

NC-CAN PROTOCOLS



NORTH CAROLINA
COLLABORATIVE LAW
ASSOCIATION

Adapted from draft Protocols of the
Collaborative Family Law Institute, Inc. of Florida

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INTRODUCTION

The North Carolina Collaborative Attorney Network (NC-CAN), a not-for-profit organization, guides and trains attorneys in Collaborative law and promotes its acceptance as the prevailing method of resolving family law matters in North Carolina. Our goal is to create a culture in which the Collaborative process is the prevailing process for the resolution of family law matters.

NC-CAN believes that it is advisable to have protocols of best practice to assist attorneys in handling Collaborative matters. These Protocols apply only to attorneys and address the following: the relationship between the attorney and the client; the relationship between the Collaborative attorneys; the relationship between the Collaborative attorney and other Collaborative professionals; protecting the process; fundamentals of the process; the use of neutral experts and other outside advisors; drafting considerations; withdrawal; termination of the process and transition to a litigation attorney.

These best practice Protocols are to be adopted and used by attorneys 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, i.e., the prohibition against serving as a Collaborative attorney when the client is represented by a litigation attorney. Other protocols and commentaries are merely descriptions of good practices, i.e., sharing meeting summary and action items within a short time frame after a meeting, etc. NC-CAN hopes that the Collaborative attorney finds these Protocols useful and that the practicing Bar embraces these Protocols as the norm for handling Collaborative matters.

CHAPTER 1 GENERAL PROVISIONS

SECTION 1.1. DEFINITIONS.

In these Protocols:

- (a) “Collaborative law process” means a process that complies with Article 4 of Chapter 50 of the North Carolina General Statutes.
- (b) “Collaborative attorney” means an attorney who represents a client in a Collaborative process who has been specially trained in the Collaborative process.
- (c) “Collaborative matter” means a particular dispute or negotiation that is handled in the Collaborative process with Collaborative attorneys and a signed Collaborative Participation Agreement.
- (d) “Collaborative Participation Agreement” means an agreement signed by both spouses and an attorney for each spouse to participate in the Collaborative process that conforms with N.C.G.S. 50-71 (2) and 50-72.

(e) “Collaborative Professional” means an individual who has been specially trained in the Collaborative process and who is engaged by the parties as a neutral professional to participate in and assist in the Collaborative process. The term includes financial professionals, mental health professionals, divorce coach, or any other professional engaged by the parties.

(f) “Collaborative Expert or Advisor” means an individual, qualified by knowledge, skill, experience, training, or education who is jointly engaged by the parties to provide neutral and unbiased information, guidance, research, opinions or inferences on a subject relevant to the Collaborative matter.

(g) “Collaborative Financial Professional” is a neutral advisor, qualified by knowledge, skill, experience, training, and education, who is trained in the Collaborative process and who is engaged by the clients to provide objective and unbiased financial information and analysis.

(h) “NC-CAN” means the North Carolina Collaborative Attorney Network, a not-for-profit North Carolina corporation dedicated to the promotion of the Collaborative process in North Carolina.

(i) “Joint meeting” means a meeting generally held among the clients, attorneys, Collaborative professionals, and other participants in a Collaborative matter.

(j) “Collaborative Mental Health Professional” is an individual licensed in the State of North Carolina as a marriage and family therapist, psychiatrist, psychologist, social worker, or other mental health field who act as a neutral in the Collaborative Process.

SECTION 1.2. APPLICATION OF PROFESSIONAL RULES. These Protocols are subordinate to the Rules of Professional Conduct of The North Carolina Bar that govern the conduct of Collaborative attorneys in the State of North Carolina.

Comment

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

SECTION 1.3. COMPLIANCE WITH PROTOCOLS.

(a) These Protocols are designed to be used by attorneys on a voluntary basis. It is strongly recommended that Collaborative attorneys follow the Protocols and their spirit in good faith. The ultimate sanction against an attorney 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 attorneys’ reputation in handling Collaborative matters.

(b) NC-CAN urges the adoption of these Protocols by local practice groups and individual Collaborative attorneys in North Carolina in order to foster and protect the efficiency and quality of the Collaborative process in North Carolina.

