ADOPTED BY THE BOARD OF DIRECTORS

TEXAS COLLABORATIVE LAW COUNCIL

September, 2004

Name of Council changed in January 2009 to:

GLOBAL COLLABORATIVE LAW COUNCIL

Revised periodically by the Council,
based upon comments and suggestions received
(*Last revision, November, 2010)*

PROTOCOLS OF PRACTICE FOR COLLABORATIVE LAWYERS

GLOBAL COLLABORATIVE LAW COUNCIL

2016 BOARD OF DIRECTORS

ORIGINAL DRAFTING COMMITTEE (2004)

INTRODUCTION

Global Collaborative Law Council ("Council") is a Texas non-profit, 501(c)(3) corporation, organized in August, 2004. The mission of the corporation is to promote the ethical and professional practice of the collaborative process for resolving civil disputes, to train lawyers and other professionals in the use of the process, to educate the public as to the benefits of the process, and to preserve the integrity of the process.

The Council is grateful to the Collaborative Law Institute of Texas, Inc. and its drafting committee members for sharing its Protocols of Practice for Collaborative Family Lawyers, which the Institute has adopted for use by collaborative lawyers in family law matters in the State of Texas.

The Protocols of Practice for Collaborative Lawyers are designed to provide guidance and assistance to lawyers using the collaborative process to resolve civil disputes. In drafting these protocols, the Council researched the use of the collaborative process in civil disputes in several areas of the United States and in Canada.

The protocols are to be used on a voluntary basis as a guideline, by lawyers who are trained in the collaborative process. It would be inappropriate to simply rely on these protocols without careful consideration of how they may apply to a specific matter. The protocols address the fundamentals of the process, the need to preserve its integrity, drafting considerations, the relationships between the lawyer, the client, experts, and other lawyers, and, if necessary, withdrawal, termination of the process, and transition to a litigation lawyer.

Some of the protocols are designed to deal with issues commonly encountered in the collaborative process and should be viewed as strong admonitions. Other protocols and commentaries are merely descriptions of good practices. The Council hopes the collaborative lawyer finds the protocols useful and that the practicing bar embraces the protocols as the norm for use of the collaborative process in resolving civil disputes.

The collaborative process is another tool in the Alternative Dispute Resolution tool box. The Council is joining with collaborative lawyers around the country who are seeking to expand the use of the process in civil disputes. The Council has developed training programs to train lawyers and other professionals in the use of the collaborative process for resolving civil disputes, and is taking steps to heighten public awareness of the benefits of the process.

The Protocols of Practice for Collaborative Lawyers and a form of Participation Agreement were approved by the Board of Directors of the Council in 2004. Revisions to the Protocols and Participation Agreement were approved by the Council in November, 2005 and in August, 2007. Lawyers are urged to use the protocols and participation agreement as guidelines to adapt to disputes in specific areas of law, and to provide any member of the drafting committee with comments and suggestions. The Council has made and will continue to make revisions and add commentaries based upon the comments and suggestions received.

Protocols of Practice for Texas Collaborative Lawyers

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CHAPTER 1.
GENERAL PROVISIONS

SECTION 1.01. DEFINITIONS.

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

(b) "Collaborative lawyer" means a lawyer who represents a client in the collaborative process.

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

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

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

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

SECTION 1.02. APPLICATION OF PROFESSIONAL RULES. These protocols are subordinate to the rules of professional conduct governing the lawyer.

Comment

A member of the State Bar of Texas is subject to the Texas Disciplinary Rules of Professional Conduct. These protocols must be interpreted in a manner consistent with those Rules.

SECTION 1.03. COMPLIANCE WITH PROTOCOLS.

(a) These protocols are designed to be used by lawyers and parties on a voluntary basis. The Global Collaborative Law Council ("Council") strongly recommends that its members and other collaborative lawyers follow, in good faith, these protocols. A Council member lawyer who, during the collaborative process, uses tactics to abuse or evade the collaborative process, or condones or encourages such tactics by the client, is subject to disciplinary action by the Council.

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

Comment

There are several examples where lawyers are urged to comply with such voluntary or aspirational protocols to elevate standards of practice: the Texas Lawyer's Creed; Texas Mediator Credentialing Association; State Bar of Texas ADR Section Ethical Guidelines for Mediators; AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.

