# COLLABORATIVE PRACTICE INSTITUTE OF MICHIGAN

# PROTOCOLS FOR PROFESSIONALS
# ADOPTED 12/15/2009

## PREAMBLE

Collaborative Practice in Michigan is an interdisciplinary approach to dispute resolution. The Collaborative Practice Institute of Michigan is committed to assisting professionals from all disciplines in working effectively in collaborative teams. Thus, the protocols which follow have been drafted to reflect effective practices in each profession, and are meant to assist collaborative professionals in understanding procedure rather than rigid "rules." They should not be utilized inflexibly, as the process needs in each case will vary depending on circumstances.

The Collaborative Practice Institute of Michigan strongly urges all collaborative professionals, their firms and local practice groups to rely on these protocols as fundamental guidelines for engagement and conduct of a collaborative case. The protocols address the fundamentals of the process, the need to preserve its integrity, drafting considerations, the relationship between the client and the professionals engaged (lawyer, mediator, financial coach, financial neutral, divorce coach, child specialist), as well as the relationships among the professionals and both clients. The protocols for each professional also address withdrawal, termination of the process, and transition to another professional, and in the case of attorneys, transfer of the case to a litigation lawyer.

While some of the protocols are designed to provide guidance on issues commonly encountered in the collaborative process, or describe generally sound practices, others should be viewed as strong aspirational recommendations, and still others as central to the collaborative process and not to be modified. For example, disqualification of attorneys when the collaborative process terminates is a fundamental characteristic of collaborative law, providing the incentive for good faith negotiation and protecting the integrity of the open communication process. It should not be modified. Acting in good faith, however, is a desirable aspirational goal but you may not wish to require it because proof of bad faith would require disclosures of all or many of the confidential communications that took place during the collaborative process. Manipulation of the collaborative law process is a danger, but the evidence necessary to sanction bad faith would require a breach of privilege that would undermine the collaborative process. Making the good faith requirement aspirational strikes the right balance between these competing considerations.

# COLLABORATIVE PRACTICE INSTITUTE OF MICHIGAN

# PROTOCOLS FOR COLLABORATIVE LAWYERS

## GENERAL PROVISIONS

### I. Definitions.

a. "Collaborative Process" is a voluntary, non-adversarial dispute resolution process in which the parties and their lawyers sign an agreement to negotiate in good faith giving consideration to the interests of all parties, to resolve their dispute without resort to a court imposed resolution, to disclose all relevant information, and to engage neutral experts, as needed, for assistance in resolving issues. The process may use mediation when needed. The written agreement must provide that the lawyers and all other team members shall withdraw if the collaborative process is terminated.

b. "Collaborative lawyer" means a lawyer who represents a client in the collaborative process who has completed the Collaborative Practice training.

c. "Participation Agreement" means a contract among the parties and their lawyers setting out the guidelines to be followed in the collaborative process.

d. "Retained expert" means an individual, qualified by knowledge, skill, experience, training, or education, who is jointly or separately engaged by the parties to provide neutral and unbiased information, research, or opinions on a subject relevant to the dispute.

e. "Consulting-only expert" means an individual who (i) has no firsthand knowledge about the dispute; (ii) has no factual knowledge about the dispute except for knowledge that was acquired through the consultation; and (iii) whose work product, opinions, or mental impressions have not been reviewed by a jointly or separately retained expert.

f. "Outside legal opinion attorney" means an attorney who gives an opinion on a specific issue or issues who is privately engaged outside of the collaborative process by a party or group of parties. This attorney may be a litigation attorney.

**II. Application of Professional Rules.** These protocols are subordinate to the rules of professional conduct governing the lawyer.

***Comment***

*Members of State Bar Associations are subject to the Disciplinary Rules of Professional Conduct of the state(s) in which they are licensed. These protocols must be interpreted in a manner consistent with those Rules.*

**III. Compliance with Protocols.**

a. These protocols are designed to be used by lawyers and parties on a voluntary basis. They are guidelines, not rules or mandates. A collaborative lawyer should not, during the collaborative process, use tactics to abuse or evade the collaborative process, or condone or encourage such tactics by the client. Each collaborative lawyer should recognize and abide by the practice requirements for collaborative professionals in the jurisdiction of the dispute.

b. Because these protocols aspire to a level of practice exceeding the minimum established in most Disciplinary Rules of Professional Conduct, it is inappropriate to use these protocols to define the level of conduct required of lawyers with regard to professional liability or lawyer discipline.

c. All collaborative attorneys must be trained in the Collaborative Process (16 hours training, or as required by the CPIM bylaws).

***Comment***

*There are several examples where lawyers are urged to comply with such voluntary or aspirational protocols to elevate standards of practice on the state and national level: Association of Attorney-Mediators Ethical Guidelines for Mediators; AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.*

**IV. Approved Forms.** Collaborative Practice Institute of Michigan ( CPIM) recommends use of the Participation Agreement adopted by CPIM and use of other standardized forms in the collaborative process to:

a. Assist in compliance with these protocols
b. Assure that all participants are working from a common set of materials
c. Enhance the quality of meetings and communications.
d.

