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14	PROTOCOLS OF PRACTICE FOR
15 16	COLLABORATIVE FAMILY LAWYERS
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21	COLLABORATIVE FAMILY LAW INSTITUTE, INC.
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Protocols of Practice for Collaborative Family Lawyers

Introduction

6 Since 2000, South Florida lawyers have been resolving family law disputes utilizing 7 collaborative law. Professional trainers from around the nation have conducted numerous 8 training sessions in the state to teach Florida lawyers and other professionals how to handle 9 family matters collaboratively. The Collaborative Family Law Institute, Inc., a not-for-profit 10 organization, helps train lawyers in collaborative law and promotes its acceptance as the 11 prevailing method of resolving family law matters in Miami-Dade County. The Institute's horizons have expanded to include other collaborative professionals and to serve their needs, 12 13 while its vision remains the same: to create a culture in which the collaborative process is the 14 prevailing process for the resolution of family law matters.

16 The Institute believes that it is advisable to have protocols of practice to assist lawyers 17 and other collaborative professionals in handling collaborative matters. In drafting these 18 protocols, the Institute relied primarily on books and articles by acknowledged leaders in the 19 field of collaborative law in the United States and Canada, the protocols of practice of the 20 Collaborative Law Institute of Texas, Inc. and the experiences of the members of the Institute. 21 These Protocols apply only to lawyers and address the following: the relationship between the 22 lawyer and the client; the relationship between the collaborative lawyers; the relationship 23 between the collaborative lawyer and other collaborative professionals; protecting the process; 24 fundamentals of the process; the use of neutral experts and other outside advisors; drafting 25 considerations; withdrawal; termination of the process and transition to a litigation lawyer.

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Membership in the Collaborative Family Law Institute, Inc. is open not only to lawyers, but also to mental health professionals and financial professionals. Each profession makes its own unique contribution to the collaborative process, has its own special relationship to the collaborative law process, and is guided by unique professional protocols.

These Protocols are to be adopted and used by lawyers on a voluntary basis. Some of the protocols are designed to deal with issues commonly encountered in collaborative matters and should be viewed as strong admonitions, e.g., the prohibition against serving as a collaborative lawyer when the client has already engaged a litigation lawyer. Other protocols and commentaries are merely descriptions of good practices, e.g., the meeting room arrangements. The Institute hopes that the collaborative lawyer finds these Protocols useful and that the practicing Bar embraces these Protocols as the norm for handling collaborative matters.

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40 These Protocols of Practice for Collaborative Family Lawyers were approved by the41 Board of Directors of the Collaborative Family Law Institute, Inc.

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3	CHAPTER 1
4	GENERAL PROVISIONS
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6	SECTION 1.01. SHORT TITLE. These Protocols may be cited as the "Protocols of
7	Practice for Collaborative Family Lawyers."
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9	SECTION 1.02. DEFINITIONS. In these Protocols:
10	
11	(1) "Child specialist" means an individual engaged to assist the parties in resolving child-
12	related matters. The term includes a mental health professional, educational specialist or other
13	similar individual.
14	
15	(2) "Collaborative process" means a process wherein the parties and their lawyers sign a
16	Participation Agreement to negotiate in good faith to settle a legal matter without resort to a
17	court until the matter has been resolved to the satisfaction of both parties, to provide all relevant
18	information and to engage other collaborative professionals and only neutral experts to assist in
19	resolving issues. The written Participation Agreement must provide that the lawyers shall
20	withdraw if the matter requires litigation. The Participation Agreement may contain other
21	provisions not inconsistent with the foregoing requirements.
22	
23	(3) "Collaborative lawyer" means a lawyer who represents a client in a collaborative
24	matter who has been specially trained in the collaborative process.
25	
26	(4) "Collaborative matter" means a particular dispute or negotiation that is handled in the
27	collaborative process.
28	•
29	(5) "Collaborative professional" means an individual engaged by the parties as a neutral
30	professional to participate in and assist in the collaborative process. The term includes a financial
31	professional, mental health professional, communication specialist or any other professional
32	engaged by the parties.
33	
34	(6) "Expert or advisor" means an individual, qualified by knowledge, skill, experience,
35	training or education who is jointly engaged by the parties to provide neutral and unbiased
36	information, guidance, research, opinions or inferences on a subject relevant to the collaborative
37	matter.
38	
39	(7) "Institute" means the Collaborative Family Law Institute, Inc. a not-for-profit Florida
40	corporation dedicated to the promotion of the collaborative process in South Florida.
41	
42	(8) "Joint meeting" means a meeting generally held among the clients, lawyers,
43	collaborative professionals and other participants in a collaborative matter.
44	

1 SECTION 1.03. APPLICATION OF PROFESSIONAL RULES. These Protocols are 2 subordinate to the Rules of Professional Conduct of The Florida Bar that govern the conduct of 3 collaborative lawyers in the State of Florida.

Comment

A member of The Florida Bar is subject to the Rules of Professional Conduct of the Rules *Regulating The Florida Bar. These Protocols must be interpreted in a manner consistent with* those Rules.