(c) Because these Protocols aspire to a level of practice above the minimum established in the North Carolina Rules of Professional Conduct, it is inappropriate to use these Protocols to define the level of conduct required of attorneys for purposes of professional liability or attorney discipline.

(d) A Collaborative attorney should never threaten to withdraw from the Collaborative process for tactical reasons. Threats or demands by any of the parties or attorneys in the Collaborative process are inappropriate for and incompatible with the Collaborative process.

Comment

While not mandatory, compliance with these Protocols creates a set of pre-arranged expectations and processes that save considerable time and complication for Collaborative professionals and their clients. Following a standard set of protocols avoids the need to “re-invent the wheel” in every case. Further, attorneys in their first case together will experience a more streamlined, efficient, and effective process that will benefit their clients. Deviation from these Protocols should be intentional, designed to benefit the matter and the clients, and agreed upon between the attorneys and other professionals involved.

SECTION 1.4. STANDARDIZED FORMS. NC-CAN urges the use of standardized forms in a Collaborative matter. This assists in the compliance with these Protocols, assures that all participants are working from a common set of materials, and enhances the quality of meetings and communications.

CHAPTER 2 STARTING THE COLLABORATIVE LAW PROCESS

SECTION 2.1. INFORMING THE CLIENT. The Collaborative attorney should inform each prospective family law client about all legal alternatives for resolving the client’s matter, including the Collaborative law process. The Collaborative attorney should explain the pros and cons of these alternatives in terms of process, risk, harm, privacy, time, and cost. The Collaborative attorney should inform the client about Collaborative law no later than the initial consultation.

Prior to the execution of a Collaborative Participation Agreement, the Collaborative attorneys should fully advise the client as to the three main tenets of the Collaborative law process: full disclosure and transparency of relevant information and documents, the interest-based negotiation model, and the mandatory withdrawal provision.

The Collaborative attorney should prepare the client for the ways in which the Collaborative law process will differ from other ADR processes and litigation. Special emphasis should be given to the non-adversarial and interest-based approach, the necessary participation of each client, and the fact that all negotiations will take place in joint meetings with clients present via group emails or between the clients themselves. The attorneys will not engage in a back and forth between the two of them to negotiate terms.

Comment

To avoid the common client misperception that litigation is the only process available for family law matters, it is recommended that the attorney establish office protocols that provide information regarding the Collaborative process and other ADR processes to each prospective client from the point of initial contact. The use of published materials, in print or electronic form, is advisable in assisting the client to be fully informed about the Collaborative process. When addressing the comparative costs of a matter handled Collaboratively with the same matter being litigated, the Collaborative attorney should explain that the actual cost will depend upon the services required by the parties and the complexity of the matter.

Because a Collaborative matter is premised on full disclosure and transparency, the client must be informed of the risks of disclosing information that could lead to legal liability or other complications prior to executing the Collaborative Participation Agreement. Examples of this include infidelity, wiretapping, marital torts, etc.

SECTION 2.2. SCREENING OF CLIENT AND MATTER FOR APPROPRIATENESS OF COLLABORATIVE LAW.

(a) The Collaborative attorney should be aware that certain matters may be inappropriate for the Collaborative process and should use careful judgment in accepting or declining to handle a Collaborative matter. A Collaborative attorney 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 attorney should decline the representation of a prospective client if the Collaborative attorney learns that the prospective client has retained a litigation attorney to represent the client in the matter or will be simultaneously represented by a litigation attorney during the Collaborative process.

(c) The Collaborative attorney should carefully assess matters for untreated mental health issues, addictions, and family violence and dynamics that are likely to reduce the likelihood of resolution to determine whether the attorney is willing and able to handle the matter.

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

Comment

The Collaborative process is not to be used as a subterfuge by clients with ulterior motives. Choosing Collaborative law as a dispute resolution process is the client's prerogative. When a Collaborative attorney is faced with a party or a matter that involves challenging issues that appear to preclude the use of collaboration, the Collaborative attorney should assess:

- (a) *The attorney's willingness to handle the matter;*
- (b) *The attorney's ability to handle the matter;*
- (c) *The availability of outside resources (for example, Collaborative professionals) to supplement the attorney's skills; and*
- (d) *The possibility of utilizing a co-counsel or a referral to a more experienced Collaborative attorney.*

Note that assessment of the matter may require the Collaborative attorney to obtain written releases from the client to make a proper evaluation.