The Participation Agreement should contain standard prohibitions on transfer of assets, change of beneficiaries, changing *status quo*, etc.

**THE COLLABORATIVE LAWYER-CLIENT RELATIONSHIP**

**I. Informing the Client.** In the initial consultation, the collaborative lawyer should inform prospective clients about all legal alternatives for resolving the client's dispute, including the collaborative process, other alternative dispute resolution methods, and litigation. The lawyer should include a discussion of privacy, risk, harm, delay, and cost when presenting the alternatives. The lawyer should discuss obligations and limitations on the client's rights related to the collaborative process such as more limited discovery tools and confidentiality obligations.

***Comment***

*Many clients have a misconception that litigation is the only process available for resolving disputes. It is recommended that the lawyer establish office protocols that provide a prospective client information in the initial consultation regarding the collaborative process and other ADR methods. Use of published materials, in print or electronic form, is advisable in assisting the client to be fully informed about the collaborative process. Clients may consult the IACP website: www.collaborativepractice.com. or the CPIM website: www.collaborativepracticemi.org*

*The lawyer is wise to counsel the client on the differences between the collaborative process and handling a case on a cooperative basis. The collaborative process has a detailed written agreement (Participation Agreement), signed by all the parties, their counsel, and retained experts. The Participation Agreement contains the "ground rules" of the process and important rights and obligations of the participants. In cooperative cases, the lawyer still needs to be concerned with trial preparation, trial strategy, and posturing in the event of a later trial.*

*In a collaborative case, 100% of the effort is utilized in trying to settle, and the options for settlement are developed by the parties and their lawyers together in face-to-face meetings. In cooperative cases, the lawyers and/or parties may easily get frustrated with the settlement efforts, end negotiations, and announce they are going to court. The collaborative process, by its very nature, makes it easier for the parties to negotiate through their differences and creates incentives to keep the participants working to avoid impasse and litigation.*

*When addressing the probable financial savings when a dispute is handled collaboratively, as opposed to being litigated, the collaborative lawyer is cautioned to explain that the actual cost will depend on the services required by the parties and the complexity of the matter.*

**II. Suitability of the Dispute for the Collaborative Process.**

a. The collaborative lawyer should be aware that certain matters may be inappropriate for the collaborative process, e.g., client objectives that are inconsistent with the principles of collaboration; dishonesty of purpose; and fraud. The collaborative lawyer should use careful judgment in accepting or declining to handle a collaborative matter. A collaborative lawyer should decline representation of the prospective client if it appears that the client is seeking to use the collaborative process to gain an advantage, however slight, in anticipated litigation.

b. Each spouse in a potential collaborative case should be screened individually for domestic violence before the process begins. This should be done either by the two attorneys, mental health coaches, or by the mediator. If there are signs of domestic violence or other types of power imbalances that are great enough to impede upon the ability of either party to freely engage in the collaborative process, the collaborative lawyers should decline the case.

c. The collaborative lawyer should not represent a client in the collaborative process unless all parties are represented by a lawyer. If a party's lawyer withdraws after the collaborative process has begun, the party may retain a new collaborative lawyer, or may under certain circumstances continue in the collaborative process without a lawyer, but only upon the written agreement of the parties.

***Comment***

*The collaborative process is not to be used as a subterfuge by parties or lawyers with ulterior motives. A collaborative lawyer acknowledges that choosing collaboration as a dispute resolution process is the client's prerogative. When a collaborative lawyer is faced with representing a party or a matter that involves challenging issues, the collaborative lawyer should assess:*

1. *The lawyer's willingness to handle the client's matter;*
2. *The lawyer's ability to handle the matter;*
3. *Availability of outside resources (for example, experts or advisors) to supplement the lawyer's skills; and*
4. *The possibility of co-counsel or referral to a more experienced collaborative lawyer.*

**III. Diligent Representation of Client.**

a. The collaborative lawyer should commit the time and resources necessary to assist the client in identifying and articulating the client's interests and goals, and to explore means by which the collaborative process can satisfy the client's interests and achieve the stated goals in a constructive manner.

b. The collaborative lawyer should inform the client as soon as feasible about interest-based negotiation as opposed to positional bargaining; the priority the collaborative process gives to non-adversarial resolution of the clients' disputes; and, when desired, preservation of ongoing relationships.

c. The collaborative lawyer should at all times be faithful in the representation of the client in pursuit of the client's stated interests and goals. Faithful representation includes informing the client about the law and its application to the client's matter at an appropriate time, preserving confidential communications, and assisting the client to develop approaches, collaboratively with the other participants, to resolve

the dispute without resort to adversarial proceedings.

d. The collaborative lawyer should explain to the client that the process allows resolution of disputes outside the limits of a judicially imposed solution, subject to securing court approval of the settlement, if required.

