit crew (referring to the Collaborative team) as opposed to highway rest stops (such as mediation and neutral evaluation) to get the car to its destination. *Id.* Practitioners may want to develop their own metaphors to vividly illustrate their points.

32. UCLA, prefatory note, at 458 (quoting Conklin v. Hanoach Weisman, 678 A.2d 1060, 1069 (N.J. 1996)).

33. For a comparison of common processes used in divorce cases, see John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282-86 & tbl.1 (2004). The comparisons in that article can be applied or adapted for cases other than divorce.

34. Cooperative practice involves an explicit agreement to use a planned negotiation process that does not involve a disqualification agreement. See JOHN LANDE, FREQUENTLY ASKED QUESTIONS ABOUT COOPERATIVE PRACTICE, INCLUDING WHY SHOULD YOU CARE? I (2009), <http://www.law.missouri.edu/lande/publications/Lande%20FAQ%20re%20Cooperative%20Practice.pdf>; see also John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in*

mediation,³⁵ neutral evaluation, arbitration, and litigation.³⁶ Although there may not be practitioners in a local community who regularly offer some of the preceding processes, it may still be possible to find practitioners to provide these services.³⁷ For example, some lawyers may be willing to serve as a neutral evaluator or arbitrator, even if they do not generally provide these services. Lawyers should also inform clients that

Wisconsin, 2008 J. DISP. RESOL. 203, 204-05 (describing the exclusion of disqualification agreements from Cooperative practice as “the key distinction” between Collaborative and Cooperative practice). Cooperative practice agreements vary and may be similar to Collaborative participation agreements, including terms such as “committing parties to negotiate in good faith, act respectfully toward each other, disclose all relevant information, use jointly retained experts, [and] protect confidentiality of communications.” *Id.* at 204. For a description of the “disqualification” provision, see *supra* note 1. The Act’s prefatory note lists Cooperative law as one of the reasonable dispute resolution options that lawyers might discuss with a potential party. See UCLA, prefatory note, at 458.

At the Hofstra Conference on Collaborative Law, Judge Linda S. Fidnick urged CP practitioners not to “throw away” Cooperative law because, in many small communities, clients may not have access to others lawyer if the parties decide to litigate and the Collaborative lawyers are disqualified. Fidnick, *supra* note 21.

35. Collaborative lawyers should be familiar with and describe to clients the various models and approaches to mediation that are reasonably available. Given the variations of mediation practice, a general discussion of mediation may not meet the requirement of informed consent if the client might reasonably consider using mediation. See Mosten, *supra* note 8, at 176-79 (describing various models of mediation and how they might be used in connection with a CP process).

36. Mosten encourages Collaborative practitioners to “[t]reat family professionals who still practice in traditional adversarial court based models as allies. Many collaborative practitioners unfortunately develop a competitive ‘us versus them’ approach in describing litigators or the court system.” See Forrest S. Mosten, *Peacemaking Within Collaborative Practice*, 11 COLLABORATIVE REV., Spring 2010, at 29, 29-35.

At the Hofstra Conference on Collaborative Law, many speakers underscored the important role the rule of law in society and how the legal system supports CP. Speakers urged Collaborative lawyers to discuss the option of court resolution in a fair and neutral manner. For example, Martha L. Walters, Justice of the Oregon Supreme Court and immediate past president of the Uniform Law Commission, stated that it is not productive to disparage the adversarial process. Martha L. Walters, Justice, Or. Supreme Court, The Uniform Collaborative Law Act at the Hofstra University School of Law Symposium: Collaborative Law: Opportunities, Challenges, and Questions for the Future (Nov. 20, 2009), available at http://www.livestream.com/hofstralaw/video?clipId=flv_f3835002-8ca3-4412-8a3e-594e1f44b8d9. She said that the entire system is necessary as not all disputes or people will be appropriate for Collaborative Law and often the courts are needed to protect people’s rights. *Id.* She emphasized the necessity of explaining the benefits of the adversarial system so that clients can have real informed consent and not fear the justice system. *Id.*