CHAPTER 3 COLLABORATIVE ATTORNEYS

SECTION 3.1 ROLE AND DUTY OF ATTORNEYS. The role and duty of each attorney on the professional team generally includes the following:

- (a) Educates and assists the client in evaluating divorce process options;
- (b) Educates the client about the client's obligations in the Collaborative Process and the risks of the process;
- (c) Ensures that the client enters the Collaborative Process with informed consent, after consideration of the risks and benefits of the Collaborative Process and alternative processes and after assessment of whether the client is in a coercive or violent relationship which might negate informed consent, which requires a determination as to whether the safety of the party can be protected adequately during the Collaborative Process;
- (d) Provides representation limited to the Collaborative process;
- (e) Assists the client in identifying the party's needs, goals, and interests and in clarifying and expressing goals, needs and interests during negotiations in service of developing workable settlement options;
- (f) Assists the client in gathering and analyzing information;
- (g) Ensures that the client is adequately informed about the law, finances, facts and data points necessary to make informed decisions to resolve issues;
- (h) Guides and enforces the structure of the Collaborative Process and works with the professional team in promoting the Collaborative Process managing conflicts and differences of opinions during the negotiation process;
- (i) Educates the client about the law and the role and limits of the law in negotiating mutually acceptable solutions; (See Comment)
- (j) Assists the client and professional team in problem-solving to resolve the client's questions in a way to meet the needs of both parties and their family;

- (k) Assists the client in making decisions, in generating and evaluating options for resolving issues, in interest-based negotiating, and in reaching resolutions that meet the needs of both parties and their family;
- (l) Assists the client in evaluating whether the settlement option meets personal interests, goals, and needs relative to collective interests, goals and needs;
- (m) Drafts the settlement agreement and orders necessary to effectuate the settlement (i.e., retirement orders);
- (n) Drafts the agreement sufficiently clearly to avoid disputes between the parties as to its interpretation; and
- (o) Represents client in uncontested divorce proceedings.

Comment

A Collaborative attorney has the duty to advise the client on the law and the role of the law and limitations of the law in the Collaborative process. Collaborative attorneys vary in how they give legal advice, depending on the practice group, familiarity of the attorneys with each other, issues in the process, and other considerations. Some practitioners have concluded that legal advice should primarily be provided in meetings including both parties and attorneys and that an attorney may also provide legal advice privately to that attorney's client provided that the attorney promptly informs the other attorney of the general substance of the advice. Other practitioners have concluded that they may privately discuss the law with their clients and the role and limitations of the law in the Collaborative process, but that they should first work out with the other Collaborative attorney how this should be done in a way to further the Collaborative process. For example, the two attorneys may discuss and decide to discuss their joint view of the legal issues in the case and agree on how the law will be presented. Other practitioners have used a combination of the choices above. In any event, it is critical that the two Collaborative attorneys discuss and agree at the beginning of the Collaborative matter how they will handle their obligation to give legal advice.

SECTION 3.2. RESPECT FOR THE OTHER ATTORNEY AND CLIENT. The Collaborative attorney recognizes a heightened requirement to be respectful at all times. A Collaborative attorney should not engage in conduct to embarrass or disparage the other attorney, the other party or any of the Collaborative professionals. The Collaborative attorney should advise the client at the outset of the Collaborative process concerning best communication practices to use during the Collaborative process, and, in particular, to avoid disparaging or negative remarks about the other party, attorney or the other Collaborative professionals in joint sessions and group emails. The Collaborative attorney should aspire to act in a calm, patient and courteous manner.

Comment

When emotions are high, respectful communications are often extremely difficult for clients. Engaging the services of at least one mental health professional is strongly urged to assist and support clients in being effective in their communications during Collaborative meetings and

throughout the process. Attorneys should make an effort to reframe and interact with the other party to build rapport and trust.