## THE COLLABORATIVE LAWYERS' RELATIONSHIP

**I. Respect for the Other Lawyer and Client.** The collaborative lawyer recognizes the heightened requirement to be respectful at all times to the other parties and lawyers. Violation of this expectation jeopardizes the prospects of a successful settlement and causes distrust among the participants. A collaborative lawyer should not engage in conduct to embarrass or disparage the other parties or their lawyers. The collaborative lawyer should advise the client to avoid disparaging or negative remarks about other participants in the collaborative process.

***Comment***

*If respectful communications become difficult for clients, engaging the services of an expert in counseling or communication skills could be considered.*

**II. Mutual Reliance.** Representation of a client in the collaborative process means the lawyer, in good faith, believes the client will act and is acting in a manner consistent with the objectives of the collaborative process. The collaborative lawyer acknowledges that other participants in the collaborative process are relying upon this representation.

***Comment***

*It is impossible to assess with absolute certainty whether a client is capable of acting in a manner consistent with the objectives of the collaborative process. If the collaborative lawyer discovers that the client is acting in bad faith, and counseling by the lawyer does not remedy the problem, the collaborative lawyer should terminate the process. See later section on termination.*

**III. Private Meetings with Other Lawyers.**

a. The collaborative lawyer recognizes the need, on occasion, to meet in private with the other participating lawyers to address issues related to the dispute. The collaborative lawyer should explain to the client that such meetings are commonplace and are intended to assist in the collaborative process. Rarely should such discussions include negotiating resolution since client participation is critical in such discussions.

b. The collaborative lawyer should confer with the other lawyers to develop the first agenda. Subsequent agendas may be set by the lawyers and the clients at the end of

each meeting.

***Comment***

*The content of communications among collaborative lawyers is dramatically different from the types of communications among adversarial lawyers. Since the primary goal of the meetings is to move the clients toward settlement, collaborative lawyers are facilitators in the process, sharing their clients' reactions to each other's demeanor and communication styles, and discussing effective communication techniques. Collaborative lawyers should confer on the optimum timing to raise issues and to develop settlement options.*

**IV. Sharing of Communications.** The collaborative lawyer recognizes that clients in the collaborative process may or may not choose to communicate directly with each other. A collaborative lawyer should not discourage direct client communications so long as the parties have agreed to communicate and the communications assist the collaborative process. The collaborative lawyer should forward promptly to the other lawyers all client-to-client communications received.

**V. Additional Collaborative Lawyer.** A collaborative lawyer should not participate on behalf of a client who is already represented by a collaborative lawyer unless such lawyer signs the Participation Agreement.

## THE COLLABORATIVE LAWYER - EXPERT RELATIONSHIP

**I. Role of Experts.** The collaborative lawyer acknowledges that the interests of the client may best be served by engaging experts to participate in the collaborative process. The participation of retained experts must be a joint decision of the parties and the lawyers, unless otherwise agreed. Retained experts must sign the Participation Agreement.

**II. Multidisciplinary Considerations.** The terms of the engagement of experts in the collaborative process must be consistent with the rules of professional conduct governing the lawyer and the expert.

**III. Defining Responsibility.** The terms of the engagement of experts must be in writing for all experts and clearly define their scope of responsibility in the collaborative process, including such matters as attendance at meetings; communications with the parties, lawyers, witnesses; and their relationship with other experts who may be engaged in the matter.

***Comment***

*See RETAINED EXPERTS section of these Protocols for specifics on all experts. Participants should attempt to employ experts trained in the collaborative process. When there are no collaboratively trained experts available, the experts chosen should be willing to abide by the spirit and intent of the process.*

## PROTECTING THE INTEGRITY OF THE COLLABORATIVE PROCESS

I. **Integrity of the Process.** The objective of the collaborative process is to achieve an ethical and enduring resolution of the clients' dispute. The collaborative lawyer should assist the client in developing alternatives for settlement that meet both the objectives of the client and those of all other parties. The collaborative lawyer acknowledges that the client is responsible for the ultimate outcome of the collaborative effort.

II. **Honesty and Full Disclosure.** The collaborative lawyer recognizes that honesty and full disclosure of relevant or requested information are critical to a successful outcome. The collaborative lawyer should assist the client in complying with the requirement of making a full and candid disclosure of all relevant or requested documents and information. A list of discovery documents typically relevant to a collaborative divorce can be prepared and used as a first step to full disclosures.