Similarly, David A. Hoffman, past Chair of the ABA Dispute Resolution Section, posed the following hypothetical question to the conference participants: “If you have a society that could have either an independent court system based on the rule of law or a highly efficient private ADR system, which would you choose?” Hoffman, *supra* note 14. A majority of the conference participants chose the rule of law. *Id.*

37. See Mediate.com, Locate a Mediator Directory, <http://www.mediate.com/mediator/search.cfm> (last visited May 25, 2010); see also American Arbitration Association Dispute Resolution Services, <http://www.adr.org/drs> (last visited May 25, 2010).

several processes can be used in combination.³⁸ Thus if parties in a CP case seem to be stalled, they might use mediation, neutral evaluation, arbitration, or the public court system to resolve the outstanding issues.³⁹

In describing the various dispute resolution options, lawyers should compare them based on the clients' procedural interests identified earlier in the consultation.⁴⁰ These may include respectful treatment, control over the process or outcome, maintaining or restoring relationships (especially if children are involved), efficiency in use of time and money, affordability, privacy, opportunity to address broad underlying interests, interest in using certain types of professionals (or not), and willingness to negotiate directly with the other party.⁴¹ Lawyers may develop materials with general descriptions and comparisons of the processes along such dimensions.⁴² In doing so, lawyers should be careful to provide accurate and balanced portrayals of the various processes tailored to address the client's interests and avoid a temptation to positively characterize processes that they prefer and negatively characterize processes that they dislike.⁴³ In addition, when consulting with clients, lawyers should tailor their analyses and comparisons based on the facts of the particular case, rather than simply relying on broad generalizations about the various processes.⁴⁴

D. Discussion of Collaborative Process

When clients are seriously considering using a CP process, lawyers should provide a detailed description of the process before the clients commit to using it.⁴⁵ Section 14(3) of the UCLA specifically requires that before undertaking a Collaborative representation, lawyers must advise prospective parties that:

- (A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;
- (B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

38. See Mosten, *supra* note 8, at 180-81.

39. See *id.* at 176-84.

40. See *supra* Part III.A.

41. See *supra* Part III.A.

42. See *supra* note 32 and accompanying text; see also Mosten, *supra* note 8, at 172.

43. See Lande & Mosten, *supra* note 14, at 402-05; see also Mosten, *supra* note 8, at 172-73 & n.32.

44. See MOSTEN, *supra* note 17, at 43; see also UCLA, prefatory note, at 458.

45. See Mosten, *supra* note 8, at 170.

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by section 9(c), 10(b), or 11(b).⁴⁶

Although these are the only disclosures specifically required under the Act, under the general informed consent requirement, lawyers must provide information about the material benefits and risks of the CP process.⁴⁷ Obviously, parties must understand the basic structure and operation of the process to understand the benefits and risks. Thus Collaborative lawyers should explain to clients about the general elements of CP, including the limited scope of the lawyer's representation, the concrete steps in the process (such as use of agendas, face-to-face meetings, and consultations before and after face-to-face meetings), the contents of the participation agreement signed by clients and lawyers as well as any agreements engaging other professionals in the case, the general nature and limits of privilege⁴⁸ and confidentiality,⁴⁹ the parties' obligations to disclose relevant information,⁵⁰ and restraint on threats to use the adversary court process.⁵¹

In addition to these standard elements of Collaborative process, lawyers should explain relevant variations in the process and which ones the lawyer is or is not willing and/or competent to undertake. Some of the key variations include whether:

- the parties will use interdisciplinary team of professionals, such as coaches, child development specialists, financial specialists, or facilitators;⁵²
- a full interdisciplinary team, if used, will be engaged at the beginning of process or built as needed;⁵³
- particular professionals, if used, would function as neutrals or have duties to individual parties;⁵⁴

46. UCLA § 14(3), at 484.

47. *Id.* § 14(2), at 484.

48. *See id.* §§ 17-19, at 485-91 (describing the nature, limits, and waiver of privilege against disclosure of CP communications in legal proceedings).

49. *See id.* § 16, at 485 (discussing the authorization for parties to agree on confidentiality of CP communications as provided by state law).