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SECTION 1.04. COMPLIANCE WITH PROTOCOLS.

12 (a) These Protocols are designed to be used by lawyers on a voluntary basis. The Institute strongly recommends that its members follow the Protocols in good faith. The ultimate sanction against a lawyer who uses tactics or trickery to abuse or evade the collaborative process or who condones or encourages such abuse by a client is the diminution of that lawyer's reputation.

17 (b) The Institute urges adoption of these Protocols by other local practice groups in the State of Florida as expectations and aspirations of membership. 18 19

20 (c) Because these Protocols aspire to a level of practice above the minimum established 21 in the Florida Rules of Professional Conduct, it is inappropriate to use these Protocols to define 22 the level of conduct required of lawyers for purposes of professional liability or lawyer 23 discipline. 24

Comment

26 There are several examples where lawyers have been urged to comply with such 27 voluntary or aspirational protocols to elevate standards of practice, such as the American Bar Association's Standards of Practice for Lawyers Representing Children in Custody Cases and 28 29 the American Academy of Matrimonial Lawyers' Bounds of Advocacy-Goals for Family 30 Lawyers. 31

32 STANDARDIZED FORMS. The Institute urges the use of SECTION 1.05. 33 standardized forms in a collaborative matter. This assists in the compliance with these Protocols, 34 assures that all participants are working from a common set of materials and enhances the quality 35 of meetings and communications.

CHAPTER 2

THE COLLABORATIVE LAWYER-CLIENT RELATIONSHIP

40 SECTION 2.01. INFORMING THE CLIENT. The collaborative lawyer should inform 41 each prospective family law client about all legal alternatives for resolving the client's matter, 42 including collaborative law. These alternatives should be explained in terms of process, risk, 43 harm, privacy, time and cost. The collaborative lawyer should inform the client about 44 collaborative law no later than the initial consultation.

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Comment

1 To avoid the common client misperception that litigation is the only process available for 2 family law matters, it is recommended that the lawyer establish office protocols that provide 3 information regarding the collaborative process and mediation to each prospective client from 4 the point of initial contact. Use of published materials, in print or electronic form, is advisable in 5 assisting the client to be fully informed about the collaborative process. The Institute's website 6 contains much information to assist the client. <u>www.collaborativefamlaw.com</u>

7 When addressing the comparative costs of a matter handled collaboratively with the 8 same matter being litigated, the collaborative lawyer is cautioned to explain that the actual cost 9 will depend upon the services required by the parties and the complexity of the matter.

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SECTION 2.02. SUITABILITY OF MATTER FOR COLLABORATIVE LAW.

(a) The collaborative lawyer should be aware that certain matters may be inappropriate for the collaborative process. Inappropriateness may include a client's objectives that are inconsistent with the principles of collaborative law, dishonesty of purpose or 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) A collaborative lawyer should decline representation of a prospective client if the
 collaborative lawyer learns that the prospective client has engaged a litigation lawyer for the
 matter or the client will be simultaneously consulting with a litigation lawyer.

(c) The collaborative lawyer should carefully assess matters for untreated mental health
 issues, addictions and family violence to determine whether the lawyer is willing and able to
 handle the matter.

(d) The collaborative lawyer should not handle a matter as a collaborative matter if the
 other party is not represented by a collaborative lawyer.

- 31 Comment 32 The collaborative process is not to be used as a subterfuge by clients with ulterior 33 motives. Choosing collaborative law as a dispute resolution process is the client's prerogative. 34 When a collaborative lawyer is faced with a party or a matter that involves challenging issues 35 that appear to preclude the use of collaboration, the collaborative lawyer should assess: 1. The lawyer's willingness to handle the matter; 36 37 2. The lawyer's ability to handle the matter; 3. The availability of outside resources (for example, collaborative professionals) to 38 39 supplement the lawyer's skills; and 40 4. The possibility of utilizing a co-counsel or a referral to a more experienced 41 collaborative lawyer. 42 Assessment of the matter may require the collaborative lawyer to obtain written releases from 43 the client to make a proper evaluation. 44 45 SECTION 2.03. FAITHFUL REPRESENTATION OF CLIENT.
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2 (a) The collaborative lawyer should commit the time and resources necessary to gain a 3 clear understanding of the client's values, assist the client in identifying and articulating the 4 client's interests and goals in a manner consistent with the client's values, and explore with the 5 client the means by which the collaborative process can satisfy the client's interests and achieve 6 the stated goals in a constructive manner.

8 (b) The collaborative lawyer should inform the client, as soon as feasible, about interest-9 based negotiation and the priority that collaborative law gives to preserving an ongoing 10 relationship between the parties through the non-judicial resolution of the client's matter.

12 (c) The collaborative lawyer should at all times be faithful in the representation of the 13 client and zealously represent the client in pursuit of the client's stated goals. This faithful 14 representation includes informing the client about the law and its application to the client's 15 matter on an ongoing basis, preserving confidential communications, and assisting the client to 16 develop approaches, collaboratively with the other participants, to resolve the matter without 17 judicial intervention.