SECTION 1.04. APPROVED FORMS. The Council urges use of the Participation Agreement and Addendum adopted by the Council. Use of these and other standardized forms in the collaborative process assists in 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.
THE COLLABORATIVE LAWYER-CLIENT RELATIONSHIP

SECTION 2.01. INFORMING THE CLIENT. In the initial consultation, the collaborative lawyer should inform prospective clients about all legal alternatives for resolving the client's dispute, including the collaborative process, other alternative dispute resolution methods, and litigation. The lawyer should include a discussion of privacy, risk, harm, delay, and cost when presenting the alternatives.

Comment

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

The lawyer is wise to counsel the client on the differences between the collaborative process and handling a case on a "settlement track" or "cooperatively". The biggest difference between cooperative/settlement track cases and collaborative cases is that the collaborative process is highly structured with a detailed written agreement (Participation Agreement), signed by all the parties, their counsel, and retained experts. The Participation Agreement contains the "ground rules" for the process and a specific road-map to guide the parties to resolution. The structure of the ground rules and the process itself create safety and less risk of being deceived or taken advantage of. A strategic difference is that in a collaborative case the lawyers and parties do not have to balance the strategic risk of attempting to settle with having to or wanting to litigate. In cooperative/settlement track cases, the lawyer still needs to be concerned with trial preparation, trial strategy, and posturing in the event of a later trial. In a collaborative case, 100% of the effort is utilized in trying to settle, and the options for settlement are developed by the parties and their lawyers together in face-to-face meetings. In cooperative/settlements track cases, the lawyers and/or parties may easily get frustrated with the settlement efforts, shut them down, and announce they are going to court. The

collaborative process, by its very nature, makes it easier for the parties to negotiate through their differences and creates incentives to keep the participants working to avoid impasse.

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

SECTION 2.02. SUITABILITY OF THE DISPUTE FOR THE COLLABORATIVE PROCESS.

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

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

Comment

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

1. *The lawyer's willingness to handle the client's matter;*
2. *The lawyer's ability to handle the matter;*
3. *Availability of outside resources (for example, experts or advisors) to supplement the lawyer's skills; and*
4. *The possibility of co-counsel or referral to a more experienced collaborative lawyer. The collaborative lawyer will need to obtain written waiver of the attorney-client privilege prior to discussing the dispute with other lawyers.*

Situations may arise when a collaborative lawyer must withdraw for reasons that have nothing to do with the representation of or conduct of a party in the process, e.g., illness, accident, relocation, etc. If the parties agree, the unrepresented party may proceed in the process without collaborative counsel. This may be an important option if the parties have already reached certain agreements and do not want the process to terminate. Whether the other parties and their lawyers will agree to continue the process when a party becomes unrepresented will depend on the nature of the relationship of the parties, the trust and confidence the unrepresented party has earned in dealing with the other parties, and how far the parties have come in the process when the withdrawal occurs.

Any client considering continuing in the process without legal counsel should be advised in writing by the withdrawing lawyer to take any proposed final settlement agreement to a collaborative lawyer outside of the dispute to explain the terms and legal implications of the agreement to the client before the client signs the settlement agreement.

SECTION 2.03. DILIGENT REPRESENTATION OF CLIENT.

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

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

(c) The collaborative lawyer should at all times be faithful in the representation of the client and zealously represent the client in pursuit of the client's stated interests and goals. Faithful representation includes informing the client about the law and its application to the client's matter on a continuing basis, preserving confidential communications, and assisting the client to develop approaches, collaboratively with the other participants, to resolve the dispute without resort to adversarial proceedings.

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

CHAPTER 3.
THE COLLABORATIVE LAWYERS' RELATIONSHIP

SECTION 3.01. RESPECT FOR THE OTHER LAWYER AND CLIENT. The collaborative lawyer recognizes the heightened requirement to be respectful at all times to the other parties and lawyers. Violation of this expectation jeopardizes the prospects of a successful settlement and causes distrust among the participants. A collaborative lawyer should not engage in conduct to embarrass or disparage the other parties or their lawyers. The collaborative lawyer should advise the client to avoid disparaging or negative remarks about other participants in the collaborative process.

Comment

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

SECTION 3.02. MUTUAL RELIANCE. Representation of a client in the collaborative process means the lawyer, in good faith, believes the client will act and is acting in a manner consistent with the objectives of the collaborative dispute resolution process. The collaborative

lawyer acknowledges that other participants in the collaborative process are relying upon this representation.