50. *See id.* § 12, at 483 (noting parties' obligation to make "timely, full, candid, and informal disclosure of information related to the collaborative matter" on the request of another party and promptly update such information).

51. For further discussion of educating clients about privilege, confidentiality, and full disclosure, see *infra* Part IV.

52. *See* Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 87, 92-94.

53. *See id.* at 92.

54. *See id.*

- the party's lawyer is willing to participate in a CP process with professionals who have not completed CP training,⁵⁵
- the lawyer is willing to represent a party in negotiation with a unilateral agreement to withdraw from representing a party in litigation (in essence, if the parties do not sign a participation agreement obligating the other lawyer to withdraw from representation in litigation).⁵⁶

In some cases, clients may prefer a process model that their lawyers may not offer. In such cases, lawyers should provide the client with appropriate referrals to local lawyers who do offer the client's preferred (and possibly requested) process model.

Cost is often a major consideration for clients in choosing among dispute resolution processes; and clients, as consumers, are entitled to get reliable estimates at the outset of a case. Lawyers often have a difficult time providing good cost estimates because so much is unpredictable, especially the complexity of the issues and the relationship dynamics of the parties (as well as characteristics of the lawyers or other members of a Collaborative team). Nonetheless, it is important for clients to get the best possible estimate of the range of time and costs that would be needed to successfully conclude a CP process.⁵⁷ Such estimates should include fees for all professionals representing parties, neutrals, and out-of-pocket costs (such as appraisals, qualified domestic relations orders, and court fees).⁵⁸ Collaborative professionals do various tasks outside the presence of the parties and it is important that parties understand the likely costs of professionals working together (without clients) to prepare and debrief, draft documents, and perform other professional tasks within the CP process.⁵⁹

After providing the information and assessment described above, lawyers should ask clients if they have any questions or concerns. Obviously, lawyers should answer the questions as best they can, indicating any questions they cannot answer and suggesting resources for answering these questions. When clients wish to proceed with a CP process, the lawyers should provide clients with copies of relevant documents (such as an attorney-client engagement letter and participation agreement) to review prior to permitting clients to sign such

55. See Mosten, *supra* note 8, at 185, 187.

56. See Tesler, *supra* note 52, at 87. This process does not qualify as a Collaborative process under the UCLA because both lawyers are not subject to disqualification and thus it would not qualify for the statutory benefits, such as a privilege. See UCLA § 9, at 481-82. Nonetheless, some parties may prefer this over other process options.

57. See Mosten, *supra* note 8, at 172; see also Lande & Mosten, *supra* note 14, at 381-82.

58. See Lande & Mosten, *supra* note 14, at 389-93.

59. See *id.* at 39-40, 42.

agreements.⁶⁰ Lawyers should discuss the period of time clients need to select a dispute resolution process as well as any other information needed to make this decision.⁶¹

E. Client Education Generally

Clients need a lot of information and individualized assessment to make good decisions about choosing a dispute resolution process.⁶² This is particularly important for CP cases because once parties sign a participation agreement, they cannot undo the disqualification provision.⁶³ Thus, lawyers should consider various ways to help clients make these challenging decisions. Clients may not be able to absorb all the information presented orally or in writing at an initial consultation, especially if they are upset, as clients often are at that stage.⁶⁴ Many people may have an especially hard time absorbing the information if lawyers use a lot of legal or dispute resolution terminology instead of plain English, or if there is pressure from the lawyer (or others) to choose a particular process option.⁶⁵

The UCLA's prefatory note states, "[h]opefully, lawyers who seek informed consent will take steps to continuously make the information they provide to prospective parties ever easier to understand and more complete."⁶⁶ Lawyers can provide accurate and easy-to-understand information on websites, brochures, and hand-outs so that people have time to absorb and reflect upon critical information.⁶⁷ Lawyers can also establish a client library in waiting rooms and other client-access areas, including concise information sheets and a computer to search the Internet.⁶⁸

60. See MOSTEN, *supra* note 17, at 54.

61. See *id.* at 54-55.

62. See *id.* at 42-43; Mosten, *supra* note 8, at 176.

63. See UCLA § 9, at 481-82. There is a strong norm in the CP community that parties and professionals should not agree to rescind or make exceptions to the disqualification agreement.