(d) The collaborative lawyer should explain to the client that the process allows settlement of the matter outside the limits of a judicially imposed solution, subject to public policy and laws in the State of Florida and nationally and securing court approval of the settlement.

CHAPTER 3

RELATIONSHIP BETWEEN COLLABORATIVE LAWYER AND OTHER LAWYER

27 SECTION 3.01. RESPECT FOR THE OTHER LAWYER AND CLIENT. The 28 collaborative lawyer recognizes a heightened requirement to be respectful at all times. Violation 29 of this expectation jeopardizes the prospects of a successful collaboration and causes distrust 30 among the participants. A collaborative lawyer should not engage in conduct to embarrass or 31 disparage the other lawyer, the other party or any of the collaborative professionals. The 32 collaborative lawyer should advise the client to avoid disparaging or negative remarks about the 33 other party, lawyer or the other collaborative professionals.

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Comment

When emotions are high, respectful communications are often extremely difficult for clients. Engaging the services of a mental health professional is strongly urged to assist clients in being effective in their interactions in the collaborative meetings.

40 **SECTION 3.02. MUTUAL RELIANCE.** Representation of a client in a collaborative 41 matter means the lawyer, in good faith, believes the client is acting in a manner consistent with 42 the objectives of the collaborative process. The collaborative lawyer knows that other 43 participants in the collaborative matter are relying upon this presumption.

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Comment

1 It is recognized that it is impossible to assess with absolute certainty whether a client is 2 capable of acting in a manner consistent with the objectives of the collaborative process. If the 3 collaborative lawyer discovers that the client is acting in bad faith and counseling by the lawyer 4 does not remedy the problem, the collaborative lawyer should terminate the process. See 5 Chapter 12 of these Protocols.

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SECTION 3.03. PRIVATE COMMUNICATIONS WITH OTHER LAWYER.

(a) The collaborative lawyer recognizes the need, on occasion, to communicate privately with the other lawyer. The collaborative lawyer should explain to the client that such communications are commonplace and intended to assist in the collaborative matter.

(b) The collaborative lawyer should confer with the other lawyer before joint meetings to
 set the agenda and to discuss how to make the collaborative process run as smoothly and
 efficiently as possible.

Comment

The content of communications between collaborative lawyers is dramatically different from the type of communications between adversarial lawyers. Since the primary goal of joint meetings is to move the clients towards 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 strategize together on the optimum timing to raise sensitive subjects and brainstorm techniques and approaches to assist both parties in navigating the collaborative path.

SECTION 3.04. SHARING OF COMMUNICATIONS. The collaborative lawyer should forward promptly to the other lawyer all client-to-client communications received.

Comment

Communications between the parties received by one collaborative lawyer from the client
 should be forwarded immediately to the other lawyer.

SECTION 3.05. ADDITIONAL OR SUBSTITUTE COLLABORATIVE LAWYER.

A lawyer who seeks to represent a client who is already represented by a collaborative lawyer or
 who was previously represented by a collaborative lawyer shall sign the Participation
 Agreement. If this is not promptly done, the other party may terminate the collaborative matter.

CHAPTER 4

RELATIONSHIP BETWEEN COLLABORATIVE LAWYER AND COLLABORATIVE PROFESSSIONALS

41 SECTION 4.01. ROLE OF COLLABORATIVE PROFESSIONAL. The 42 collaborative lawyer acknowledges that the interests of the client may best be served by engaging 43 a collaborative professional to participate in the collaborative matter. The participation of a 44 collaborative professional must be a joint decision of the parties and the lawyers. 45

SECTION 4.02. MULTIDISCIPLINARY CONSIDERATIONS. The terms of the engagement of a collaborative professional in a collaborative matter must be consistent with the rules of professional conduct governing the lawyer and the other collaborative professional.

SECTION 4.03. DEFINING RESPONSIBILITY. The terms of engagement for the collaborative professional must be in writing and clearly define his or her scope of responsibility in the collaborative matter, such as attendance at meetings; communications with the lawyers, parties and children; payment of the collaborative professional's fee and the relationship with other collaborative professionals who may be engaged in the matter.

CHAPTER 5 PROTECTING INTEGRITY OF COLLABORATIVE LAW PROCESS

15 **SECTION 5.01. INTEGRITY OF THE PROCESS.** The collaborative process has the 16 objective of achieving an ethical and enduring settlement for the clients. The collaborative 17 lawyer should assist the client to develop alternatives for settlement that meet both the objectives 18 of the client and the other party. The collaborative lawyer acknowledges that the client is 19 responsible for the ultimate outcome of the collaborative effort.

SECTION 5.02. HONESTY AND FULL DISCLOSURE. The collaborative lawyer recognizes that honesty and full disclosure of relevant information is critical to the successful outcome of a collaborative matter and should assist the client in complying with the requirement to make a full and candid exchange of all relevant or requested documents and information to the appropriate participants.