SECTION 3.3. MUTUAL COMMITMENT TO THE GOALS OF THE COLLABORATIVE PROCESS. Representation of a client in a Collaborative matter means the attorney, in good faith, believes the client is acting in a manner consistent with the tenets, goals and spirit of the Collaborative process. The Collaborative process is premised on principles of respect, integrity, transparency, full disclosure, and the like, and all participants in the Collaborative matter rely on the mutual and continued commitment to the Collaborative process.

Comment

It is impossible to assess with absolute certainty at the outset of a matter, whether a client is capable of acting in a manner consistent with the objectives of the Collaborative process. There is a risk that a client might be able to misuse the Collaborative process for purposes of delay or advantage over the other. By engaging in the Collaborative process, each attorney proceeds on a good faith basis in the Collaborative process unless and until there is reason to believe that a participant is acting in less than good faith. Examples of behavior of acting in less than good faith include, but are not limited to: the secret disposition of marital and divisible property, failure to disclose the existence or the true nature of assets, debts and/or obligations, ongoing emotional or physical abuse by either participant, secret preparation to engage in litigation while appearing to participate in a Collaborative process, failure to participate in the spirit of the Collaborative process, withholding a secret plan or intention to leave the jurisdiction of the court with the children, etc. If either Collaborative attorney discovers at any time during the Collaborative process that a client is acting in bad faith and counseling by that client's attorney does not remedy the issue such that the client acts in a manner consistent with the objectives of the Collaborative process, the Collaborative attorney should terminate the process. See Chapter 8 of these Protocols for more guidance on termination.

SECTION 3.04 ATTORNEY-CLIENT PRIVILEGE. Attorneys should be aware that, before a client signs the Collaborative engagement agreement with the attorney or Collaborative Participation Agreement (both of which permit sharing of the client's information within the Collaborative process), the attorney must preserve attorney-client privilege. During the process, a party has the right to revoke consent to share information and assert attorney-client privilege. If the party asserts privilege, the attorney must respect the privilege but, depending on the importance and materiality of the information withheld, if the client continues to withhold consent to share the information, the attorney may have to withdraw from the process. The attorney should advise the client that the client has an obligation as part of the Collaborative Process to disclose important and material information and, if the client chooses not to do so, the attorney may need to withdraw from the representation. Important and material information that is required to be disclosed should include information which either party might need to make an informed decision about each issue in dispute. The attorney should work with the party to anticipate short-term and long-term consequences of both alternatives: keeping the information secret or sharing the information. If the party chooses to continue to assert the privilege with respect to information the attorney deems important to share, the attorney must withdraw without revealing the reason.

Comment

The Collaborative attorney should advise the client that all statements made and work-product produced during the Collaborative conference are inadmissible in litigation; however, once the information is shared it is now known (i.e. “the cat is out of the bag”).

SECTION 3.5. PRIVATE COMMUNICATIONS WITH OTHER ATTORNEY.

(a) The Collaborative attorney recognizes the need to communicate, when necessary, privately with the other attorney. The Collaborative attorney should explain to the client that these communications are common and necessary, and are intended to assist in the Collaborative matter.

(b) The Collaborative attorney should brief with the other attorney before any joint meetings to, with the assistance of the professional team, set the agenda and to discuss how to make the meeting proceed as smoothly and efficiently as possible.

Comment

The content of communications between Collaborative attorneys is dramatically different from the type of communications between adversarial attorneys. Since the primary goal of joint meetings is to promote conflict resolution and settlement, Collaborative attorneys share their clients’ reactions to each other’s demeanor and communication styles, and discuss and promote effective communication. Collaborative attorneys should strategize together on the optimum timing to raise sensitive subjects and brainstorm techniques and approaches to assist both clients in navigating the Collaborative path.

SECTION 3.6. SHARING OF COMMUNICATIONS. With permission from the Collaborative attorney’s client, the Collaborative attorney should promptly forward to the other attorney client-to-client communications received that may require attention and discussion.

Comment

Communications between the parties received by one Collaborative attorney from the client should be promptly forwarded to the other attorney.

SECTION 3.7. ADDITIONAL OR SUBSTITUTE COLLABORATIVE ATTORNEY. An attorney who seeks to represent a client who is already represented by a Collaborative attorney or who was previously represented by a Collaborative attorney shall sign the Participation Agreement. If this is not promptly done, the other party may terminate the Collaborative matter.