64. See Mosten, *supra* note 8, at 170; see also MOSTEN, *supra* note 17, at 42-43.

65. See Tesler, *supra* note 52, at 87 n.11; see also MOSTEN, *supra* note 17, at 45-46.

66. UCLA, prefatory note, at 458.

67. See *id.* at 172.

68. See Mosten, *supra* note 8, at 172 (describing how lawyers can make their offices "classrooms of client education"); see also Southern California Mediation Association, SCMA/Forrest S. Mosten Conflict Resolution Libraries, <http://scmediation.org/?p=151> (last visited May 25, 2010) (describing client libraries in non-profit institutions to help the underserved). For an example of an information sheet written in plain English, see *infra* app.

IV. INFORMING CLIENTS ABOUT THE EXTENT AND LIMITS OF PRIVACY IN COLLABORATIVE CASES

Protections of privacy⁶⁹ in CP cases can provide both benefits and risks to clients that are often technical, subtle, and hard to convey, especially at the beginning of a case.⁷⁰ Privacy protections can have major impact on the parties' rights and the costs in the case, and thus it is important for Collaborative lawyers to explain clearly the benefits and risks before beginning the process.⁷¹

Some of the benefits of privacy protections are obvious. Statutes and rules prevent use in court proceedings of certain communications in negotiation⁷² and mediation⁷³ to encourage candid discussion and promote settlement.⁷⁴ The same logic applies in CP cases.⁷⁵ If parties fear that their statements and offers in these processes could later be used against them at trial, they may be reluctant to share sensitive information needed for constructive negotiation.⁷⁶ By the same token, parties may be reluctant to make candid statements in negotiation if they fear that the other party would disclose the statements to others, such as through gossip to friends, relatives, or business associates, dissemination on the Internet, or statements to the news media.⁷⁷ Privilege and confidentiality protections create space for parties to live up to ideals of honesty and help them trust each other enough to feel confident that they can make agreements that they can rely on.⁷⁸

Some of the risks resulting from privacy protections are less obvious. For example, if the parties spend a large amount of money for an expert to prepare a written report of an asset's value (such as real

69. We use the term "privacy" to include both preclusion of use of Collaborative law communications in legal proceedings, such as the privilege in the UCLA, see UCLA §§ 17-19, at 485-91, as well as preclusion in contexts *other than legal proceedings*, which is generally dependent on the agreement of the parties. See *id.* § 16, at 485. In this context, privacy also refers to the freedom not to disclose certain information because it is not covered by the general obligation of full disclosure. See *id.* § 12, at 483.

70. Many similar confidentiality issues have been litigated in the mediation context and have subtle nuances and technical risks for lawyers. See Hamline University School of Law, Mediation Case Law Project, <http://law.hamline.edu/adr/mediation-case-law-project.html> (last visited May 25, 2010) (collecting litigated cases about mediation from 1999-2005, including 237 cases involving confidentiality issues). Although those decisions are limited to mediation, CP raises many separate issues.

71. See UCLA, prefatory note, at 459; see also Lande, *supra* note 1, at 667.

72. See, e.g., FED. R. EVID. 408.

73. See, e.g., UNIF. MEDIATION ACT §§ 4-6, 7 U.L.A. 122-24 (2006).

74. See generally *id.* prefatory note (explaining how the mediation privilege promotes candor).

75. UCLA, prefatory note, at 463-64.

76. *Id.*

77. *Id.* at 464.

78. *Id.* at 455.

estate or a business), they may not be able to use the report if they end up litigating the issue.⁷⁹ In that situation, both parties may need to hire one or more new experts, which could be quite costly.⁸⁰ This risk results from an arrangement that has great benefits of initially hiring one expert to produce a neutral evaluation instead of setting up a “battle of the experts” who each produce reports slanted in favor of their clients.⁸¹ This risk is normally worth taking as long as the parties understand it at the outset.