Comment

It is impossible to assess with absolute certainty whether a client is capable of acting in a manner consistent with the objectives of the collaborative process. If the collaborative lawyer discovers that the client is acting in bad faith, and counseling by the lawyer does not remedy the problem, the collaborative lawyer should terminate the process. See Chapter 14 of these protocols.

SECTION 3.03. PRIVATE MEETINGS WITH OTHER LAWYERS.

(a) The collaborative lawyer recognizes the need, on occasion, to meet in private with the other participating lawyers to address issues related to the dispute. The collaborative lawyer should explain to the client that such meetings are commonplace and are intended to assist in the collaborative process.

(b) The collaborative lawyer should confer with the other lawyers to set the agenda.

Comment

The content of communications between collaborative lawyers is dramatically different from the types of communications between adversarial lawyers. Since the primary goal of the 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 confer on the optimum timing to raise issues and to develop settlement.

SECTION 3.04. SHARING OF COMMUNICATIONS. The collaborative lawyer recognizes that clients in the collaborative process may or may not choose to communicate directly with each other. A collaborative lawyer should not discourage direct client communications so long as the parties have agreed to communicate and the communications assist the collaborative process. The collaborative lawyer should forward promptly to the other lawyers all client to client communications received.

SECTION 3.05. ADDITIONAL COLLABORATIVE LAWYER. A collaborative lawyer who seeks to participate on behalf of a client who is already represented by a collaborative lawyer shall sign the Participation Agreement; if this is not promptly done, any party may terminate the collaborative process.

SECTION 3.06. IN-HOUSE COUNSEL. In-house counsel may serve as a collaborative lawyer for their employers, with the informed consent of all parties in the collaborative process.

Comment

Potential conflicts of interests exist when in-house counsel represent their employers in the collaborative process. All in-house counsel who intend to serve as collaborative lawyers in the collaborative process have a duty to fully disclose their employment relationship prior to signing participation agreements, so that all parties can make informed decisions regarding their

acceptance of the collaborative process when in-house counsel seeks to participate as a collaborative lawyer.

CHAPTER 4.
THE COLLABORATIVE LAWYER - EXPERT RELATIONSHIP

SECTION 4.01. ROLE OF EXPERTS. The collaborative lawyer acknowledges that the interests of the client may best be served by engaging experts to participate in the collaborative process. The participation of retained experts must be a joint decision of the parties and the lawyers, unless otherwise agreed.

SECTION 4.02. MULTIDISCIPLINARY CONSIDERATIONS. The terms of the engagement of experts in the collaborative process must be consistent with the rules of professional conduct governing the lawyer and the expert.

SECTION 4.03. DEFINING RESPONSIBILITY. The terms of the engagement of experts must be in writing for all experts and clearly define their scope of responsibility in the collaborative process, including such matters as attendance at meetings; communications with the parties, lawyers, witnesses; and their relationship with other experts who may be engaged in the matter.

Comment

See Chapters 10, 11 and 12 of these protocols for specifics on all experts.

CHAPTER 5.
PROTECTING THE INTEGRITY OF THE COLLABORATIVE PROCESS

SECTION 5.01. INTEGRITY OF THE PROCESS. The objective of the collaborative process is to achieve an ethical and enduring resolution for the clients' dispute. The collaborative lawyer should assist the client to develop alternatives for settlement that meet both the objectives of the client and those of all other parties. The collaborative lawyer acknowledges that the client is responsible for the ultimate outcome of the collaborative effort.

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

Comment

A major paradigm shift for both lawyers and clients entering the collaborative process is called for in meeting the requirements of full disclosure of relevant or requested documents and information. This requirement is the antithesis of litigation practice but the cornerstone of the safe environment sought to be created by the collaborative process. If the documents and information are requested, they must be delivered or divulged.

Should a dispute arise regarding the relevance or privileged nature of requested documents or information, the parties may engage a retained expert to conduct an in-camera inspection and give an opinion.

"Relevant information" not specifically requested presents a substantial challenge to the lawyer and client who have made a commitment to the collaborative process. In our "don't ask, don't tell" society, the disclosure of unrequested but relevant information contradicts customary and usual practices. To determine what information is relevant, the lawyer may ask the client: "Putting the shoe on the other foot, would you need, expect or desire such information in attempting to make an informed decision?" Consider the following definitions of "relevant": (a) having significant and demonstrable bearing on the matter at hand; (b) tending to prove or disprove the matter at issue or under discussion; and (c) implying a traceable, significant, logical connection. Phrased differently: Is the information appropriate for the occasion? Is the information so close to the matter at hand, that it cannot be ignored without a serious impact on the decision making process?