Comment

A major paradigm shift for a lawyer handling a collaborative matter is the requirement for the voluntary disclosure of documents and information. It is the antithesis of litigation practice but the cornerstone of the safe environment sought to be created by the collaborative process. "Requested documents and information" requires minimal thought. If the documents and information are requested, they must be delivered or divulged. The parties may negotiate the manner and method of production.

However, "relevant information" not specifically requested presents a substantial 34 35 challenge to the lawyer and client, both of whom have made a commitment to the collaborative process. In our "don't-ask-don't-tell" society, the disclosure of unrequested, but relevant 36 37 information goes against the grain. The appropriate minimum standard for disclosure should be 38 thus posited: "Putting the shoe on the other foot, would my client need, expect or desire such information in attempting to make an informed decision?" The definitions of "relevant" should 39 40 guide the lawyer and client in disclosing the information: "having significant and demonstrable bearing on the matter at hand," "affording evidence tending to prove or disprove the matter at 41 issue or under discussion," "having social relevance," and "implying a traceable, significant, 42 43 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 44 45 the decision making process?

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SECTION 5.03. FINANCIAL AFFIDAVITS. Each party in a collaborative matter shall prepare and exchange with the other party a sworn Financial Affidavit consistent with the forms approved by the Florida Supreme Court setting forth that party's income, expenses, assets and liabilities, including the values of the assets and liabilities. The collaborative attorney shall explain to the client the law in the State of Florida with respect to the filing of financial affidavits if a formal action is filed in court after the collaborative process is concluded.

8 **SECTION 5.04. FORMAL DISCOVERY BY AGREEMENT.** If required to maintain 9 a participant's confidence in the safety of the process, the collaborative lawyers and their clients 10 may agree to engage in formal discovery procedures such as sworn affidavits and written 11 interrogatories. These procedures should be used sparingly, and every effort should be made to 12 create an environment within which the participants will feel secure and such formalities will be 13 unnecessary.

15 SECTION 5.05. CORRECTION OF MISTAKES. The collaborative lawyer shall not 16 take advantage of known mistakes, errors of fact or law, miscalculations, or other 17 inconsistencies. The collaborative lawyer should disclose such errors and seek to have them 18 corrected as quickly as possible.

Comment

21 Overcoming the win-lose, one-upmanship mentality of litigation, requires the greatest 22 paradigm shift for the lawyer. That critical shift in thinking is the bedrock standard established 23 by these Protocols. That shift is made more difficult by the television-movie inspired mindset of 24 parties in the divorce situation. But strict adherence to this provision is essential to the enduring 25 integrity of the parties' agreement and to the collaborative process concept. It requires more 26 than simply avoiding fraudulent and intentionally deceitful conduct. Misunderstandings should 27 be corrected and not relied upon in the hope that they will benefit the client. The crucial 28 consideration should be whether the lawyer or the client either induced the misunderstanding or is aware that any other participant is relying on an assumption that is inaccurate. 29 30

SECTION 5.06. SAFE ENVIRONMENT. The collaborative lawyer should strive to
 provide a safe environment for the collaborative matter.

34 *Comment* 35 *The collaborative lawyer acknowledges that a safe environment necessarily involves the* 36 *following principles:* 37

- Refraining from insistence on acceptance of conditions precedent to entering into the collaborative process.
 Encouraging creative problem-solving and discouraging positional bargaining.
 - 3. Speaking directly with participants about any perceived non-collaborative behavior
 - and attempting to remedy the same in a constructive manner.
- 43 *4. Using non-defensive methods of hearing criticism.*
 - 5. Exercising patience at all times.

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

1	7. Acknowledging that the collaborative process can only progress at the pace of the
2	slowest participant.
3	8. Avoiding offensive or provocative conduct, such as cross-examination, and
4	promptly reminding each other that such behavior is destructive to the process.
5	9. Avoiding assessment of blame and use of judgmental language.
6	10. Avoiding surprises.
7	11. Adhering to agendas.
8	12. Avoiding unilateral actions.
9	13. <u>Avoiding unsolicited legal opinions in joint meetings.</u>
10	14. Encouraging the joint engagement of other collaborative professionals, including
11 12	financial professionals, mental health professionals, mediators, clergy and others for
12	assistance in the resolution of the matter. 15. Urging the use of language that encourages the speaker to speak in the first person (I
13 14	feel, I believe, etc.) and avoiding speech in the second person (you know, you failed,
15	you always, you never, etc.)
16	16. Training non-lawyer employees to be knowledgeable about these Protocols.
17	Tot Training non tanyor employees to be haten teageable about mese Troibeets.
18	SECTION 5.07. CIVILITY AND PREPARATION. The collaborative lawyer should
19	strive at all times to be courteous, punctual, and prepared for meetings. The collaborative lawyer
20	should strive to schedule meetings free from outside distractions.
21	
22	Comment
23	It is usually advisable to schedule time before each collaborative meeting for last-minute
24	preparation and review of communication protocols with the client and to meet with the other
25	lawyer to discuss any last-minute agenda items. Time should also be allocated immediately after
26	each joint meeting for separate debriefings with the client, the other collaborative lawyer and
27	the other collaborative professionals. Private space should always be made available for the
28	other lawyer and client for their pre- and post-meeting conferences.
29	
30	SECTION 5.08. EFFICIENT COMMUNICATIONS. The collaborative lawyer should
31	encourage efficient communications, especially by the use of e-mails and faxes, among the
32	parties, lawyers, paralegals, collaborative professionals, and other participants to schedule
33	meetings, share documents and relay procedural information.
34	
35	<i>Comment</i>
36 37	The collaborative lawyer should promptly respond to any communication received in a
37 38	collaborative matter. A late response deserves an explanation and, if necessary, an apology.
38 39	SECTION 5.09. PROTECTION OF A CHILD. A collaborative lawyer should not
40	interview a minor child unless agreed to by all participants. If the child is being seen by a mental
41	health professional or a child specialist has been engaged, the interview should only be
42	conducted with the approval of the mental health professional or the child specialist. A child
43	should not attend joint meetings unless all of the participants, including the mental health
44	professional or the child specialist, agree to the child's attendance. Unresolved issues of parental
45	responsibility and timesharing may be referred to a jointly engaged child specialist.
46	