Some confidentiality agreements may be quite broad and, if interpreted literally, could prevent normal and appropriate disclosure of information or communications in a CP process.⁸² For example, it may be necessary or appropriate for parties to make such disclosures to their professionals who are not part of the CP process, such as therapists, realtors, or accountants. Similarly, it may be necessary or appropriate to discuss some matters with relatives, friends, employers, business partners, or members of a religious or educational community.⁸³ In particular, parents may need to discuss with their children (or their own parents or other relatives) some things arising in a CP process.⁸⁴ Although such discussions can sometimes be disruptive to CP negotiations, they can also be quite helpful in some situations—particularly cases in which family members provide financial support or influence decision making. An overbroad confidentiality agreement risks creating dilemmas about honoring the agreement and also making appropriate disclosures if confidences are shared outside the process.⁸⁵

Some parties may be surprised about what they commit to when they agree to make “timely, full, candid, and informal” disclosure of information “related to” the CP matter.⁸⁶ For example, some parties in a divorce case may not expect that they are required to disclose information about their past and current romantic relationships, potential employment changes, or interest in receiving particular assets.⁸⁷ Full

79. *See id.* § 17, at 485-86.

80. The expert report would be considered a privileged “Collaborative law communication” and thus inadmissible in court unless all parties and the expert waive the privilege. *See id.* §§ 2(1)(A), 17, 18(a), at 467, 485-88. It is unclear whether a party could provide a copy of this report to a subsequent expert to facilitate an independent evaluation, which might be subject to the provisions of any confidentiality agreement in the process.

81. *See* Mosten, *supra* note 8, at 182; *see also* UCLA, prefatory note, at 446.

82. *See* UCLA § 16, at 485.

83. *See id.* prefatory note, at 464.

84. *See id.*

85. *See id.* at 464; *see also id.* § 4 cmt., at 474.

86. *See id.* § 12, at 483; *see also id.* prefatory note, at 464.

87. *See id.* prefatory note, at 464. In a study of Cooperative practice, lawyers had very different interpretations of a “full disclosure” requirement in their cases. *See* Lande, *supra* note 34,

disclosure of information is important for the reasons described above, but parties can unwittingly find that they committed to making more revealing disclosures than they intended.⁸⁸

Lawyers can help clients understand the obligations they would undertake in a CP case and the extent and limits of privacy protections in the process.⁸⁹ Lawyers should explain the meaning and implications of these provisions, both in individual consultations with their clients and the first joint session with all parties and CP professionals.⁹⁰ Because these issues can be complicated, lawyers may find it helpful to provide clients with written summaries in plain English of the relevant provisions of any statutes, rules, and standard participation agreements, such as the model set out in the Appendix.⁹¹ Collaborative lawyers should review their standard participation agreements and consider whether to modify the confidentiality provisions to accommodate the possibility that the parties will want to share CP communications with people outside the process.⁹² Lawyers should ask clients about facts in the case to determine whether there is sensitive relevant information that the clients would be required to disclose and if they are willing to do so.⁹³ Lawyers should caution clients that failure to provide full disclosure may require termination of a CP process (and also hurt their credibility and trust with the other party).⁹⁴ Lawyers should also discuss whether any professionals engaged in the CP process would be disqualified from testifying in litigation⁹⁵ and that any of their work-product from the CP

at 244-47 & tbl.19. In some cases, lawyers would urge clients to disclose information even if they believed that they were not required to do so. *Id.* at 246.

88. *See* UCLA § 16, at 485.

89. *See id.* prefatory note, at 458.

90. *See supra* notes 47-51 and accompanying text.

91. *See supra* notes 65-68 and accompanying text; *see also infra* app.

92. *See* UCLA, prefatory note, at 464.

93. *See supra* note 17 and accompanying text.

94. The Ethical Standards for Collaborative Practitioners of the International Academy of Collaborative Professionals provides that CP participation or fee agreements must inform clients about the full disclosure requirement and consequences of failure to comply with the agreement. ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS § 7.1.A.2 (2008), available at <http://www.collaborativepractice.com/lib/Ethics/Ethical%20Standards%20Jan%20%202008.pdf>.