The parties may negotiate the manner and method of production.

SECTION 5.03. CONFIDENTIALITY. The commitment to confidentiality extends to oral or written communications relating to the subject matter of the dispute made by the parties, their lawyers, and other participants in the collaborative process, whether before or after the institution of formal adversarial proceedings.

Comment

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

SECTION 5.04. FORMAL DISCOVERY BY AGREEMENT. To maintain a participant's trust in the safety of the process, the collaborative lawyers and their clients may agree to engage in formal discovery procedures such as sworn affidavits, written interrogatories, or depositions, but these procedures should be used sparingly. If the lawyer makes every effort to create an environment in which the participants feel secure, such formalities generally will be unnecessary.

SECTION 5.05. CORRECTION OF MISTAKES. The collaborative lawyer shall identify known mistakes, errors of fact or law, miscalculations and other inconsistencies and correct them for all participants.

Comment

Overcoming the win-lose, one-upmanship mentality of litigation, requires the greatest paradigm shift for the lawyer. This critical shift in thinking is the bedrock standard required by this Protocol, though it is made more difficult by the television/movie portrayal of the litigation process. However, strict adherence to the protocols in this section is essential to the enduring integrity of the parties' agreement and to the success of the collaborative process.

It requires more than simply avoiding fraudulent and intentionally deceitful conduct. It requires that misunderstandings not be relied upon in the hope that they will benefit the client.

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

Comment

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

1. *Refraining from insistence on acceptance of conditions precedent to entering into the collaborative process.*
2. *Encouraging creative problem-solving and discouraging positional bargaining.*
3. *Speaking directly with participants about any perceived non-collaborative behavior and attempting to remedy it in a constructive manner.*
4. *Using non-defensive methods of hearing criticism and non-offensive methods of offering criticism.*
5. *Exercising patience at all times.*
6. *Avoiding the use of pressure, threats, or deadlines.*
7. *Acknowledging the process can only progress at the pace of the slowest participant.*
8. *Avoiding offensive or provocative conduct, such as cross-examination, and promptly reminding participants that such behavior is destructive to the process.*
9. *Avoiding assessment of blame and use of judgmental language.*
10. *Avoiding surprises.*
11. *Adhering to agendas.*
12. *Avoiding unilateral actions.*
13. *Avoiding unsolicited legal opinions in a meeting of all the participants in the collaborative process.*
14. *Encouraging the joint engagement of mediators, arbitrators and other professional consultants for assistance in resolution.*
15. *Urging use of language that encourages the speaker to speak in the first person (I feel, I believe, etc.) and avoiding speech in the second person (you know, you failed, you always, you never, etc.).*
16. *Training the lawyer's staff in the collaborative process and the protocols.*

SECTION 5.07. CIVILITY AND PREPARATION. The collaborative lawyer should strive at all times to be courteous, punctual, and prepared for meetings. The collaborative lawyer should strive to schedule meetings free from outside distraction.

Comment

It is usually advisable for the lawyer to schedule time before each collaborative meeting for last-minute preparation with the client, and to meet with other lawyers to discuss any last-minute agenda items. Time should also be allocated immediately after the collaborative meeting for separate debriefings with the client and the other collaborative lawyers. Private space should always be made available for lawyers and clients for their pre- and post-meeting conferences.

SECTION 5.08. EFFICIENT COMMUNICATIONS. The collaborative lawyer should encourage open communications, especially by use of e-mail and fax, among the clients and lawyers to schedule meetings, share documents, and relay procedural information.

Comment

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

SECTION 5.09. PROFESSIONAL FEES. The agenda for the first meeting should address payment of lawyers' fees. When a decision is made to engage a neutral expert, the parties and their lawyers should address payment of the expert's fees. At any subsequent meeting, the status of fees is a legitimate agenda item.

Comment

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

CHAPTER 6.
FUNDAMENTALS OF THE COLLABORATIVE PROCESS

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

(a) Determining the clients' goals and interests;
(b) Information gathering;
(c) Development of settlement options;
(d) Evaluation of the options; and
(e) Negotiation of the settlement.