CHAPTER 4

ENGAGEMENT OF NON-ATTORNEY COLLABORATIVE PROFESSIONALS

SECTION 4.1. ROLE OF COLLABORATIVE PROFESSIONAL. The Collaborative attorney acknowledges that the interests of the client may best be served by engaging a Collaborative professional to participate in the Collaborative matter. The participation of a Collaborative professional must be a joint decision of the parties and the attorneys.

SECTION 4.2. 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 attorney and the other Collaborative professional.

SECTION 4.3. DEFINING RESPONSIBILITY. The terms of engagement for the Collaborative professional must be in writing and clearly define the scope of responsibility in the Collaborative matter, such as attendance at meetings, communications with the attorneys, 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 STRUCTURE AND CORE ELEMENTS OF THE COLLABORATIVE PROCESS

SECTION 5.0. STAGES OF THE COLLABORATIVE PROCESS.

The Collaborative process consists of five discrete stages:

1. Defining 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 attorney 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.

SECTION 5.2. 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 attorneys assist 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 goals and interests.

Comment

The Collaborative process is premised upon the concept of interest-based negotiation. A Collaborative attorney is skilled in exploring the parties' interests (their respective goals, needs, values, priorities, concerns and fears) to understand why they desire a 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 either party. This knowledge increases the likelihood of settlement and offers opportunities for creative negotiation and problem solving. The value added is that the parties can then achieve what they perceive as their best possible outcome.

A skilled Collaborative attorney can help their respective client to recognize their interests by preparing for each meeting and its corresponding agenda. By the parties sharing their individual interests in the Collaborative meetings, they then brainstorm solutions for the larger overarching goals, such as the welfare of the children, the desire for a healthy restructured family, the need for financial security, etc., while problem-solving in a safe environment. The attorneys should endeavor to help reframe the parties' goals to ascertain common ground. The more common ground identified, the more likely the parties will settle their differences.

SECTION 5.3. GATHERING INFORMATION. Gathering, organizing and analyzing all relevant information is central to the Collaborative process. The Collaborative attorneys assist the clients in gathering documents, preparing schedules and locating and engaging appraisers, financial professionals, mental health professionals and other Collaborative professionals whose assistance would facilitate the gathering, organization and analysis of information related to the parties' financial condition and the needs of their children.

SECTION 5.4. 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 attorney should assist the clients in developing options, with the understanding that any settlement option proffered for consideration is ultimately the clients' responsibility. The Collaborative attorney must not participate in developing a settlement option that is false, misleading, contrary to public policy or that, in the attorney's opinion, would be abusive or neglectful of the children.

Comment

*Collaborative attorneys 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 **impose**, self-edit or pre-judge the options before the evaluation stage in the Collaborative process.*

SECTION 5.5. EVALUATION OF OPTIONS. When the parties are satisfied that all possible options have been developed, the Collaborative attorneys should then assist the clients in evaluating the options, analyzing how the options meet the clients' goals, and assist in determining whether an option is realistically achievable.

SECTION 5.6. NEGOTIATION OF SETTLEMENT. The focus of the final stage should be determining which options for settlement best serve both parties' interests and common goals. The ultimate goal of the process should be the achievement of what the parties perceive as the best possible outcome for each of them and their children. The goal, especially when the parties will have an ongoing relationship in the future, shall be to create long-term mutually beneficial results that will benefit both of the parties and, when applicable, their children. Upon negotiation of the settlement, the attorneys shall promptly draft all of the necessary documents to finalize the settlement.

Comment

Collaborative attorneys recognize that interest-based negotiation and creative problem 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 possible outcome in an efficient manner.

CHAPTER 6. COMMITMENT TO THE COLLABORATIVE LAW PROCESS

SECTION 6.1. INTEGRITY OF THE PROCESS. The objective of the Collaborative process is to achieve an ethical and enduring settlement for the clients. The Collaborative attorney should assist the client to develop alternatives for settlement that meet both the objectives of the client and the other party. The Collaborative attorney acknowledges that the client is ultimately responsible for the outcome of the Collaborative effort.