If a client knowingly withholds or misrepresents information material to the Collaborative process, or otherwise acts or fails to act in a way that undermines or takes unfair advantage of the Collaborative process, and the client continues in such conduct after being duly advised of his or her obligations in the Collaborative process, such continuing conduct will mandate withdrawal of the Collaborative Practitioner and if such result was clearly stated in the Participation and/or Fee Agreement, the conduct shall result in termination of the Collaborative Process.

Id.

95. The Ethical Standards for Collaborative Practitioners of the International Academy of Collaborative Professionals states: "Upon termination of the Collaborative process, the representing Collaborative practitioners and all other professionals working within the Collaborative process are

process would be inadmissible.⁹⁶ If so, lawyers should explain that new experts might be required to be hired in litigation.⁹⁷ In the first joint session, the parties should develop a clear understanding about what information from the CP process may and may not be disclosed, to whom, and at what times.⁹⁸

V. CONCLUSION

The UCLA establishes requirements for Collaborative lawyers to obtain informed consent from clients and assess the appropriateness of a Collaborative process before undertaking it.⁹⁹ Although these provisions in the Act are relatively brief, they require substantial and sometimes challenging actions by Collaborative lawyers to fulfill the letter and spirit of the Act. This Article analyzes these requirements and identifies procedures for practitioners to comply with the requirements.

Compliance with informed consent and screening requirements benefits Collaborative clients and the Collaborative field in several ways. First, as a matter of principle, it is appropriate for clients to make carefully considered decisions before undertaking a process with unusual and significant benefits and risks. When so informed, clients are likely to have more realistic expectations, which should lead to improved experiences and outcomes. When this occurs, the Collaborative field stands to benefit from increased client satisfaction (and motivation to pay the fees incurred), referrals from satisfied clients, and an enhanced reputation with the public and professional communities.

We believe that it is generally appropriate for lawyers to follow similar procedures as described above in helping clients make informed decisions about all dispute resolution procedures. This is particularly important when clients contemplate litigation and trial, which pose numerous risks including harshly unfavorable decisions, large expenditures of time and money, damaged relationships and reputations,

prohibited from participating in any aspect of the contested proceedings between the parties." *Id.* § 7.1.B.3.

96. See *supra* notes 80-81 and accompanying text; see also UCLA, prefatory note, at 465.

97. See *supra* note 81 and accompanying text.

98. See *supra* notes 89-90 and accompanying text; see also *infra* app.

99. The statutory requirements are generally consistent with the requirements under legal ethical rules, though augment them in some ways. For a description of the requirements under these rules, see Lande & Mosten, *supra* note 14, at 393-405. The UCLA also augments previous requirements for other limited scope services such as unbundled legal coaching of unrepresented parties. See generally MOSTEN, *supra* note 17 (discussing the process of unbundling legal services); Forrest S. Mosten, *Unbundling Legal Services to Help Divorcing Families*, in INNOVATIONS IN FAMILY LAW PRACTICE 117 (Kelly Browe Olson & Nancy Ver Steegh eds., 2008) (discussing generally unbundling legal services in the context of divorce and family law matters).

and escalation of conflict, among others. Hopefully, lawyers will adapt informed consent procedures from CP cases to other procedures they undertake on behalf of their clients. This should benefit clients and may increase positive public perceptions of the legal profession generally.¹⁰⁰

100. See generally Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489 (2009) (discussing how family lawyers can adopt peacemaking values and strategies in their roles as litigators, negotiators, mediators, and preventive legal health care providers).

APPENDIX: MODEL INFORMATION SHEET FOR CLIENTS EXPLAINING PRIVACY IN COLLABORATIVE CASES

The following is a model information sheet to explain privacy issues in Collaborative cases. This is based on the provisions of the Uniform Collaborative Law Act. Practitioners should adapt this material to reflect the applicable statutes, rules, protocols, and norms in their community.