***Comment***

*A major paradigm shift for both lawyers and clients in the collaborative process is necessary for full disclosure of relevant or requested documents and information. The parties may negotiate the manner and method of production. This requirement of full disclosure is the antithesis of litigation practice but the cornerstone of the safe environment sought to be created by the collaborative process. If the documents and information are requested, they must be delivered or divulged.*

*Should a dispute arise regarding relevance, privilege, oppression, undue burden or expense of producing the requested documents or information, the parties may engage a retained expert to conduct an in-camera inspection and give an opinion.*

*"Relevant information" not specifically requested presents a substantial challenge to the lawyer and client who have made a commitment to the collaborative process. In our "don't ask, don't tell" society, the disclosure of unrequested but relevant information contradicts customary and usual practices. To determine what information is relevant, the lawyer may ask the client: "Putting the shoe on the other foot, would you need, expect or desire such information in attempting to make an informed decision?"*

*Consider the following definitions of "relevant": (a) having significant and demonstrable bearing on the matter at hand; (b) tending to prove or disprove the matter at issue or under discussion; and (c) implying a traceable, significant, logical connection. Phrased differently: Is the information appropriate for the occasion? Is the information so close to the matter at hand, that it cannot be ignored without a serious impact on the decision making process?*

**III.Confidentiality.** Oral and written communications relating to the subject matter of the dispute made by the parties, their lawyers, or other participants in the collaborative process are confidential. Unless the party directs otherwise, persons within the collaborative process may share information on a need to know basis but shall not disclose communications to others outside of the process. Such confidentiality continues after the process terminates, unless agreed otherwise in writing by the parties. The parties must be advised of this continuing requirement to keep communications confidential before they sign the Participation Agreement. Parties sometimes wish to have non-professional people (e.g., relatives or friends) informed of or present during parts of the process. Because there are limits to the protection from involuntary disclosure of otherwise privileged communications when "non-essential" persons are present, parties who desire to have such persons informed or present must be advised that this may cause the confidentiality of process communications to be voided in a hostile subsequent process. Practitioners must address this with parties who wish to have non-essential people present or informed. It is advisable that the practitioner obtain written definition regarding what may be communicated in the presence of or to non-essential persons and an acknowledgement and acceptance of any risks by the party that such disclosure beyond the necessary process professionals may compromise the confidentiality of their communications during the collaborative process.

***Comment***

*All communications, whether oral or written, and the conduct of any party, lawyer, or retained expert in the collaborative process constitute negotiations under Rule 408 of the Federal Rules of Evidence. Unless the parties otherwise agree in writing, these communications and any written materials, tangible items, and other information used in or made a part of the collaborative process are only discoverable and admissible in an adversarial proceeding regarding the dispute, or in any other proceeding among the parties to the dispute, if they would otherwise be admissible or discoverable independent of the collaborative process. This restriction does not apply to the admissibility of a fully executed Collaborative Settlement Agreement.*

**IV. Correction of Mistakes.** The collaborative lawyer shall identify known mistakes, errors of fact or law, miscalculations and other inconsistencies and correct them for all participants.

***Comment***

*Overcoming the win-lose, one-upmanship mentality of litigation requires the greatest paradigm shift for the lawyer. This critical shift in thinking is the bedrock standard required by these Protocols. Strict adherence to these Protocols is essential to the enduring integrity of the parties' agreement and to the success of the collaborative process. It requires more than simply avoiding fraudulent and intentionally deceitful conduct. It requires that misunderstandings not be relied upon in the hope that they will benefit the client.*

**V. Safe Environment.** The collaborative lawyer should strive to provide a safe environment for the collaborative process.

***Comment***

*The collaborative lawyer acknowledges that a safe environment necessarily involves adherence to the following principles:*

*1. Refraining from insistence on acceptance of conditions precedent to entering into the collaborative process.*

*2. Encouraging creative problem-solving and discouraging positional bargaining.*

*3. Speaking directly with participants about any perceived non-collaborative behavior and attempting to remedy it in a constructive manner.*

*4. Using non-defensive methods of hearing criticism and non-offensive methods of offering criticism.*

*5. Exercising patience at all times.*

*6. Avoiding the use of pressure, threats, or deadlines.*

*7. Acknowledging the process can only progress at the pace of the slowest participant.*

*8. Avoiding offensive or provocative conduct, such as cross-examination, and promptly reminding participants that such behavior is destructive to the process.*

*9. Avoiding assessment of blame and use of judgmental language.*

*10. Avoiding surprises.*

*11. Avoiding unilateral actions.*

*12. Avoiding unsolicited legal opinions in a meeting of all the participants in the collaborative process.*

*13. Encouraging the joint engagement of mediators, arbitrators and other professional consultants for assistance in resolution when helpful.*

*14. Urging use of language that encourages the speaker to speak in the first person (I feel, I believe, etc.) and avoiding speech in the second person (you know, you failed, you always, you never, etc.).*

*15. Training the lawyer's staff in the collaborative process and the protocols.*

**VI. Civility and Preparation.** The collaborative lawyer should strive at all times to be courteous, punctual, and prepared for meetings. The collaborative lawyer should strive to schedule meetings free from outside distraction.

