Smoothing Out the Wrinkles
Protocols of Practice for Collaborative Professionals

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Purpose:

> Protocols establish guidelines for collaborative professionals to enable them to better serve their clients. All protocols must focus on the needs and interests of clients rather than lawyers, neutral coaches, or experts, and encourage flexibility in the collaborative process; so that the process may be adjusted to meet the legitimate goals of the parties. The guidelines should not be considered license to exceed legal limitations or ignore public policy. On the other hand, the protocols should not rely on standards established by any adversarial or judicial system. Protocols for the practice of collaborative law require a higher standard than those necessary for ordinary litigation. The goals of collaborative protocols should, at all times, focus on the parties and their best interests and seek to achieve fruition through honesty and transparency.

Keeping this standard in mind, it is necessary to examine some situations that have caused confusion regarding guidelines for conducting civil collaborative cases. Areas of concern include multiparty disputes, in-house counsel serving as the collaborative lawyer, the effectiveness of firewalls to protect confidential information, and the transition from the collaborative lawyer to the litigation lawyer should the parties fail to resolve their disputes in the collaborative process.

Multiparty Disputes

Currently most protocols require that the parties proceed to litigation if any participant terminates the collaborative process. Below are suggestions for three different situations:

(a) In a multiparty dispute, two or more parties may agree to employ the collaborative process without the participation of all parties to the dispute. **(**This situation also occurs in litigation when all parties do not have an arbitration clause in their contracts.**)**

(b) If a participant in the collaborative process desires to withdraw and proceed to litigation and there are two or more parties who wish to remain in the process, the remaining parties may continue the process without the withdrawing party.

© If a collaborative lawyer gives notification of termination of the collaborative process and two or more parties desire to continue in the collaborative process, the parties desiring to continue must sign a new participation agreement.

All parties to a dispute should not be penalized if one party is averse to the collaborative process. Two or more parties should be able to proceed without the other party or parties.

Participants must realize that this may create a hardship on the parties and/or the process due to several possible scenarios: 1) The abstaining party may not agree to postpone discovery; 2) If no legislation is in place to address multiparty disputes, the court may order discovery or trial before the collaborative process has an opportunity to complete; and 3) If litigation goes forward, the clients must consider retaining litigation attorneys while still participating in the collaborative process.

In the event that a collaborative lawyer terminates the process, the remaining

participants will assume that the action was taken to protect the integrity of the process. For this reason the participants who did not terminate the process must enter into a new participation agreement in order to continue. Full disclosure of these possibilities should be made to all parties prior to commencing a multiparty dispute.

In-house Counsel Serving as Collaborative Lawyer

The collaborative process relies on the desire and ability of all participants to go forward in honesty and good faith. Going forward with complete transparency can be especially difficult for a culpable party. If the culpable party is represented by a lawyer that is a full time employee, this arrangement conceivably creates a conflict of interest for such lawyer. Hence, it is necessary to examine the question of in-house counsel participating in the process as collaborative lawyers for their employers.

Family collaborative professionals have recognized that not all attorneys who give lip service to the collaborative process have managed to navigate the paradigm shift. A few "would be" family collaborative lawyers have become so frustrated trying to forego litigation tactics that they have given up their collaborative practices and returned to full time litigation. One can reasonably expect this same situation will occur with civil collaborative lawyers who are unable to move to a new mind set.

If the CEO of a company determines that, when possible, the collaborative process will be used by the company to settle disputes, that decision will not automatically mean that all personnel understand the process much less embrace it or have made a shift in the CEO's way of thinking.

If the companies' in-house collaborative lawyers discover relevant information that is extremely detrimental to the company and the lawyers know that their supervisors will be extremely distressed if the information is disclosed, a conflict of interests definitely exists. Moreover, how will the opposing parties view the "safe environment" that is supposedly created in the collaborative process? Will they believe that they can be honest with an individual that is not only an attorney for the other side, but who is also a full time employee of the other side?

Hospitals that have procedures in place to investigate events which involve the possibility of medical error have discovered that when there is an employee of the hospital conducting the investigation, both the doctors and the patients are ill at ease and have no confidence in the confidentiality of the process. A neutral investigator has been found to obtain better results since the parties to the investigation feel free to share information and believe that it truly will be kept confidential.

Can an in-house lawyer participate with full transparency when his or her entire livelihood is controlled by the party represented in the collaborative process? If after full disclosure the parties agree to go forward, it is possible; however, the wiser choice may be to reserve in-house attorneys for litigation.

Companies with in-house counsel can employ outside firms for collaborative representation, and in-house counsel will not be put in the position of choosing between loyalty to their employers and their obligations under the participation agreement. In addition, an outside firm is not 100 percent dependent on a single company for its current income, future income, and future relationship with supervisors and fellow employees that might be adversely affected by disclosures in the process. This also allows collaborative

lawyers who are not employees of parties to the dispute more freedom to be objective and assist the parties in arriving at "out of the box" solutions. If the parties fail to settle, in-house counsel can step in and litigate the case.