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

SECTION 6.02. DETERMINATION OF THE PARTIES' GOALS AND INTERESTS.

The first and most important stage of the collaborative process is defining the parties' goals and interests. The collaborative lawyers assist the parties in differentiating between their bargaining

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

Comment

The collaborative process is based on the concept of interest-based negotiation. A collaborative lawyer needs to be skilled in exploring the parties' interests (their respective goals, needs, values, priorities, and concerns) in order to understand why they desire any particular option. The fleshing out of interests leads to the recognition of common ground as well as those matters that are of special significance to the parties. An understanding of the parties' interests increases the likelihood of settlement and offers opportunities for creative trading and problem-solving. The value added is that the parties can then achieve their best possible 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, which may include the desire to maintain ongoing relationships, the need for financial stability, and the desire to resolve the dispute in a safe environment. "Micro" goals are simply options or ways to achieve "macro" goals. The lawyers' task is to help re-frame the parties' "micro" goals to the "macro" level in order to ascertain common ground. As small agreements are made, common ground develops. The more common ground identified, the more likely the parties will be to settle their differences.

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

SECTION 6.03. INFORMATION GATHERING. Gathering, organizing, and analyzing all relevant information are central to the collaborative process. The collaborative lawyer assists the client in these tasks.

Comment

Collaborative lawyers are encouraged to organize information in duplicate notebooks prepared for all participants with common indexing for quick reference to information.

SECTION 6.04. DEVELOPMENT OF SETTLEMENT OPTIONS. Upon completion of the exchange and organization of all relevant information, the parties shall propose and develop all possible options for settlement of the issues in face-to-face meetings. The collaborative lawyers should assist the clients in developing such options, with the understanding that any option proffered for consideration is ultimately the client's responsibility. The collaborative lawyer must not participate in developing a settlement option that is false, misleading, unlawful, or contrary to public policy.

Comment

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

SECTION 6.05. EVALUATION OF THE OPTIONS. When the parties are satisfied that all possible options have been proposed, the collaborative lawyers should assist the clients in evaluating the options, analyzing how the options meet the clients' interests and goals, and determining whether an option is realistically achievable.

Comment

If the parties agree to do so, the parties may in a joint session, compare the outcome in any option with the possible result if the matter were to be litigated. Otherwise, such evaluation should be shared with the client only in private consultation.

SECTION 6.06. NEGOTIATION OF THE SETTLEMENT. The focus of the final stage should be determining which options for resolution best serve the parties' interests and common goals. The ultimate goal of the process should be the achievement of the best possible outcome for the parties. The parties, with assistance of the lawyers, should fashion the terms of the agreement, and, upon resolution of all issues, the lawyers shall promptly draft all of the necessary documents to finalize the settlement.

Comment

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

SECTION 6.07. IMPASSE AVOIDANCE TECHNIQUES.

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

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

SECTION 6.08. FUTURE ADVERSARIAL MATTERS. After conclusion of the collaborative process, whether by settlement or termination, no collaborative lawyer, nor any lawyer associated in the practice of law with the collaborative lawyer, shall serve as a litigation lawyer in the dispute, or in any other adversarial proceeding among any of the parties to the dispute.

Comment

The parties to a collaboration will not feel secure voluntarily disclosing information under the full and open disclosure requirements of the Participation Agreement unless they are completely assured that the collaborative lawyers, and their associates in practice to whom the knowledge is automatically imputed, will not later use that information against them. An attempt to establish an

impenetrable barrier between the collaborative lawyer and other lawyers in the same practice is not adequate to insulate the other lawyers.

To protect the integrity of the collaborative process, it is imperative that the collaborative lawyer, and any lawyer associated in the practice of law with the collaborative lawyer, not serve as a litigation lawyer for the client in the dispute or as a litigation lawyer in any other adversarial proceeding among any of the parties. This requirement may not be modified.

CHAPTER 7.
MEETINGS AND SCHEDULING

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

Comment

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

SECTION 7.02. SCHEDULING AND ARRANGEMENTS. Meetings of all parties and lawyers should be scheduled at mutually convenient times. Meetings should not be adjourned without scheduling at least one subsequent meeting, whenever possible.