In the Collaborative process, parties agree to share all relevant information so that they can make fully-informed decisions that are fair for everyone involved. To make it easier for parties to share this information, there are rules protecting the privacy of these discussions. This handout is designed to provide you a general explanation of these arrangements. To help you understand these issues and avoid providing more information than you might want, this handout does not provide all the detailed rules. If you have any questions about these issues, please be sure to ask your lawyer or a member of the lawyer's staff.

Collaborative Law Privilege in General

In general, "communications" (things you say and offers you make) in a Collaborative process generally cannot be used in court if you do not settle the case. You have a "privilege" (an important right) to prevent "Collaborative law communications" from being used in court or other legal procedures. This means that if one party tries to introduce a Collaborative law communication in a court hearing, the other party can object and prevent the communication from being used. Parties sometimes hire some other professionals to participate in the process, such as financial or mental health experts, and these professionals can object to the use of their statements in court. If an expert prepares a report for the Collaborative process, the report may not be used in court. So if you do go to court, you might need to hire new experts to testify (possibly separately for each party), which could cost you substantial additional fees.

Communications Protected by the Privilege

The communications protected under the law can be spoken, written, or even involve nonverbal conduct intended to communicate something, such as nodding one's head. They include communications made from the time the parties sign a Collaborative law participation agreement until the time that the process ends. Therefore, until a

participation agreement is signed, you should be careful about statements that you make to the other party or documents that you might provide.

Some communications are protected even if they are not made during face-to-face meetings, such as conversations between professionals between these meetings. Conversations between clients and their lawyers are also generally protected from disclosure (though this is protected under the general attorney-client privilege, not the Collaborative law privilege).

The privilege does not apply to communications or documents that currently exist or that are not made for or within the Collaborative process, such as tax returns. Just because some information is used in a Collaborative process does not mean that it cannot be used in court if the information can be produced in some way other than a Collaborative law communication. For example, if accounting records are kept in the regular course of business, the fact that they are used during a Collaborative process does not prevent them from also being used in court.

Waiver of Privilege

Parties can give up (“waive”) their privileges if they want. If there is a court hearing, a Collaborative law communication can be used if all parties waive their privilege. If the communication involves a statement by a nonparty, such as an expert hired in the process, the expert would also need to waive the privilege for the communication to be used in court.

Exceptions to the Privilege

Certain communications are not protected by the privilege and thus they may be used in court. Some of the major exceptions to the privilege include threats to physically harm another person, plans to commit a crime, statements indicating child abuse or neglect, and complaints of professional misconduct.

Preventing Use of Communications in Non-Court Situations

The privilege described above prevents use of Collaborative law communications in court and other legal procedures. It *does not provide confidentiality protection in other situations* such as sharing Collaborative law communications with other family members, professionals you use outside the Collaborative process (including accountants, realtors, or therapists), business associates, friends, or

members of your community. It also does not prevent you or the other party from sharing communications publicly, for example by posting them on the Internet or giving information to the news media.

You and the other party can agree to prohibit use of these communications outside of court. These agreements normally will be made in the participation agreement as agreed in the first joint session, though you can also make agreements about this later in the process. Before the first session, consider what information you would want to share (or prevent from being shared) at all or with particular individuals. If you are in a divorce and you have children, you should plan to reach an agreement about what should or should not be told to the children, when and how it should be done, etc. You might also plan to discuss what should be told, if anything, to other relatives and friends.

Extent and Limits of Duty of Full Disclosure

An essential part of the Collaborative process is that each party must fully disclose all relevant information. There is no clear definition of what is “relevant,” which depends on the facts of each case. For example, in some cases, parties may—or may not—be required to disclose a past or current romantic relationship, employment, or a financial opportunity. If you do not provide full disclosure, the process may be terminated before an agreement is reached and the other party may not trust you or cooperate in settlement negotiation. In some situations, if you fail to disclose an asset the settlement agreement could be set aside and the court could award the entire asset to the other party as punishment for non-disclosure. If you have any questions about what you would or would not need to disclose, discuss this with your lawyer or a member of the lawyer’s staff.