SECTION 6.2. HONESTY AND FULL DISCLOSURE. The Collaborative attorney recognizes that honesty and full disclosure of relevant information is critical to the successful outcome of the Collaborative matter and should assist the client in complying with the requirement to make a candid and complete exchange of all relevant and requested documents and information to the appropriate participants. The Collaborative attorney should explain to the client at the beginning of the process that both clients are required to make a full and complete disclosure to each other and that if the client refuses to make a full and complete disclosure, the Collaborative attorney will withdraw from further representation of the client.

Comment

A major paradigm shift for an attorney 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 and transparent 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 challenge to the attorney and client, both of whom have made a commitment to the Collaborative process. The appropriate minimum standard for disclosure should be: "Putting the shoe on the other foot, would my client need, expect or desire such information in attempting to make an informed decision?" Is the information appropriate for the occasion? Is the information so close to the matter at hand, that it cannot be ignored without a significant impact on the decision-making process?

SECTION 6.3. SHARING RECORDS BY AGREEMENT. The Collaborative attorneys and their clients shall agree to exchange and share documents using a listing decided upon both parties and dates in which they mutually agree upon the document(s) to exchange, who shall collect them, and when they will be shared. These procedures should be used to create an environment within which the participants feel secure and Discovery formalities used in traditional litigation will be unnecessary.

SECTION 6.4. CORRECTION OF MISTAKES. The Collaborative attorney shall not deceive or intentionally mislead the other Collaborative attorney or any other participant in the Collaborative process. The Collaborative attorney shall not take advantage of known mistakes, errors of fact or law, miscalculations, or other inconsistencies. The Collaborative attorney must disclose such errors and seek to have them corrected as quickly as possible.

Comment

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

SECTION 6.5. SAFE ENVIRONMENT. The Collaborative attorney should strive to provide a safe environment for the Collaborative matter.

Comment

The Collaborative attorney acknowledges that a safe environment necessarily involves the following principles:

- (a) Refraining from insistence on acceptance of conditions precedent to entering into the Collaborative process.*
- (b) Encouraging creative problem-solving and discouraging positional bargaining.*
- (c) Speaking directly with participants about any perceived non-Collaborative behavior and attempting to remedy the same in a constructive manner.*
- (d) Using non-defensive methods of hearing criticism.*
- (e) Exercising patience at all times.*
- (f) Avoiding the use of pressure, threats or deadlines.*
- (g) Acknowledging and respecting the needs of both parties regarding the timeline and pace of the process.*
- (h) Avoiding offensive or provocative conduct, such as cross-examination, and promptly reminding each other that such behavior is destructive to the process.*
- (i) Avoiding assessment of blame and use of judgmental language.*

(j) *Avoiding surprises.*

(k) *Adhering to agendas.*

(l) *Avoiding unilateral actions.*

(m) *Avoiding unsolicited legal opinions in joint meetings.*

(n) *Encouraging the joint engagement of other Collaborative professionals, including financial professionals, mental health professionals, mediators, clergy and others for assistance in the resolution of the matter.*

(o) *Urging the 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.)*

(p) *Training non-attorney employees to be knowledgeable about these Protocols.*

SECTION 6.6. CIVILITY AND PREPARATION. The Collaborative attorney should strive at all times to be courteous, punctual, and prepared for meetings. The Collaborative attorney should strive to schedule meetings free from outside distractions.

Comment

It is advisable to schedule time before each Collaborative meeting for last-minute preparation and review of communication protocols with the client and to meet with the other attorney to discuss the agenda items. Time should also be allocated immediately after each joint meeting for separate debriefings with the client, the other Collaborative attorney and the other Collaborative professionals. Private space should always be made available for the other attorney and client for their pre- and post-meeting conferences.

SECTION 6.7. EFFICIENT COMMUNICATIONS. The Collaborative attorney should encourage efficient communications, especially by the use of e-mails between the parties, attorneys, paralegals, Collaborative professionals, and other participants to schedule meetings, share documents, and relay necessary information.

SECTION 6.8. TECHNIQUES TO AVOID IMPASSE.

(a) A Collaborative attorney 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 attorney should advise the other attorney of this prospect.

(b) Before terminating the matter, the Collaborative attorneys should explore deadlock-breaking techniques such as partial settlement, mediation, having one or both clients interview with litigation attorney, and other techniques.