Comment

The meeting arrangements should include provisions for:

1. *Rotation of meeting sites unless the parties desire otherwise.*
2. *Seating arrangements that avoid a confrontational atmosphere, with consideration being given to using a round table.*
3. *Private space for the guest lawyer and client to meet before, during and after the meeting.*
4. *A hospitable venue for guest lawyer and client (providing, as appropriate, snacks, beverages, and access to phone, fax, duplication, internet, pens, paper, and calculators).*
5. *Preparation in advance and distribution of multiple hole-punched copies of relevant documents to use at meetings.*
6. *Availability of client and lawyer notebooks and calendars at every meeting.*

CHAPTER 8.
AGENDAS AND MINUTES

SECTION 8.01. AGENDA FOR MEETINGS.

(a) A written agenda prepared and distributed in advance by the collaborative lawyers in consultation with their respective clients should govern each meeting. The parties should be encouraged to schedule agenda items in advance through their lawyers. The collaborative lawyer should discourage raising issues in the meeting which are not on the agenda, to avoid the element of surprise. Matters that arise during a meeting that are not on the agenda should be deferred until the end of the meeting or placed on the next meeting's agenda unless the parties agree otherwise.

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

Comment

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

Subsection (b) provides for reading the Participation Agreement to make clear the seriousness of the proceeding and to permit discussions that may lead to changes to the Participation Agreement.

SECTION 8.02. MINUTES. Minutes should be prepared after each meeting by a designated collaborative lawyer and distributed to all participants in a timely fashion.

Comment

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

CHAPTER 9.
LEGAL DOCUMENTS AND PROCEEDINGS

SECTION 9.01. PENDING LAWSUIT. While the collaborative process may be initiated whether or not a lawsuit is pending, there may be situations where a party needs to file suit before signing the Participation Agreement, such as to fix the venue, to toll limitations, to preserve causes of action or defenses, or to obtain injunctive relief.

Comment

In a prospective collaborative matter, care should be taken that the filing of a suit is not done in such a manner or at such a time as to alienate other parties from consideration of the process. If a suit has been filed, options should be discussed, such as filing only pleadings to preserve causes of action, defenses, or establish certain extraordinary relief. Pleadings should only be filed when deemed necessary to preserve the legal rights of the parties.

SECTION 9.02. NOTICE TO THE COURT. When a court proceeding is pending, the parties should file a joint motion to advise the court that the parties have signed a Participation Agreement, and request that the court abate the court action while the parties are engaged in the collaborative process. The collaborative lawyers should cooperate to ensure that any required status reports are timely filed with the court.

SECTION 9.03. NECESSARY ORDERS. The collaborative lawyer recognizes that in some situations court orders may be necessary. If a party desires the entry of a court order, the terms of such order are to be negotiated in a collaborative manner, and the order is to be presented to the court as an agreed order.

Comment

Efforts are underway to include the collaborative process in the Texas Civil Practice and Remedies Code. A bill will be filed in the 2007 Session of the Texas Legislature, outlining the collaborative law procedures and requiring a mandatory abatement of a pending lawsuit for a specified period of time while the parties are engaged in the collaborative process.

CHAPTER 10.
RETAINED EXPERTS

SECTION 10.01. JOINT ENGAGEMENT – RETAINED EXPERTS. Unless the parties agree to separately retain neutral experts, the parties will jointly retain neutral experts by written agreement. Such experts are considered retained experts. The reports and work product of the retained experts, including all documents submitted to the retained experts, should be made equally available to the parties and the collaborative lawyers.

SECTION 10.02. NEUTRALITY. The retained expert should use care to avoid the appearance of bias. The retained expert should be instructed to disclose any reason that may exist that would cause a question about the individual's impartiality. Scope and terms of the engagement should be in writing, signed by the participants and the retained expert. The retained expert should be advised on the need to be available for discussion of the opinions or findings with the parties. All retained experts must sign a Retained Expert Participation Agreement.

SECTION 10.03. EFFECT OF OPINION OR FINDING. The opinion or finding of a neutral expert engaged in the collaborative process is not binding on the parties, unless the parties agree in writing to be bound by such opinion or finding.

Comment

A hallmark of the collaborative law process is that the parties do not use adversarial experts to counter each other's positions. Instead, the parties seek the assistance of unbiased, neutral

experts whom the parties engage jointly. Parties may occasionally agree in writing to engage retained experts separately. However, separately engaged retained experts are subject to full disclosure to the parties, and their work product and opinions are available to all parties and lawyers as if they were jointly retained experts.