SECTION 5.10. PROFESSIONAL FEES. The agenda for the first joint meeting should address payment of the lawyers' fees. When a decision is made to engage an other collaborative professional or a neutral expert, the payment of the collaborative professional's or expert's fees should also be addressed. The status of fees is a legitimate agenda item at any subsequent meeting.

Comment

8 The collaborative lawyer acknowledges that any payment schedule of fees other than 9 prompt payment according to employment contracts, results in an imbalance of power and an 10 abuse of the process. Thus, each collaborative lawyer should encourage the client to take all 11 actions required to pay promptly all professional fees according to employment contracts. A 12 collaborative lawyer's withdrawal from the matter or the termination or conclusion of the matter 13 does not preclude the lawyer or other collaborative professional retained in the process from 14 collecting outstanding fees and testifying in support of their reasonableness.

CHAPTER 6

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FUNDAMENTALS OF THE COLLABORATIVE PROCESS

SECTION 6.01. STAGES OF THE COLLABORATIVE PROCESS. The collaborative process consists of five discrete stages:

- 1. Determining the clients' goals and interests;
- 2. Information gathering;
 - 3. Development of settlement options;
 - 4. Evaluation of the options; and
 - 5. Negotiation of the settlement agreement.

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

- 32 33
- SECTION 6.02. DETERMINATION OF CLIENTS' GOALS AND INTERESTS.

The first and most important stage of the collaborative process is defining the parties' goals and interests. The collaborative lawyer assists the parties to differentiate between their bargaining positions regarding settlement and their fundamental interests, to enable each party to recognize areas of commonality and to understand and acknowledge the other party's interests.

38 39

Comment

40 The collaborative process is premised upon the concept of interest-based negotiation. A 41 collaborative lawyer is skilled in exploring the parties' interests (their respective goals, needs, 42 values, priorities, concerns and fears) to understand why they desire a particular option. The 43 fleshing out of interests leads to the recognition of common ground, as well as those matters that

- 44 are of special significance to either party. This knowledge increases the likelihood of settlement
- 45 and offers opportunities for creative negotiation and problem solving. The value added is that
- 46 the parties can then achieve what they perceive as their best possible outcome.

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, such as the welfare the children, the desire for a healthy restructured family, the need for financial security, and the desire to problem-solve in a safe environment. "Micro" goals are options available to achieve the "macro" goals. The lawyer's task is to help reframe the parties' "micro" goals to the "macro" level to ascertain common ground. The more common ground identified, the more likely the parties will settle their differences.

8 Collaborative lawyers are encouraged to use easel pads to frame and display the parties' 9 interests. The interests should be included in the minutes of each meeting and should be on the 10 agenda of each meeting for confirmation or supplementation.

12 **SECTION 6.03. GATHERING INFORMATION.** Gathering, organizing and 13 analyzing all relevant information is central to the collaborative process. The collaborative 14 lawyers assist the clients in gathering documents, preparing schedules and locating and engaging 15 appraisers, financial professionals, mental health professionals and other collaborative 16 professionals whose assistance would facilitate the gathering, organization and analysis of 17 information related to the parties' financial condition and the needs of their children.

Comment

The Institute urges collaborative lawyers to organize information and educational materials in notebooks prepared for all participants with common indexing for quick reference.

SECTION 6.04. DEVELOPMENT OF SETTLEMENT OPTIONS. Upon completion of the exchange and organization of all relevant information, the parties should be encouraged to propose all possible options for the settlement of the issues. The collaborative lawyer should assist the clients in developing options, with the understanding that any settlement option proffered for consideration is ultimately the clients' responsibility. The collaborative lawyer must not participate in developing a settlement option that is false, misleading, contrary to public policy or that, in the lawyer's opinion, would be abusive or neglectful of the children.

Comment

Collaborative lawyers recognize that brainstorming all possible options, even those some would consider improbable, ensures that the choice the parties make is what they perceive as their best possible outcome. It is important not to self-edit or pre-judge the options before the evaluation stage.