Comment

Before terminating a Collaborative matter, it may become advisable for a party to have a consultation with a litigation attorney. This is one deadlock-breaking technique that should be a last resort and for the purposes of ensuring that a client is fully aware of the consequences of terminating the Collaborative process and not for the purpose of securing an opinion to use as a threat or other tactic in the Collaborative process. Resorting to this measure requires care and consideration on a case-by-case basis as a last resort and suggests the attorney and client revisit the terms of the Collaborative Participation Agreement to remember the intent and rules of the process.

SECTION 6.9. SUBSEQUENT LITIGATION. No Collaborative attorney shall represent his or her Collaborative client in a subsequent litigated matter against the other party per North Carolina General Statutes.

CHAPTER 7 COLLABORATIVE PROCESS EXPECTATIONS

SECTION 7.1. MEETINGS. Joint meetings are necessary to facilitate the Collaborative process and to achieve a successful and enduring outcome. The Collaborative attorney should emphasize to the client the importance of attending all meetings and participating in good faith. Although face-to-face meetings are preferred, circumstances may arise where other arrangements are necessary and can be used with the consent of all participants.

SECTION 7.2. SCHEDULING. The Collaborative attorney acknowledges the need to meet regularly with the clients and the other Collaborative attorney at mutually convenient times and locations. Before a joint meeting is adjourned, it is important to discuss scheduling the next meeting(s).

Comment

The meeting arrangements should include provisions for:

- (a) Preparation of technology need (Zoom, computers, etc.) prior to the start of the meeting to avoid time-consuming delays.*
- (b) Rotation of meeting sites unless the parties desire otherwise.*
- (c) Seating arrangements that avoid a confrontational atmosphere with consideration being given to having the parties sit on the same side of the table or using a round table.*
- (d) Private space for the guest attorney and client to meet before, during and after the joint meeting.*
- (e) Preparation in advance and distribution of information and documents to use at meetings to avoid time-consuming duplication during the meeting.*

(f) *When appropriate, personal computers to allow access to up to date account information.*

(g) *A hospitable venue for the guest attorney and client (providing, as appropriate, food, beverages, and access to phone, duplication, internet, pens, paper, and calculators).*

(h) *Availability of the client and attorney calendars at every joint meeting.*

SECTION 7.3. AGENDA.

(a) A written agenda prepared in advance by the Collaborative attorneys or other Collaborative professionals in consultation with the clients should be used to facilitate each joint meeting. 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 should be encouraged to schedule agenda items in advance through their attorneys. The Collaborative attorney should discourage raising issues not on the agenda to avoid the element of surprise.

(b) The agenda of the first joint meeting should include the parties and attorneys signing the Participation Agreement.

Comment

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

Subsection (b) provides for a high level discussion of the Participation Agreement. This makes clear to the parties the seriousness of the commitment to the Collaborative process. The attorney should share and discuss the Participation Agreement with the client in advance and in detail to answer questions and concerns prior to the joint meeting.

SECTION 7.4. MEETING SUMMARY. A summary of working agreements and action items should be prepared and distributed in a timely manner after each meeting by a designated Collaborative attorney or by another mutually chosen Collaborative professional.

Comment

The meeting summary should 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. The Collaborative attorneys, the parties and

the other Collaborative professionals should receive a copy of the meeting summary within forty-eight (48) hours of the meeting.

SECTION 7.5. PRE-BRIEF. The Collaborative attorney should meet with the client, other attorney and team members as appropriate, prior to a joint meeting to discuss the agenda to obtain any further insight or developments as to the agenda item(s) since preparing the agenda and set the tone for the upcoming meeting.

Comment

There may be instances where a pressing issue or issue of concern arises between when the agenda is drafted and the meeting occurs. In this instance, it is highly recommended the attorney reach out to the other attorney/Collaborative professional(s) in advance to discuss how to approach and work through the issue.

SECTION 7.6. DE-BRIEF. The Collaborative attorney should meet with the client, other attorney and team members as appropriate, after a joint meeting to provide the client, other attorney and team members as appropriate, an opportunity to reflect on the meeting, to discuss open action items and to review next steps.