SECTION 10.04. WORK PRODUCT AND OPINIONS OF RETAINED EXPERTS. A retained expert's work product, opinions, mental impressions, and the facts upon which they are based are available to all parties and their lawyers in the collaborative process. A retained expert is free to communicate with the parties, their lawyers, and other retained experts. All information provided to a retained expert by a party must be provided to the other parties. However, a retained expert's work product, opinions, mental impressions and the facts on which they are based are not discoverable and are inadmissible in any adversarial proceeding resulting from the dispute, or in any other adversarial proceeding among any of the parties.

SECTION 10.05. RETAINED EXPERTS MAY NOT TESTIFY. Retained experts are prohibited from testifying as fact or expert witnesses in any adversarial proceeding resulting from the dispute, or in any other adversarial proceeding among the parties.

Comment

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

SECTION 10.06. LAWYER MAY NOT SERVE AS LITIGATION COUNSEL. A retained expert who is a lawyer, and any lawyer associated in the practice of law with such lawyer, shall not serve as the litigation lawyer for any party in any adversarial proceeding arising from the dispute or in any other adversarial proceeding involving one or more of the parties.

CHAPTER 11
CONSULTING-ONLY EXPERTS

SECTION 11.01. ROLE DEFINED. A party may privately seek the advice of an expert who is engaged for consultation purposes only. A consulting-only expert is an expert who has specialized knowledge or skills, but no firsthand knowledge of the dispute, and no factual knowledge of the dispute except for what the expert has learned through the consultation with the party and the lawyer.

SECTION 11.02. DISCLOSURE OF IDENTITY. Any party utilizing a consulting-only expert must disclose the identity of the expert to the other parties prior to that party engaging such expert.

SECTION 11.03. WORK PRODUCT AND COMMUNCIATIONS PRIVILEGED. The work product of a consulting-only expert, and communications between a party, the party's collaborative lawyer and their privately engaged consulting-only expert, are privileged.

SECTION 11.04. TESTIMONY. Consulting-only experts are prohibited from testifying as fact or expert witnesses in any adversarial proceeding resulting from the dispute, or in any other adversarial proceeding among the parties unless the parties agree otherwise.

SECTION 11.05. LOSS OF CONSULTING-ONLY STATUS. If a retained expert reviews the work product or opinions of a consulting-only expert, the consulting-only expert loses the status of a consulting-only expert and becomes a retained expert whose work product and opinions must be disclosed to all parties.

SECTION 11.06. LAWYER MAY NOT SERVE AS LITIGATION COUNSEL. A consulting-only expert who is a lawyer, and any lawyer associated in the practice of law with such lawyer, shall not serve as the litigation lawyer for the engaging party in any adversarial proceeding arising from the dispute.

Comment

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

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

A consulting-only expert may review the work product and opinions of the retained experts without losing confidentiality or status as a private consultant. However, if the consulting-only expert's work product and opinions are reviewed by a retained expert, the consulting-only expert becomes a retained expert whose work product and opinions must be disclosed to all parties.

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

The primary difference in a consulting-only expert who is a lawyer and an outside legal opinion lawyer is that the parties can agree that the outside legal opinion lawyer may represent the engaging party in an adversarial proceeding arising from the dispute, while the consulting-only lawyer and any lawyer associated with such lawyer in the practice of law cannot.

The reason for this distinction is that some lawyers who may agree to act as a consulting-only expert will not want to be put in the position of having a party later insist that such lawyer, having been engaged by the party, must represent the party in an adversarial proceeding.

CHAPTER 12.
OUTSIDE LEGAL OPINION

SECTION 12.01. IDENTITY DISCLOSED. Prior to or during the collaborative process, a party or group of parties may privately engage an attorney, including a litigation attorney, outside of the collaborative process for the purpose of obtaining an opinion on a specific issue or issues. Before beginning consultation with an outside attorney, the engaging party or parties must disclose the identity of any attorney outside of the collaborative process to all parties. If a party has engaged an attorney other than the party's collaborative lawyer prior to signing a Participation Agreement, the party shall disclose the identity of such attorney to all parties before signing the Participation Agreement.