***Comment***

*Time should be allocated immediately after the collaborative meeting for separate debriefings with the client and the other collaborative lawyers. Private space should always be made available for lawyers and clients for their post-meeting conferences.*

**VII. Efficient Communications.** The collaborative lawyer should encourage open communications, especially by use of e-mail and fax, among the clients and lawyers to schedule meetings, share documents, and relay procedural information.

***Comment***

*The collaborative lawyer should promptly respond to any communication received in a collaborative matter. Late response deserves an explanation and, if necessary, an apology.*

**VIII. Professional Fees.** The agenda for the first meeting should address payment of lawyers' fees if not already secured. When a decision is made to engage a retained expert, the parties and their lawyers should address payment of the expert's fees. At any subsequent meeting, the status of fees is a legitimate agenda item

***Comment***

*The collaborative lawyer should encourage the clients to pay promptly all professional fees according to employment contracts to avoid a possible imbalance of power and an abuse of the process. A collaborative lawyer's withdrawal from the collaborative process or the termination or conclusion of the process does not preclude the lawyer or other experts engaged in the process from collecting outstanding fees and testifying in support of their reasonableness*.

**FUNDAMENTALS OF THE COLLABORATIVE PROCESS**

**I. Stages of the Collaborative Process.** The collaborative process consists of five distinct stages:

a. Determining the clients' goals and interests;

b. Information gathering;

c. Interim arrangements;

d. Development of settlement options;

e. Evaluation of the options; and

f. Negotiation of the settlement package.

The collaborative lawyer prepares the client for each stage, helps the client communicate effectively with the other parties throughout the process, and protects the integrity of the process by requiring the parties to proceed through the stages and resist the impulse to eliminate steps.

**II. Determination of the Parties' Goals and Interests.** The first and most important stage of the collaborative process is defining the parties' goals and interests. The collaborative lawyers assist the parties in differentiating between their positions

regarding settlement and their fundamental interests. The goal of collaborative lawyers is to enable their clients to recognize areas of commonality in the dispute, and to not only understand but also acknowledge each party's interests.

***Comment***

*The collaborative process is based on the concept of interest-based negotiation. A collaborative lawyer needs to be skilled in exploring the parties' interests (their respective goals, needs, values, priorities, and concerns) in order to understand why they desire any particular option. The fleshing out of interests leads to the recognition of common ground as well as those matters that are of special significance to the parties. An understanding of the parties' interests increases the likelihood of settlement and offers opportunities for creative trading and problem solving. The value added is that the parties can then achieve their best possible outcomes.*

*A skilled collaborative lawyer can help the parties recognize their shared interests by distinguishing their "macro" and "micro" goals. "Macro" goals are the larger, overarching goals, which may include the desire to maintain ongoing relationships, the need for financial stability, and the desire to resolve the dispute in a safe environment. "Micro" goals are simply options or ways to achieve "macro" goals. The lawyers' task is to help re-frame the parties' "micro" goals to the "macro" level in order to ascertain common ground. As small agreements are made, common ground develops. The more common ground identified, the more likely it is the parties will settle their differences.*

*Collaborative lawyers may wish to use easel pads in developing lists of parties' interests and goals in each step of the process. The shared interests should be included in the minutes of each meeting and should be reviewed, modified, and supplemented at each meeting, as appropriate.*

**III. Information Gathering.** Gathering, organizing, and analyzing all relevant information are central to the collaborative process. The collaborative lawyer assists the client in these tasks.

***Comment***

*Collaborative lawyers are encouraged to organize information in duplicates prepared for all participants, with common indexing, for quick reference to information.*

**IV. Development of Settlement Options.** Upon completion of the exchange and organization of all relevant information, the parties should propose and develop all possible options for settlement of the issues in face-to-face or real time meetings. The collaborative lawyers should assist the clients in developing such options, with the understanding that any option proffered for consideration is ultimately the client's responsibility. The collaborative lawyer must not participate in developing a settlement option that is false, misleading, unlawful, or contrary to public policy.

***Comment***

*Collaborative lawyers recognize that brainstorming all possible options in face-to-face or real time meetings, even those some would consider improbable, ensures that the one chosen is perceived to be the best possible outcome. It is extremely important not to self-edit or pre-judge the options before the evaluation stage.*

**V. Evaluation of the Options.** When the parties are satisfied that all possible options have been proposed, the collaborative lawyers should assist the clients in evaluating the options, analyzing how the options meet the clients' interests and goals, and determining whether an option is realistically achievable.

**VI. Negotiation of the Settlement.** The final stage should determine which options for resolution best serve the parties' interests and common goals. The ultimate goal of the process should be the achievement of the best possible outcome for the parties. The parties, with assistance of the lawyers, should fashion the terms of the agreement, and, upon resolution of all issues, the lawyers shall promptly draft all of the necessary documents to finalize the settlement.