SECTION 7.7. CONSULTANTS. Third-party neutral consultants (i.e. appraiser, mortgage broker, etc.) may be consulted during the Collaborative process when the Collaborative attorneys mutually agree a third party neutral will assist the parties and/or the attorneys.

(a) **JOINT ENGAGEMENT.** Unless the parties agree otherwise a neutral consultant is to be retained jointly and in writing. Except as provided in (b), any report and related work papers of the consultant, including all documents submitted to the consultant, should be made equally available to the parties and the attorneys, whether the assistance was rendered for one or both parties.

(b) **NEUTRALITY.** The Collaborative attorney should inform the consultant that he or she is being engaged jointly in a Collaborative process and should use care to avoid the appearance of bias. The neutral expert or advisor should be instructed to disclose any reason that may exist that could cause someone to question his or her impartiality. The scope and terms of the engagement of the expert or advisor should be in writing, signed by the parties and the consultant. The consultant should be instructed to be available for discussions with one or both parties.

(c) **EFFECT OF OPINION OR FINDING.** The opinion or finding of a consultant or advisor in a Collaborative matter is not binding on the parties, unless the parties agree in writing to be bound by such opinion or finding.

(d) **TESTIMONY BARRED.** Should the dispute become a litigated matter, the consultant or advisor may not testify in the litigation unless the parties and the expert or advisor otherwise agree in writing.

(e) **SURVEILLANCE.** Neither the Collaborative attorney 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.

SECTION 7.8. SETTLEMENT DOCUMENT

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

(b) The settlement document should be circulated between the Collaborative attorneys, and the Collaborative professionals, if appropriate, for their comments, corrections, and revisions before circulating the settlement document to the clients. Review and comment should continue until the Collaborative attorneys are in agreement with the settlement document and then the clients agree to the terms of the settlement document.

(c) The parties may mutually agree to sign one or more partial settlement documents to memorialize agreements during the Collaborative process.

CHAPTER 8

WITHDRAWAL AND TERMINATION OF THE COLLABORATIVE PROCESS

SECTION 8.1. WITHDRAWAL. Subject to the terms of that attorneys' retainer agreement, a Collaborative attorney may withdraw from a Collaborative matter as in any other matter. The Collaborative attorney should assist the successor Collaborative attorney in becoming familiar with the matter.

SECTION 8.2. SUCCEEDING ANOTHER COLLABORATIVE ATTORNEY. A Collaborative attorney who is succeeding another Collaborative attorney must sign the Participation Agreement. If this is not promptly done, the other party may terminate the Collaborative matter.

SECTION 8.3. TERMINATION OF THE PROCESS.

(a) The Collaborative attorney should explain to the client that the Collaborative process is voluntary and may be terminated by the client at any time and for any reason.

(b) The Collaborative attorney should seek to obtain authority in the retainer agreement to terminate the Collaborative process on behalf of the client, without giving a reason, if the attorney discovers that the client has violated or proposes to violate the Participation Agreement in a manner that would compromise the integrity of the process.

(c) The Collaborative attorneys should seek to incorporate in the Participation Agreement authority to terminate the Collaborative process on behalf of their respective clients, without giving a reason, if either attorney discovers that a client has violated, or proposes to violate the Participation Agreement in any 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 attorney.

Comment

During the course of the Collaborative process, a circumstance may occur in which the client refuses to honor commitments previously made, yet asserts the attorney-client privilege to prohibit the Collaborative attorney from disclosing the violation. Under these circumstances, the attorney must withdraw.

The Collaborative process cannot proceed without both parties being represented by a Collaborative attorney. If a party chooses not to be represented by a Collaborative attorney, the process cannot proceed consistent with the basic tenets of the Collaborative process and the process must terminate.

SECTION 8.4. TRANSITION TO LITIGATION ATTORNEY. A Collaborative attorney may assist the litigation attorney in becoming familiar with the matter. The litigation attorney cannot under any circumstances be an attorney in the same firm as the Collaborative attorney. The Collaborative attorney must cease further work on the matter once the litigation attorney has accepted the matter.

**CHAPTER 9
MISCELLANEOUS**

SECTION 9.1 N.C.G.S. 50-70, *et. seq.* [Article 4. Collaborative Law Proceedings](#)

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