SECTION 12.02. ROLE IN ADVERSARIAL PROCEEDING. Prior to engaging an attorney outside of the collaborative process, all parties should agree in writing whether or not such attorney, and any attorney associated in the practice of law with such attorney, are disqualified:

(a) from testifying as a fact or expert witness in any adversarial proceeding resulting from the dispute, or in any other adversarial proceeding among any of the parties; or

(b) from serving as litigation counsel for the consulting party or parties in any adversarial proceeding resulting from the dispute, or in any other adversarial proceeding among any of the parties.

SECTION 12.03. CHANGE IN STATUS. An attorney engaged to give an outside legal opinion will become a retained expert if:

(a) all parties to the Participation Agreement jointly engage such attorney; or

(b) a retained expert reviews the work product or opinions of such attorney.

SECTION 12.04. COOPERATION OF ENGAGING PARTY. Any attorney engaged outside of the collaborative process for the purpose of giving an opinion on any issue or issues should be given all information necessary to give informed advice, including reports of retained experts whose services have been engaged in the collaborative process.

Comment

The parties should know when the Participation Agreement is signed if an attorney outside of the collaborative process has been or may be engaged during the process, and the role of such attorney should be clarified. Absent such knowledge and understanding at the outset, the integrity of the process will be compromised and the process could be terminated prematurely if such facts are later revealed.

CHAPTER 13.
SETTLEMENT DOCUMENTS AND CLOSING THE MATTER

SECTION 13.01. GOOD FAITH DRAFTING.

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

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

SECTION 13.02. SIGNING SETTLEMENT DOCUMENTS. The settlement documents should be signed in the final meeting of all participants. Any remaining issues between the parties should be resolved during such meeting.

CHAPTER 14.
WITHDRAWAL AND TERMINATION

SECTION 14.01. WITHDRAWAL. A collaborative lawyer, subject to the terms of engagement, may withdraw from a collaborative process as in any other client matter. The withdrawing collaborative lawyer should assist a successor collaborative lawyer in becoming acquainted with the client's matter to avoid any prejudice to the client.

SECTION 14.02. SUCCEEDING ANOTHER COLLABORATIVE LAWYER. A collaborative lawyer who is succeeding another collaborative lawyer must sign the Participation Agreement; otherwise, any party may terminate the collaborative process.

SECTION 14.03. TERMINATION TO PRESERVE THE PROCESS.

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

(b) Collaborative lawyers should incorporate in the Employment and Participation Agreements authority for the lawyer to terminate the collaborative process on behalf of their respective clients, without giving a reason, if the lawyer discovers the client has violated or proposes to violate the Employment or Participation Agreement in a manner that would compromise the integrity of the collaborative process, and if the client persists after counseling by the lawyer.

Comment

During the collaborative process, a situation may arise in which the client refuses to honor commitments previously made and invokes attorney-client privilege to prohibit the collaborative lawyer from disclosing the violation. Under such circumstances, withdrawal by the lawyer would be ineffective to protect the other participants or the integrity of the process, because the client could retain a new collaborative lawyer who is unaware of the violation, and thereby take unfair advantage. Absent contractual authorization to terminate the collaborative process, the collaborative lawyer may be ethically constrained from serving as protector of the collaborative process. As a practical matter, a lawyer should rarely, if ever, be required to make such declaration of termination, because the recalcitrant client after counseling by the lawyer, given the choice of terminating the process, or having it done by counsel, would almost assuredly elect personally to terminate the process.

SECTION 14.04. TRANSITION TO LITIGATION LAWYER.

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

(b) All documents and information created during the collaborative process should be clearly labeled to ensure that such items are identified as confidential and inadmissible in any subsequent adversarial proceeding.

(c) The collaborative lawyer should have no contact or communication with the litigation attorney regarding the subject matter of the dispute.

Comment

In the event that in-house counsel serves as a collaborative lawyer for his/her employer and the process terminates prior to resolution of the dispute, a lawyer with the employer other than the collaborative lawyer should arrange transfer of documents and information to the litigation attorney and the lawyer arranging the transfer may monitor or participate in such adversarial proceeding according to the employer's normal business practice regarding matters which are handled by outside counsel.

SECTION 14.05. THIRTY DAY MORATORIUM. Upon notice of termination of the process to all collaborative lawyers, there will be a thirty day waiting period (unless there is an emergency) before any court hearing to permit all parties to engage other attorneys and make an orderly transition. All written agreements shall remain effective until modified by agreement or court order. A party may bring this provision to the attention of the court in requesting a postponement of a hearing.