37 **SECTION 6.05. EVALUATION OF OPTIONS.** When the parties are satisfied that all 38 possible options have been developed, the collaborative lawyers should assist the clients in 39 evaluating the options, analyzing how the options meets the clients' goals, determining whether 40 an option is realistically achievable, and considering whether the option would likely be 41 approved by the court.

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Only if the participants agree that the exercise would be productive in a joint meeting,
they may compare any option with the possible result if the matter were to be litigated.
Otherwise, such information is to be shared with the client only in private consultation.

Comment

2 SECTION 6.06. NEGOTIATION OF SETTLEMENT. The focus of the final stage 3 should be determining which options for settlement best serve both parties' interests and 4 common goals. The ultimate goal of the process should be the achievement of what the parties 5 perceive as the best possible outcome for them and their children. The parties, with the assistance 6 of the collaborative lawyers and the other collaborative professionals, should fashion the terms of 7 the settlement, and the lawyers should encourage any settlement that would be approved by the 8 court. Upon negotiation of the settlement, the lawyers shall promptly draft all of the necessary 9 documents to finalize the matter. 10

Comment

12 Collaborative lawyers recognize that interest-based negotiation and creative problem 13 solving creates more satisfying experiences for the parties, models healthy problem solving methods for resolution of future disputes, and yields what the parties perceive as the best 14 15 possible outcome in a more efficient manner. These approaches resolve the vast majority of all 16 collaborative matters without the participants ever resorting to traditional positional bargaining. For participants who feel more comfortable with traditional negotiation techniques, 17 only with the consent of all participants, may a settlement offer be provided or simultaneously 18 19 exchanged in order to help define the range of acceptable solutions.

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SECTION 6.07. TECHNIQUES TO AVOID IMPASSE.

(a) A collaborative lawyer should not threaten to terminate the collaborative matter 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 matter, the collaborative lawyers should explore deadlockbreaking techniques such as partial settlement, mediation, securing the opinion of another lawyer, arbitration or referral to a special master for limited issues, a trip to the courthouse to view a trial, and an interview with a litigation lawyer.

SECTION 6.08. SUBSEQUENT LITIGATION.

No collaborative lawyer shall represent his or her collaborative client in a subsequent litigated matter against the other party.

CHAPTER 7 MEETINGS

40 **SECTION 7.01. IMPORTANCE OF MEETINGS.** The collaborative lawyer 41 acknowledges the importance of joint meetings to facilitate the collaborative process and to 42 achieve a successful outcome. The collaborative lawyer should emphasize to the client the 43 importance of attending all meetings and participating in good faith. Although face-to-face 44 meetings are preferred, circumstances may arise where other arrangements are necessary.

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Comment

1 When a client refuses to attend joint meetings, a collaborative lawyer should seek to 2 involve a mental health professional to assist the client in overcoming the resistance. If that fails 3 or if a client is unable to attend meetings but desires to continue in the process, a collaborative 4 lawyer should explore all viable alternatives to attendance at the meetings including, without 5 limitation, conference calls, video- or internet-conferencing, joint meetings without the resistant 6 client, joint meetings with collaborative professionals, the client's participation by speaker 7 phone or by proxy, face-to-face meetings between the lawyers only, caucus style meetings where 8 the lawyers or one of them shuttle back and forth between separate meeting rooms, or meetings 9 facilitated by a mediator. 10 11 SECTION 7.02. SCHEDULING AND ARRANGEMENTS. The collaborative lawyer 12 acknowledges the need to meet regularly with the clients and the other collaborative lawyer at 13 mutually convenient times and locations. A joint meeting should not be adjourned without 14 scheduling at least one subsequent meeting. 15 16 *Comment* 17 The meeting arrangements should include provisions for: 1. Rotation of meeting sites unless the parties desire otherwise. 18 2. Seating arrangements that avoid a confrontational atmosphere with 19 20 consideration being given to having the parties sit on the same side of the 21 table or using a round table. 22 3. Private space for the guest lawyer and client to meet before, during and after 23 the joint meeting. 24 4. Preparation in advance and distribution of multiple hole-punched copies of 25 relevant documents to use at meetings to avoid time-consuming duplication 26 during the meeting. 27 5. A hospitable venue for the guest lawyer and client (providing, as appropriate, food, beverages, and access to phone, fax, duplication, internet, pens, paper, 28 29 and calculators). 30 6. Availability of the client and lawyer notebooks and calendars at every joint 31 meeting. 32 33 **CHAPTER 8** 34 AGENDAS AND MINUTES 35 36 **SECTION 8.01. AGENDA FOR MEETINGS.** 37 38 (a) A written agenda prepared in advance by the collaborative lawyers or other 39 collaborative professionals in consultation with the clients should govern each joint meeting. 40 Matters that arise during a joint meeting that are not on the agenda should be deferred until the end of the meeting or placed on the next meeting's agenda, as the participants agree. The parties 41 should be encouraged to schedule agenda items in advance through their lawyers. The 42 43 collaborative lawyer should discourage raising issues not on the agenda to avoid the element of

44 surprise.