***Comment***

*Collaborative lawyers recognize that interest-based negotiation and creative problem solving create more satisfying experiences for the parties, model problem-solving methods for resolution of future disputes, and yield the parties' best possible outcome in a more efficient manner. These collaborative approaches resolve the majority of disputes without the participants resorting to traditional positional bargaining. Only* with *the consent of all participants may a settlement offer be proposed or simultaneously exchanged in order to help define the range of acceptable solutions.*

**VII. Impasse Avoidance Techniques.**

a. A collaborative lawyer should not threaten to terminate the collaborative process and should advise the client to avoid similar threats. If there is a genuine likelihood of termination, the collaborative lawyer should advise the other lawyer of this prospect.

b. Before terminating the process, the collaborative lawyers should explore deadlock breaking techniques, such as: partial settlement, mediation, securing the opinion of another lawyer, arbitration or referral to a special master for limited issues, a courthouse trip to view a trial, or consulting with a litigation lawyer.

**VIII. Future Adversarial Matters.** After conclusion of the collaborative process, whether by settlement or termination, no collaborative lawyer shall serve in any adversarial proceeding involving the subject matter of the dispute.

## MEETINGS AND SCHEDULING

**I. Importance of Meetings.** The collaborative lawyer acknowledges the importance of face-to-face meetings of all participants to facilitate the collaborative process and to achieve a successful outcome. The collaborative lawyer should emphasize to the client the importance of attending all meetings and participating in good faith. Although meetings of all clients and lawyers are preferred, circumstances may arise where other arrangements are necessary, such as real time meetings.

***Comment***

*If a client cannot attend a particular meeting, a collaborative lawyer should explore all viable alternatives to attendance at the meeting, e.g., rescheduling, conference call, internet, or video conferencing. These alternatives should only be continued until a face-to-face meeting of all participants can take place. When there are difficult issues which create an extremely stressful situation for one or more of the parties, the parties may consider mediation, or as a last resort, caucus style meetings where one or more lawyers shuttle back and forth between separate meeting rooms.*

**II. Scheduling and Arrangements.** Meetings of all parties and lawyers should be scheduled at mutually convenient times and locations. Meetings should not be adjourned without scheduling at least one subsequent meeting, whenever possible.

***Comment***

*The meeting arrangements should include provisions for:*

*1. Rotation of meeting sites unless the parties desire otherwise.*

*2. Seating arrangements that avoid a confrontational atmosphere, with consideration being given to using a round table.*

*3. Private space for the guest lawyer and client to meet if necessary.*

*4. A hospitable venue for guest lawyer and client (providing, as appropriate, snacks, beverages, and access to phone, fax, duplication, internet, pens, paper, and calculators).*

*5. Preparation in advance and distribution of multiple hole-punched copies of relevant documents to use at meetings.*

*6. Availability of client and lawyer notebooks (or equivalent) and calendars at every meeting.*

## AGENDAS AND MINUTES

**I. Agenda for Meetings.**

a. A written agenda prepared in advance and distributed by the collaborative lawyers in consultation with their respective clients should govern each meeting. The parties should be encouraged to schedule agenda items in advance through their lawyers. The collaborative lawyer should discourage raising issues in the meeting

which are not on the agenda, to avoid the element of surprise. Matters that arise during a meeting that are not on the agenda should be deferred until the next meeting's agenda unless the parties agree otherwise.

b. The agenda of the first meeting should include the reading aloud of the Participation Agreement by the parties and lawyers, review in detail of key provisions, the signing of the Participation Agreement and any Addendums.

***Comment***

*Subsection (a) anticipates that the meeting agenda be specific to the matter, not generic. The agenda for the first meeting should include the ascertainment of the clients' goals and interests. The restatement of goals and interests as the first agenda item in all subsequent meetings may serve to focus the parties. It is recommended that parties receive a draft of the agenda at least 48 hours before the meeting and any amended drafts at least four hours before the meeting. E-mail distribution of the agenda will facilitate timeliness.*

*Subsection (b) provides for reading the Participation Agreement to make clear the seriousness of the proceeding, review rights and obligation as well as rights relinquished in the collaborative process, and to permit discussions that may lead to changes to the Participation Agreement and the Addendum.*

**II. Meeting Summary.** Meeting Summaries should be prepared after each meeting by a designated collaborative lawyer and distributed to all participants in a timely fashion.

***Comment***

*Ideally, summaries should be delivered to all participants within five (5) business days after each meeting, and not later than two (2) business days before the next meeting, to allow for the parties to suggest revisions and corrections. The summary should document the items discussed and any agreements reached. Editorial bias should be avoided. The minutes should serve as a running record of documents, disclosures, and information still needed and remaining issues to be resolved including a to-do list and the next meeting time and place.*

**LEGAL DOCUMENTS AND PROCEEDINGS**

**I. Pending Lawsuit.** The collaborative process should be initiated and an agreement reached prior to filing a lawsuit. There may be limited situations where a party needs to file suit before signing the Participation Agreement or prior to reaching agreement in the Collaborative Process, such as to fix the venue, to toll limitations, to preserve causes of action or defenses, or to obtain injunctive relief. Such filing should only be done with the agreement of all participants.

