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COLLABORATIVE LAW INSTITUTE OF TEXAS, INC.

**PROTOCOLS OF PRACTICE FOR  
COLLABORATIVE FAMILY LAWYERS**

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# **Protocols of Practice for Collaborative Family Lawyers**

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# **Protocols of Practice for Collaborative Family Lawyers**

## **Introduction**

Since 2000, Texas lawyers have been resolving family law disputes utilizing collaborative law. In 2001, the Texas Legislature passed legislation giving statutory recognition to the process. Professional trainers from around the nation have conducted numerous courses in the state to teach Texas lawyers how to handle such matters. The Collaborative Law Institute of Texas, Inc., a nonprofit organization, helps train lawyers in collaborative law and promotes its acceptance as the prevailing method of resolving family law matters in the state. The Institute's horizons have expanded to include other collaborative professionals and to serve their needs, while its vision remains the same: "to create a culture in which Collaborative Law is the prevailing process for the resolution of family law matters."

The Institute believes it is advisable to have protocols of practice to assist lawyers and allied professionals in handling a collaborative matter. In drafting these protocols, the Institute relied primarily on books and articles by acknowledged leaders in the field of collaborative law in the United States and Canada, as well as the five-year experience base of Texas collaborative lawyers. These protocols apply only to lawyers and address the following: the relationship between the lawyer and the client; the relationship between the collaborative lawyers; the relationship between the collaborative lawyer and allied 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 lawyer.

Membership in the Collaborative Law Institute of Texas is open not only to lawyers, but also to mental health professionals, financial professionals, resolution facilitators, and others. Each profession makes its own unique contribution to collaborative law, has its own special relationship to the collaborative law process, and is guided by unique professional protocols. The Institute encourages and supports allied professional members in developing and implementing protocols appropriate to their respective practices and consistent with the goals of the Institute. Further, the Institute looks forward to promoting similar projects within those professions to the end that a common expectation of the highest professionalism will exist among all members of the Collaborative Law Institute of Texas, Inc.

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

These Protocols of Practice for Collaborative Family Lawyers were provisionally approved by the Board of Trustees, Collaborative Law Institute of Texas, Inc. on January 28, 2004. Lawyers were urged to use these protocols over the following twelve months and to provide the drafting committee with comments and suggestions. Based upon input received, the

drafting committee made some changes and on January 21, 2005, the Protocols were formally adopted by the Board of Trustees.

## **CHAPTER 1 GENERAL PROVISIONS**

**SECTION 1.01. SHORT TITLE.** These protocols may be cited as “Protocols of Practice for Collaborative Family Lawyers.”

**SECTION 1.02. DEFINITIONS.** In these protocols:

(1) “Allied professional” means an individual engaged by the parties as a neutral to participate in and assist in the collaborative law process. The term includes a financial professional, mental health professional, resolution facilitator, communication specialist, coach or any other individual engaged by the parties.

(2) “Child specialist” means an individual engaged to assist the parties in resolving child-related matters. The term includes a lawyer, mental health professional, educational specialist, or other similar individual.

(3) “Collaborative law” means a process wherein the parties and their lawyers sign an agreement to negotiate in good faith to settle a legal matter without resort to a court’s imposing the resolution, to provide all relevant information and to engage only neutral experts and allied professionals to assist in resolving issues. The written agreement must provide that the lawyers shall withdraw if the matter requires litigation. The agreement may contain other provisions not inconsistent with the foregoing requirements.

(4) “Collaborative lawyer” means a lawyer who represents a client in a collaborative matter.

(5) “Collaborative matter” means a particular case being conducted in the collaborative law process.

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

(7) “Joint meeting” means a “four-way meeting” or “joint session” generally held among the clients, lawyers, allied professionals, and other participants in a collaborative matter. The terms are interchangeable.

**SECTION 1.03. 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 1.04. COMPLIANCE WITH PROTOCOLS.**

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

(b) The Collaborative Law Institute of Texas, Inc. urges adoption of these protocols by local practice groups as expectations and aspirations of membership.