(b) The agenda of the first joint meeting ordinarily should include the reading aloud of the Participation Agreement by the parties and the lawyers and the signing of the Agreement.

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Comment

5 <u>Subsection (a) urges that the meeting agenda be specific to the matter, not generic</u>. The 6 agenda for the first joint meeting should include the ascertainment of the parties' goals and 7 interests. The restatement of goals and interests as the first agenda item in all subsequent joint 8 meetings may serve to focus the parties. It is recommended that parties receive a copy of the 9 agenda before going to each meeting. A report on long-term homework assignments not expected 10 to be completed between any two meetings should be an agenda item to encourage 11 accountability.

12 Subsection (b) provides for reading the Participation Agreement. This makes clear to the 13 parties the seriousness of the proceeding. However, some collaborative lawyers believe that 14 where there is adequate assurance that legally sophisticated clients have read the Agreement in 15 advance, a reading of a summary document should suffice and the parties should sign both the 16 Agreement itself and the summary version.

SECTION 8.02. MINUTES. Minutes should be prepared and distributed in a timely manner after each meeting by a designated collaborative lawyer or by another mutually chosen collaborative professional.

Comment

The minutes should be comprehensive and document the items that were discussed and any agreements reached. Editorial bias should be avoided. They should serve as a running record of unfinished assignments and issues still needed to be resolved. Approval of the minutes should be an agenda item at each meeting. The collaborative lawyers, the parties and the other collaborative professionals should sign the minutes of each meeting acknowledging that they read the minutes, that the minutes accurately reflect what took place during the prior meeting and that they acknowledge any agreements contained in the minutes.

CHAPTER 9 EXPERTS AND ADVISORS

34 **SECTION 9.01. JOINT ENGAGEMENT.** Unless the parties agree otherwise, in a 35 collaborative matter, a neutral expert or advisor is to be retained jointly and in writing. Except as 36 provided in Section 9.02, any report and related work papers of the expert or advisor, including 37 all documents submitted to the expert or advisor, should be made equally available to the parties 38 and the lawyers, whether the assistance was rendered for one or both parties.

40 **SECTION 9.02. NEUTRALITY.** The collaborative lawyer should inform the neutral 41 expert or advisor that he or she is being engaged jointly and should use care to avoid the 42 appearance of bias. The neutral expert or advisor should be instructed to disclose any reason that 43 may exist that could cause someone to question his or her impartiality. The scope and terms of 44 the engagement of the expert or advisor should be in writing, signed by the parties and the 45 neutral expert or advisor. The neutral expert or advisor should be instructed to be available for 46 discussions with one or both parties.

1 2 SECTION 9.03. OTHER LEGAL OPINION. In a collaborative matter, it may become 3 advisable to secure an opinion from another lawyer for the benefit of one or both parties. The 4 engagement of this lawyer should be disclosed before the first consultation with the outside 5 lawyer. If the opinion is only sought by one party, then the opinion given by the other lawyer is 6 not required to be disclosed to the other participants in the collaborative process, as such would 7 be subject to the lawyer-client privilege. Any lawyer offering an opinion should be given all 8 information necessary to give informed advice, including the reports of the experts, advisors and 9 collaborative professionals whose services have been engaged in the collaborative matter. The 10 lawyer should be privy to any information that a substitute collaborative or a subsequent litigation lawyer would have in rendering opinions. This section does not apply to a lawyer 11 12 representing the client as co-counsel who signs the Participation Agreement. 13 14 SECTION 9.04. EFFECT OF OPINION OR FINDING. The opinion or finding of a 15 neutral expert or advisor in a collaborative matter is not binding on the parties, unless the parties 16 agree in writing to be bound by such opinion or finding. 17 18 SECTION 9.05. TESTIMONY BARRED. Should the dispute become a litigated

matter, the expert or advisor may not testify in the litigation unless the parties and the expert or advisor otherwise agree in writing.

22 SECTION 9.06. SURVEILLANCE. Neither the collaborative lawyer nor the client may directly or indirectly conduct surveillance of the other party's activities during the collaborative matter. This prohibition extends to allowing the use of an investigator, detective or other individual paid for or engaged by a third party.

CHAPTER 10 SETTLEMENT DOCUMENTS AND CLOSING

SECTION 10.01 SETTLEMENT DOCUMENT

(a) Once the parties have resolved all of their issues in the collaborative matter, the terms of their agreement shall be reduced to writing. The collaborative lawyers should mutually determine which one of them will create the initial draft of the settlement document.

36 (b) The settlement document should be circulated between the collaborative attorneys, the 37 parties and the collaborative professionals, if appropriate, for their comments, corrections and 38 revisions. This should continue until all of the collaborative lawyers and the clients agree to the 39 terms of the settlement agreement. 40

41 The parties may sign one or more partial settlement agreements during the (c) 42 collaborative process should they mutually choose to do so.