***Comment***

*Initiation of a lawsuit and assignment of a judge significantly influences the tone of a case and may substantially undermine the Collaborative Process. Parties should be advised that*

*a complaint will only be filed once agreement has been reached and applicable waiting periods should be noted. If all participants agree to an earlier filing, care should be taken that the filing of a suit is not done in such a manner or at such a time as to alienate other parties from the process. If a suit has been filed, options should be discussed, such as dismissing the case or filing only pleadings to preserve causes of action, defenses, or establish certain extraordinary relief. Pleadings should only be filed when deemed necessary to preserve the legal rights of the parties.*

**II. Notice to the Court.** When a court proceeding is pending, the parties should file a dismissal of the suit. Alternatively, a joint motion may be filed to advise the court that the parties have signed a Participation Agreement, and request that the court abate the court action while the parties are engaged in the collaborative process. The collaborative lawyers should cooperate to ensure that any required status reports are timely filed with the court.

**III. Necessary Orders.** The collaborative lawyer recognizes that in rare situations court orders may be necessary. If a party desires the entry of a court order, the terms of such order are to be negotiated in a collaborative manner, and the order is to be presented to the court as an agreed order.

***Comment***

*If collaborative lawyers are not in a jurisdiction that has passed legislation regarding mandatory abatement of a pending lawsuit for a specified period of time while the parties are engaged in the collaborative process, the lawyers may, nevertheless, approach the court and request an abatement.*

**JOINTLY RETAINED NEUTRAL EXPERTS**

**I. Joint Engagement – Retained Experts.** the parties may jointly retain neutral experts by written agreement.

**II. Neutrality.** The jointly retained neutral expert should use care to avoid the appearance of bias. The jointly retained neutral expert should be instructed to disclose any reason that may exist that would cause a question about the individual's impartiality. Scope and terms of the engagement should be in writing, signed by the participants and the jointly retained neutral expert. The jointly retained neutral expert should be advised on the need to be available for discussion of the opinions or findings with the parties. All jointly retained neutral experts must sign the Participation Agreement.

**III. Effect of Opinion or Finding.** The opinion or finding of a jointly retained neutral expert engaged in the collaborative process is not binding on the parties, unless the parties agree in writing to be bound by such opinion or finding.

***Comment***

*A hallmark of the collaborative law process is that the parties do not use adversarial experts to counter each other's positions. Instead, the parties seek the assistance of unbiased, neutral experts whom the parties engage jointly. Parties may occasionally agree in writing to engage retained experts separately. However, separately engaged retained experts are subject to full disclosure to the parties, and their work product and opinions are available to all parties and lawyers as if they were jointly retained experts.*

**IV. Work Product and Opinions of Jointly Retained Neutral Experts.** A jointly retained neutral expert's work product, opinions, mental impressions, and the facts upon which they are based are to be made available to all parties and their lawyers in the collaborative process. A jointly retained netrual expert is free to communicate with the parties, their lawyers, and other retained experts. The jointly retained neutral expert's work product, opinions, mental impressions, and the facts on which they are based are not discoverable and are inadmissible in any adversarial proceeding resulting from the dispute, or in any other adversarial proceeding among any of the parties, unless the parties stipulate otherwise.

**V. Jointly Retained Neutral Experts May Not Testify.** Jointly retained neutral experts are prohibited from testifying as fact or expert witnesses regarding the subject matter of the dispute in any adversarial proceeding, unless the parties stipulate otherwise.

**VI. Jointly Retained Neutral Experts May Not Serve as Litigation Counsel.** A jointl retained neutral expert who is a lawyer, and any lawyer associated in the practice of law with such lawyer, shall not serve as the litigation lawyer for any party in any litigated proceeding arising from the subject matter of the dispute.

***Comment***

*The collaborative process seeks to insulate and limit the role of the collaborative lawyers and retained experts in order to ensure that a party cannot attempt to use the collaborative process to gain tactical advantage. Collaborative lawyers and experts in a collaborative process necessarily learn a great deal about the parties and their goals and interests, as it is intended to facilitate an agreed upon resolution of the dispute which is beneficial to all parties. It is because of this unusual access that separately and jointly retained experts have to the parties and to all information, that retained experts are precluded from testifying as fact or expert witnesses in any adversarial proceeding regarding the subject matter of the dispute. If the parties want to introduce the findings or opinions of a retained expert in an adversarial proceeding, they may do so by stipulation.*

**CONSULTING-ONLY EXPERTS**

**I. ROLE DEFINED.** A party may privately seek the advice of an expert who is engaged for consultation purposes only. A consulting-only expert is an expert who

has specialized knowledge or skills, but no firsthand knowledge of the dispute, and no factual knowledge of the dispute except for what the expert has learned through the consultation with the engaging party and the lawyer.