(c) Because these protocols aspire to a level of practice above 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 have been urged to comply with such voluntary or aspirational protocols to elevate standards of practice: the Texas Lawyer's Creed; the American Bar Association's Standards of Practice for Lawyers Representing Children in Custody Cases; and the American Academy of Matrimonial Lawyers' Bounds of Advocacy-Goals for Family Lawyers.*

**SECTION 1.05. STANDARDIZED FORMS.** The Collaborative Law Institute of Texas, Inc. urges use of standardized forms in a collaborative matter. This 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.** The collaborative lawyer should inform each prospective family law client about all legal alternatives for resolving the client's matter, including collaborative law. These alternatives should be explained in terms of process, risk, harm, privacy, delay, and cost. The collaborative lawyer should inform the client about collaborative law no later than the initial consultation.

#### ***Comment***

*To avoid the common client misperception that litigation is the only process available for family law matters, it is recommended that the lawyer establish office protocols that provide information regarding collaborative law and mediation to each prospective client from the point of initial contact. Use of published materials, in print or electronic form, is advisable in*

*assisting the client to be fully informed about the process of collaborative law. The Institute's website contains much information to assist the client. [www.collablawtexas.org](http://www.collablawtexas.org)*

*When addressing the comparative costs of a matter handled collaboratively with the same matter 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 MATTER FOR COLLABORATIVE LAW.**

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

(b) A collaborative lawyer should decline representation of a prospective client if the collaborative lawyer learns the prospective client has engaged a litigation lawyer for the matter or the client will be simultaneously consulting with a litigation lawyer.

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

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

### ***Comment***

*Collaborative law 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 lawyer is faced with a party or a matter that involves challenging issues that appear to preclude the use of collaboration, the collaborative lawyer should assess:*

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

*Assessment of the matter may require the collaborative lawyer to obtain written releases from the client to make a proper evaluation.*

## **SECTION 2.03. FAITHFUL REPRESENTATION OF CLIENT.**

(a) The collaborative lawyer should commit the time and resources necessary to gain a clear understanding of the client's values, assist the client in identifying and articulating the client's interests and goals in a manner consistent with the client's values, and explore with the

client the means by which the collaborative law 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 and the priority that collaborative law gives to preserving an ongoing relationship between the parties through the nonjudicial resolution of the client's matter.

(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 goals. This faithful representation includes informing the client about the law and its application to the client's matter on an ongoing basis, preserving confidential communications, and assisting the client to develop approaches, collaboratively with the other participants, to resolving the matter without judicial intervention.

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

### **CHAPTER 3**

#### **RELATIONSHIP BETWEEN COLLABORATIVE LAWYER AND OTHER LAWYER**

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

#### *Comment*

*When emotions are high, respectful communications are often extremely difficult for clients. In order to assist clients in being effective in their interactions in the collaborative meetings, engaging the services of an allied professional might be advisable.*

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

#### *Comment*

*It is recognized that it is impossible to assess with absolute certainty whether a client is capable of acting in a manner consistent with the objectives of collaborative law. 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 12 of these Protocols.*

### **SECTION 3.03. PRIVATE COMMUNICATIONS WITH OTHER LAWYER.**

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

(b) The collaborative lawyer should confer with the other lawyer before joint meetings to set the agenda.

#### ***Comment***

*The content of communications between collaborative lawyers is dramatically different from the type of communications between adversarial lawyers. Since the primary goal of joint meetings is to move the clients towards settlement, collaborative lawyers are facilitators in the process, sharing their clients' reactions to each other's demeanor and communication styles, and discussing effective communication techniques. Collaborative lawyers should strategize together on the optimum timing to raise sensitive subjects and brainstorm techniques and approaches to assist both parties in navigating the collaborative path.*

**SECTION 3.04. SHARING OF COMMUNICATIONS.** The collaborative lawyer recognizes that clients in a collaborative matter may or may not choose to communicate directly with each other. A collaborative lawyer should not discourage those communications so long as the communications are agreed upon and assist the collaborative law process. The collaborative lawyer should forward promptly to the other lawyer all client-to-client communications received. Communications received by one collaborative lawyer from the other party should be forwarded immediately to the other lawyer.

**SECTION 3.05. ADDITIONAL COLLABORATIVE LAWYER.** A lawyer who seeks to represent a client who is already represented by a collaborative lawyer shall sign the collaborative law participation agreement. If this is not promptly done, the other party may terminate the collaborative matter.