- 44 SECTION 10.02. GOOD FAITH DRAFTING.
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1 (a) A collaborative lawyer should in good faith draft settlement documents and 2 subsequent pleadings and court orders in a manner that honestly and completely reflects the 3 parties' intentions. 4 5

(b) A collaborative lawyer should not take advantage of a drafting mistake and should promptly notify the other lawyer of the mistake.

SECTION 10.03. CLOSING. All of the settlement documents must be signed by all of the parties to the collaborative process. If feasible, the signing of the settlement documents should be done in a joint meeting. Any remaining issues between the parties should be resolved at that time. The parties should be encouraged to plan a concluding meeting that meets their 12 needs. 13

CHAPTER 11 LEGAL DOCUMENTS AND PROCEEDINGS

SECTION 11.01. FILING OF PETITION. The collaborative lawyers shall file a joint Petition for Dissolution of Marriage and Answer once the parties have entered into a settlement agreement.

SECTION 11.02. NOTICE TO COURT. Upon signing the Participation Agreement, if a court proceeding is pending, notice shall be sent to the court that the matter is being handled as a collaborative matter. The collaborative lawyers should cooperate to ensure that any required status reports are timely filed.

SECTION 11.03. TEMPORARY AGREEMENTS. The collaborative lawyers recognize that there may be a need for temporary agreements in certain matters. Such agreements should be written and signed by the parties. If the collaborative process is terminated and litigation ensues, the temporary agreements shall be adopted by the court.

CHAPTER 12 WITHDRAWAL AND TERMINATION

34 SECTION 12.01. WITHDRAWAL. A collaborative lawyer, subject to the terms of 35 engagement, may withdraw from a collaborative matter as in any other matter. The collaborative 36 lawyer should assist the successor collaborative lawyer in becoming familiar with the matter.

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SECTION 12.02. SUCCEEDING ANOTHER COLLABORATIVE LAWYER. A collaborative lawyer who is succeeding another collaborative lawyer must sign the Participation Agreement. If this is not promptly done, the other party may terminate the collaborative matter.

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SECTION 12.03. TERMINATION OF THE PROCESS.

44 (a) A collaborative lawyer should explain to the client that the collaborative process is 45 voluntary and may be terminated by the client at any time and for any reason. 46

1 (b) A collaborative lawyer should seek to obtain authority in <u>the retainer agreement</u> to 2 terminate the collaborative process on behalf of the client, without giving a reason, if the lawyer 3 discovers that the client has violated or proposes to violate the Participation Agreement in a 4 manner that would compromise the integrity of the process.

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13 14 (c) The collaborative lawyers should seek to incorporate in <u>the Participation Agreement</u> authority to terminate the collaborative process on behalf of their respective clients, without giving a reason, if the lawyer discovers that the client has violated or proposes to violate the Participation Agreement in a manner that would compromise the integrity of the process.

(d) The collaborative process must terminate if one of the attorneys withdraws or is discharged by a party and the party does not retain a successor collaborative lawyer.

Comment

15 During the course of the collaborative process, a circumstance can occur in which the 16 client refuses to honor commitments previously made, yet invokes the attorney-client privilege to prohibit the collaborative lawyer from disclosing the violation. Under these circumstances, 17 18 withdrawal by the lawyer would be ineffective to protect the other participants, as well as the 19 integrity of the process, because the client could retain a new collaborative lawyer who is 20 unaware of the violation, and thereby take unfair advantage of the other party. Absent 21 contractual authorization to take this action, the collaborative lawyer may be ethically 22 constrained from this guardianship role. As a practical matter, one should rarely, if ever, be required to make such declaration of termination, because the recalcitrant client, given the 23 choice of declaring termination or having it done by counsel, would almost assuredly elect 24 25 personally to make that declaration.

The collaborative process cannot proceed without both parties being represented by a collaborative lawyer. If a party chooses not to be represented by a collaborative lawyer, the process cannot proceed consistent with the basic philosophies of the collaborative process and the process must terminate completely.

31 SECTION 12.04. TRANSITION TO LITIGATION LAWYER. The collaborative 32 lawyer should assist the litigation lawyer in becoming familiar with the matter. The litigation 33 lawyer may not be a lawyer in the same firm as the collaborative lawyer. The collaborative 34 lawyer should cease further work on the matter once the litigation lawyer has accepted the matter. A collaborative lawyer approached to give an opinion in a collaborative matter in which 35 he or she is not involved should do so only after confirming that the other party has been given 36 37 notice that the opinion has been sought. Unless the parties agree in writing to the contrary, any 38 lawyer who has been jointly engaged to give an opinion to both parties may not serve as the 39 litigation lawyer for either party.

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CHAPTER 13 MISCELLANEOUS PROVISIONS

44 SECTION 13.01. INTERPRETATION. The advancement of the highest and noblest
 45 goals of furthering the collaborative process as a preferred process of resolving family law
 46 matters should guide the interpretation of these Protocols.

SECTION 13.02. EFFECTIVE DATE. These Protocols took effect upon adoption by
 the Board of Directors of the Collaborative Family Law Institute, Inc. on ______.