**II. DISCLOSURE OF IDENTITY.** Any party utilizing a consulting-only expert must disclose the identity of the expert to the other parties prior to that party engaging such expert.

***Comment***

*A party should not engage a consulting-only expert for the purpose of undermining the collaborative process by gaining a tactical or strategic advantage over any other party. To avoid the appearance that a party engaging a consulting-only expert is attempting to gain an unfair advantage, the party must disclose the identity of the consulting-only expert to the other parties before the consulting-only expert is engaged.*

*When a consulting-only expert is engaged, all parties should be assured that the consulting-only expert has been instructed that the parties are involved in collaboration, and the consulting-only expert's role is not to create conflict between the parties; rather, to assist the engaging party to privately review information to facilitate resolution of the dispute.*

*The role of the consulting-only expert is to give a private opinion based only on the information provided by the engaging lawyer and party which has been developed through the collaborative process. If the consulting-only expert steps outside this prescribed role, or the engaging party attempts to utilize the consulting-only expert to gain advantage over other party, then the collaborative lawyer must terminate the engagement of the consulting-only expert and consider terminating the collaborative process.*

## SETTLEMENT DOCUMENTS AND CLOSING THE MATTER

### I. GOOD FAITH DRAFTING.

a. A collaborative lawyer should in good faith draft settlement documents and agreed court orders in a manner that honestly and completely reflects the parties' intentions.

b. A collaborative lawyer should not take advantage of any drafting mistake made by another party or an expert or advisor and should promptly notify all other lawyers of the mistake.

**II. SIGNING SETTLEMENT DOCUMENTS.** The settlement documents should be signed in the final meeting of all participants. Any remaining issues between or among the parties should be resolved during such meeting.

## WITHDRAWAL AND TERMINATION

**I. WITHDRAWAL.** A collaborative lawyer, subject to the terms of engagement, may withdraw from a collaborative process as in any other client matter.

**II. SUCCEEDING ANOTHER COLLABORATIVE LAWYER.** A collaborative lawyer who is succeeding another collaborative lawyer must sign the Participation Agreement; otherwise, any party may terminate the collaborative process.

**III. TERMINATION TO PRESERVE INTEGRITY OF THE PROCESS.**

a. A collaborative lawyer should explain to the client that the collaborative process is entirely voluntary and may be terminated by the client or the lawyer at any time and for any reason.

b. Collaborative lawyers should incorporate in the Participation Agreement authority for the lawyer to terminate the collaborative process on behalf of their respective clients, without giving a reason, if the lawyer discovers the client has violated or proposes to violate the Participation Agreement in a manner that would compromise the integrity of the collaborative process, and if the client persists in such conduct after counseling by the lawyer. How much the lawyer should disclose, if anything, will depend on the issues of concern and on the lawyer's individual understanding of how applicable ethical rules apply.

***Comment***

*During the collaborative process, a situation may arise in which the client refuses to honor commitments previously made and invokes attorney-client privilege to prohibit the collaborative lawyer from disclosing the violation. Under such circumstances, withdrawal by the lawyer would be ineffective to protect the other participants or the integrity of the process, because the client could retain a new collaborative lawyer who is unaware of the violation, and thereby take unfair advantage. The collaborative lawyer may serve as protector of the collaborative process by terminating the process rather than simply withdrawing. As a practical matter, the recalcitrant client after counseling by the lawyer, may elect to terminate the process instead.*

**IV. TRANSITION TO LITIGATION LAWYER.**

a. The collaborative lawyer shall return to the client all original documents and information which have been furnished by the client. The client will also likely have a notebook containing the agendas and minutes of the face-to-face meetings. The client may deliver all of this information to the litigation attorney.

b. All documents and information *created* during the collaborative process shall be clearly labeled to ensure that such items are identified as confidential and

inadmissible in any subsequent adversarial proceeding, except as the parties may otherwise stipulate.

c. When possible, the lawyer shall have a face-to-face meeting with the client to review the issues that have been resolved and what remains to be resolved and answer questions of the client.

d. The collaborative lawyer shall have no contact or communication with the litigation attorney regarding the subject matter of the dispute.

**VI. THIRTY-DAY MORATORIUM.** Upon notice of termination of the process to all collaborative lawyers, there will be a thirty-day waiting period (unless there is an emergency) before any court hearing, to permit all parties to engage other attorneys and make an orderly transition. All written agreements shall remain effective until modified by agreement or court order. A party may bring this provision to the attention of the court in requesting a postponement of a hearing. Interim agreements, including those contained in the Participation Agreement, should remain in effect until litigation is initiated or other agreements reached, as specifically provided for in the Participation Agreement.