## **CHAPTER 4 RELATIONSHIP BETWEEN COLLABORATIVE LAWYER AND ALLIED PROFESSIONAL**

**SECTION 4.01. ROLE OF ALLIED PROFESSIONAL.** The collaborative lawyer acknowledges that the interests of the client may best be served by engaging an allied professional to participate in the collaborative matter. The participation must be a joint decision of the parties and the lawyers.

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

**SECTION 4.03. DEFINING RESPONSIBILITY.** The terms of engagement for the allied professional must be in writing and clearly define his or her scope of responsibility in the

collaborative matter, including such matters as attendance at meetings, communications with the lawyers, parties and children, and the relationship with other allied professionals who may be engaged in the matter.

## **CHAPTER 5 PROTECTING INTEGRITY OF THE COLLABORATIVE LAW PROCESS**

**SECTION 5.01. INTEGRITY OF THE PROCESS.** Collaborative law has the objective of achieving an ethical and enduring settlement for the clients. The collaborative lawyer should assist the client to develop alternatives for settlement that meet both the objectives of the client and the other party. 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 information is critical to the successful outcome of a collaborative matter and should assist the client in complying with the requirement of making a full and candid exchange of all relevant or requested documents and information to the appropriate participants.

### *Comment*

*A major paradigm shift for a lawyer handling a collaborative matter is the requirement for disclosure of documents and information. It is the antithesis of litigation practice but the cornerstone of the safe environment sought to be created by the collaborative law 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 lawyer and client, both of whom have made a commitment to the collaborative law process. In our "don't-ask-don't-tell" society, the disclosure of unrequested, but relevant information goes against the grain. The appropriate minimum standard for disclosure should be thus posited: "Putting the shoe on the other foot, would my client need, expect or desire such information in attempting to make an informed decision?" The definitions of "relevant" should guide the lawyer and client in disclosing the information: "having significant and demonstrable bearing on the matter at hand," "affording evidence tending to prove or disprove the matter at issue or under discussion," "having social relevance," and "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?*

**SECTION 5.03. INVENTORY AND APPRAISEMENT.** In a divorce, a sworn joint inventory and appraisal should be prepared describing the parties' assets and liabilities, unless the inventory is waived in writing or the parties agree to prepare individual inventories and appraisements.

**SECTION 5.04. FORMAL DISCOVERY BY AGREEMENT.** If required to maintain a participant's confidence 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 of parties. These procedures should be used sparingly, and every effort should be made to create an environment within which the participants will feel secure and such formalities will be unnecessary.

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

***Comment***

*Overcoming the win-lose, one-upmanship mentality of litigation, requires the greatest paradigm shift for the lawyer. That critical shift in thinking is the bedrock standard established by this protocol. That shift is made more difficult by the television-movie inspired mindset of parties in the divorce situation. But, strict adherence to this provision is essential to the enduring integrity of the parties' agreement and to collaborative law as an institution. 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 lawyer or the client either induced the misunderstanding or is aware that any other participant is relying on an assumption that is inaccurate.*

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

***Comment***

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

1. *Refraining from insistence on acceptance of conditions precedent to entering into the collaborative law 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 same in a constructive manner.*
4. *Using non-defensive methods of hearing 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 each other 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 the joint meeting.*

14. *Encouraging the joint engagement of allied professionals, including financial professionals, mental health professionals, mediators, clergy and others 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 nonlawyer employees to be knowledgeable about these 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 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 lawyer to discuss any last-minute agenda items. Time should also be allocated immediately after each joint meeting for separate debriefings with the client and the other collaborative lawyer. Private space should always be made available for the other lawyer and client for their pre- and post-meeting conferences.*

**SECTION 5.08. EFFICIENT COMMUNICATIONS.** The collaborative lawyer should encourage efficient communications, especially by use of email and fax, among the parties, lawyers, paralegals, allied professionals and other participants 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. PROTECTION OF A CHILD.** A collaborative lawyer should not interview a minor child unless agreed to by all participants. If the child is being seen by a mental health professional or a child specialist has been engaged, the interview should only be conducted with the approval of the mental health professional or the child specialist. A child should not attend joint meetings, unless all participants, including the mental health professional or the child specialist agree to the child's attendance. Unresolved issues of parental responsibility and parenting time may be referred to a jointly engaged child specialist.

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

***Comment***

*The collaborative lawyer acknowledges that any payment schedule of fees other than prompt payment according to employment contracts, results in an imbalance of power and an abuse of the process. Thus, the collaborative lawyer should encourage the client to take all*

*actions required to pay promptly all professional fees according to employment contracts. A collaborative lawyer's withdrawal from the matter or the termination or conclusion of the matter, does not preclude the lawyer or other allied professional retained in the process from collecting outstanding fees and testifying in support of their reasonableness.*

## **CHAPTER 6 FUNDAMENTALS OF COLLABORATIVE LAW**

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

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

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

**SECTION 6.02. DETERMINATION OF CLIENTS' GOALS AND INTERESTS.** The first and most important stage of the collaborative law process is defining the parties' goals and interests. The collaborative lawyer assists the parties to differentiate between their bargaining positions regarding settlement and their fundamental interests, to enable each party to recognize areas of commonality, and to understand and acknowledge the other party's interests.

### ***Comment***

*Collaborative law is premised on the concept of interest-based negotiation. A collaborative lawyer is skilled in exploring the parties' interests (their respective goals, needs, values, priorities, concerns and fears) 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 which are of special significance to either party. This knowledge increases the likelihood of settlement and offers opportunities for creative trading and problem-solving. The value added is that the parties can then achieve what they perceive as their best possible outcome.*

*A skilled collaborative lawyer can help the parties recognize their shared interests by distinguishing their "macro" and "micro" goals. "Macro" goals are the larger, overarching goals, such as the welfare the children, the desire for a healthy restructured family, the need for financial security, and the desire to problem-solve in a safe environment. "Micro" goals are simply options available to achieve the "macro" goals. The lawyers' task is to help reframe the parties' "micro" goals to the "macro" level in order to ascertain common ground. The more common ground identified, the more likely the parties will settle their differences.*

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

**SECTION 6.03. GATHERING INFORMATION.** Gathering, organizing, and analyzing all relevant information is central to the collaborative law process. The collaborative lawyers assist the clients in gathering documents, preparing spreadsheets, and locating and engaging appraisers, financial professionals, mental health professionals, and other allied professionals or neutral experts whose assistance would facilitate the gathering, organization, and analysis of information related to the parties' property and the needs of their children.

***Comment***

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

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

***Comment***

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

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

***Comment***

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

**SECTION 6.06. 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 them and their children. The parties, with assistance of the lawyers, should fashion the terms of the settlement, and the lawyers should encourage any settlement that will be approved by the court. Upon negotiation of the settlement, the lawyers shall promptly draft all of the necessary documents to finalize the matter.

### ***Comment***

*Collaborative lawyers 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 a more efficient manner. These approaches resolve the vast majority of all collaborative matters without the participants ever resorting to traditional positional bargaining. For participants who feel more comfortable with traditional negotiation techniques, only with the consent of all participants may a settlement offer be provided or simultaneously exchanged in order to help define the range of acceptable solutions.*

### **SECTION 6.07. TECHNIQUES TO AVOID IMPASSE.**

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

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

### **SECTION 6.08. FUTURE ADVERSARIAL MATTERS.**

After conclusion of a collaborative matter, whether by settlement or termination, a collaborative lawyer should not represent the client in any subsequent adversarial matter against the other party.

## **CHAPTER 7 MEETINGS**

**SECTION 7.01. IMPORTANCE OF MEETINGS.** The collaborative lawyer acknowledges the importance of joint meetings to facilitate the collaborative law 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 face-to-face meetings are preferred, circumstances may arise where other arrangements are necessary.

### ***Comment***

*When a client refuses to attend joint meetings, a collaborative lawyer should seek to involve an allied professional to assist the client in overcoming resistance. If that fails or a client is unable to attend meetings but desires to continue in the process, a collaborative lawyer should explore all viable alternatives to attendance at the meetings, including, without limitation: conference calls; video- or internet-conferencing; joint meetings without the resistant client; joint meetings with allied professionals; the client's participation by speaker phone or by proxy; face-to-face meetings between the lawyers only; caucus style meetings where the lawyers or one of them shuttle back and forth between separate meeting rooms; or meetings facilitated by a mediator.*

**SECTION 7.02. SCHEDULING AND ARRANGEMENTS.** The collaborative lawyer acknowledges the need to meet regularly with clients and lawyers at mutually convenient times. A joint meeting should not be adjourned without scheduling at least one subsequent meeting.

***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 having the parties sit on the same side of the table or using a round table.*
3. *Private space for the guest lawyer and client to meet before, during and after the joint meeting.*
4. *Preparation in advance and distribution of multiple hole-punched copies of relevant documents to use at meetings to avoid time-consuming duplication during the collaboration.*
5. *A hospitable venue for guest lawyer and client (providing, as appropriate, food, beverages, and access to phone, fax, duplication, internet, pens, paper, and calculators).*
6. *Availability of the client and lawyer notebooks and calendars at every joint meeting.*

**CHAPTER 8  
AGENDAS AND MINUTES**

**SECTION 8.01. AGENDA FOR MEETINGS.**

(a) A written agenda prepared in advance by the collaborative lawyers in consultation with the clients should govern 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 lawyers. The collaborative lawyer should discourage raising issues not on the agenda to avoid the element of surprise.

(b) The agenda of the first joint meeting ordinarily should include the reading aloud of the collaborative law participation agreement by the parties and the lawyers and the signing of the 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 meetings may serve to focus the parties. It is recommended that parties receive a copy of the agenda before going to the 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 reading the participation agreement. This makes clear to the parties the seriousness of the proceeding and allows changes to be discussed and made to the participation agreement. However, some collaborative family lawyers believe that where there is adequate assurance that legally sophisticated clients have read the agreement in advance, a reading of a summary document should suffice and the parties sign both the agreement itself and the summary version.*

**SECTION 8.02. MINUTES.** Minutes should be prepared and distributed in a timely manner after each meeting by a designated collaborative lawyer.

***Comment***

*The minutes should be comprehensive and document the items that were discussed and any agreements reached. Editorial bias should be avoided. They should serve as a running record of unfinished assignments and documents still needed. Approval of the minutes should be an agenda item at each meeting.*

**CHAPTER 9  
LEGAL DOCUMENTS AND PROCEEDINGS**

**SECTION 9.01. FILING OF PETITION.** The collaborative lawyer should explore the feasibility of filing a joint petition. The collaborative lawyer recognizes that ordinarily it is preferable for the parties to decide whether one or both should file the petition.

***Comment***

*The collaborative lawyer recognizes that the joint petition option can be an early sign of cooperation between the parties and sends the right signal for future agreements. However, there may be situations where a party may need to file before signing the participation agreement, such as to fix the venue or to prevent running of limitations. Sometimes a party may decide that it is necessary to file to induce the other party to take action in finding a collaborative lawyer. In a prospective collaborative matter, care should be taken that any unilateral filing itself is not done in such a manner or at such a time as to alienate the other party from consideration of the process.*

*If the parties decide to file separate pleadings or one is already on file, the option of filing only an answer or an answer and counter-petition should be discussed. No collaborative lawyer, on a client's behalf, should nonsuit a petition that has only been answered without prior notice to the other participants to offer them the opportunity to file a counter-petition while the court retains jurisdiction.*

**SECTION 9.02. NOTICE TO COURT.** Upon signing the collaborative law participation agreement, if a court proceeding is pending or, if not, immediately upon the filing of a court action, notice should be sent to the court that the matter is being handled as a collaborative matter. The collaborative lawyers should cooperate to insure that any required Six-Month Status Report or One-Year Joint Motion for Continuance and Status Report are timely filed.

**SECTION 9.03. TEMPORARY ORDERS.** The collaborative lawyer recognizes the need for temporary orders in certain matters. If either party desires the entry of a temporary court order, the terms of this order are to be negotiated collaboratively, and the order is to be presented to the court as an agreed order.

## **CHAPTER 10 EXPERTS AND ADVISORS**

**SECTION 10.01. JOINT ENGAGEMENT.** Unless the parties agree otherwise, in a collaborative matter, a neutral expert or advisor is to be retained jointly and in writing. Except as provided in Section 10.02, any report and related work papers of the expert or advisor, including all documents submitted to the expert or advisor should be made equally available to the parties and the lawyers, whether the assistance was rendered for one or both parties.

**SECTION 10.02. NEUTRALITY.** The collaborative lawyer should inform the neutral expert or advisor that he or she is being engaged jointly 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. Scope and terms of the engagement should be in writing, signed by the participants and the neutral expert or advisor. The neutral expert or advisor should be instructed to be available for discussion with one or both parties.

**SECTION 10.03. OTHER LEGAL OPINION.** In a collaborative matter, it may become advisable to secure an opinion from another lawyer for the benefit of one or both parties. The engagement of this lawyer should be disclosed before the first consultation. If the opinion is only sought by one party, then the opinion given by such lawyer is not required to be disclosed to the other participants in the collaborative law process, as such would be subject to the lawyer-client privilege. Any lawyer offering an opinion should be given all information necessary to give informed advice, including the reports of the experts, advisors and allied professionals whose services have been engaged in the collaborative matter. The lawyer should be privy to any information that a substitute collaborative or a subsequent litigation lawyer would have in rendering opinions. This section does not apply to a lawyer representing the client as co-counsel who signs the participation agreement.

**SECTION 10.04. EFFECT OF OPINION OR FINDING.** The opinion or finding of a neutral expert 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.

**SECTION 10.05. TESTIMONY BARRED.** Should the dispute become a litigated matter, the expert or advisor may not testify, unless the parties and the expert or advisor agree in writing otherwise.

**SECTION 10.06. SURVEILLANCE.** Neither the collaborative lawyer nor the client may directly or indirectly conduct surveillance or research into the other party's activities during the collaborative matter. This prohibition extends to allowing the use of an investigator, detective, or other individual paid for or engaged by a third party.

**CHAPTER 11  
SETTLEMENT DOCUMENTS AND CLOSING**

**SECTION 11.01. GOOD FAITH DRAFTING.**

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

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

**SECTION 11.02. CLOSING.** If feasible, the signing of the closing documents should be done in a joint meeting. Any remaining issues between the parties should be resolved at this time. The parties should be encouraged to plan a concluding meeting which meets their needs.

**CHAPTER 12  
WITHDRAWAL AND TERMINATION**

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

**SECTION 12.02. SUCCEEDING ANOTHER COLLABORATIVE LAWYER.** A collaborative lawyer who is succeeding another collaborative lawyer is expected to sign the collaborative law participation agreement. If this is not promptly done, the other party may terminate the collaborative matter.

**SECTION 12.03. TERMINATION OF THE PROCESS.**

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

(b) A collaborative lawyer should seek to obtain authority in the employment agreement to terminate the collaborative law process on behalf of the client, without giving a reason, if the lawyer discovers that the client has violated or proposes to violate the collaborative law participation agreement in a manner that would compromise the integrity of the process.

(c) The collaborative lawyers should seek to incorporate in the participation agreement authority to terminate the collaborative law process on behalf of their respective clients, without giving a reason, if the lawyer discovers that the client has violated or proposes to violate the collaborative law participation agreement in a manner that would compromise the integrity of the process.

### **Comment**

*During the course of the collaboration, a circumstance can occur in which the client refuses to honor commitments previously made, yet invokes attorney-client privilege to prohibit the collaborative lawyer from disclosing the violation. Under these circumstances, withdrawal by the lawyer would be ineffective to protect the other participants, as well as 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 take this action, the collaborative lawyer may be ethically constrained from this guardianship role. As a practical matter, one should rarely, if ever, be required to make such declaration of termination, because the recalcitrant client, given the choice of declaring termination or having it done by counsel, would almost assuredly elect personally to make that declaration.*

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

## **CHAPTER 13 MISCELLANEOUS PROVISIONS**

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

**SECTION 13.02. EFFECTIVE DATE.** These protocols take effect upon adoption by the Board of Trustees of the Collaborative Law Institute of Texas, Inc. [Adopted by Trustees on January 21, 2005]