Effectiveness of Firewalls to Protect Confidential Information

There are those who would argue that one law firm should be able to handle both the collaborative and litigation aspects of the same dispute. An example would be a single law firm with a collaborative department that is able to pass disputes which fail to settle in the collaborative process to their litigation department and have the same firm continue to represent the client. Advocates of this practice in other states rely on State Supreme Court decisions which have recognized "firewalls" or "Chinese walls" in large law firms as adequate to isolate and protect confidential information.

There are several problems with this approach. First, the question must be asked, "Is it wise to rely on the litigation process and case law, which the collaborative process seeks to avoid, to set the parameters for collaborative protocols?" The purpose of the collaborative process is to discover solutions that meet, as much as possible, the goals and interests of all parties. Results of case law give relief to only one side of the dispute.

A second argument for the "one stop firms" is that the law firms will already be familiar with the client. If the dispute is kept in the same law firm for collaboration and litigation, proponents claim this will eliminate clients having to get new counsel up to speed on their companies' business. This argument raises two questions: 1) If the litigation departments of firms are all familiar with clients' business, does this imply that firewalls have never been established? 2)Would a fresh perspective from completely new counsel, unfamiliar with the client and the former firm's approach and ideas, have a better chance to settle the litigation portion of the dispute without a trial?

Next question: Can the participants in the dispute accept the premise that all partners and associates in the law firm have made the paradigm shift and are versed in and have accepted and agreed that the firm will honor the collaborative process? In a situation in which in-house attorneys act as collaborative counsel, there is the problem of convincing opposing parties that they are in a safe environment. In a situation that allows one firm to handle the collaboration and litigation, not only will opposing parties have concerns, the firms' clients will have reason to question the motives of the firm if the dispute continues on to litigation.

Question: If obstacles creating a safe environment are overcome, will the disputes handled in this manner be restricted to certain jurisdictions since all states do not recognize firewalls? Although we do not rely on statutes to dictate how the process is conducted, we cannot place requirements in the participation agreement or protocols that violate law or public policy.

Visualize a young associate in a large firm who has aspirations to "make partner" some day. A senior partner in the litigation department approaches the young associate and suggests that he or she share information regarding a collaborative dispute that failed to settle. Question: What is the young associate going to do? Will he or she go to another partner and disclose the situation, comply with the request to disclose information, resign, or find some other solution? None of these options appear desirable.

Question: Doesn't this situation totally defeat the original purpose of the withdrawal provision since the same firm can

still continue to financially benefit from the dispute? The incentive that first made the collaborative process successful will be totally eliminated if a single law firm is in charge of the total dispute..

Last question: Why is it necessary for the same firm to handle both the collaborative and litigation phases of the dispute? Is it primarily for the benefit of the clients or the law firms?

Transition from Collaborative Lawyer to Litigation Attorney

If the dispute does not settle, how much contact should the collaborative lawyer have with the litigation attorney? As with all aspects of the collaborative process there are many opinions that range from no contact between the lawyers to allowing the collaborative lawyer to disclose everything that the collaborative lawyer knows to the litigation attorney. The reasons supporting full disclosure include: 1)The client will tell the litigation attorney everything anyway. 2)The collaborative lawyer is a better source of information than a distraught client. And 3)It is the duty of the collaborative lawyer to assist the litigation attorney so as not to prejudice the client.

It appears that there should be some middle ground that would protect the safety of the process yet inform the litigation attorney of pertinent information that is necessary to an understanding of the dispute. The following suggestions may satisfy the transfer concerns:

(a) The collaborative lawyer is required to return to the client all original documents and information which have been furnished by the client. The client will also likely have a notebook containing the agendas, minutes, and important documents produced in the face-to-face meetings. The client may deliver all of this information to the litigation attorney.

(b) All documents and information in the client's possession which were 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.

© The collaborative lawyer should refrain from any contact or communication with the litigation attorney regarding the subject matter of the dispute.

The above suggestions satisfy the need of the client to pass on valuable information, protect the confidential information which the client is sure to verbally relate to the litigation attorney, and prevent the transfer of the file from becoming an ongoing conversation with the collaborative lawyer giving advice to the litigation attorney regarding management of the case.

The collaborative process is still in its infancy, but it has signs of a healthy prognosis. Electronic Data Systems (EDS) recently announced that collaborative law will be their dispute resolution procedure of choice. Other companies, hospitals, and institutions are also investigating the process.

It is certain that many more questions will arise that address various opinions and ideas regarding protocols for the collaborative process, and it is impossible to devise guidelines that will ideally solve every situation and client in every area of the law. The only absolute that can be steadfastly relied upon is to absolutely keep the collaborative process focused on the clients and their goals and interests, and to steadfastly avoid focusing on satisfying the self interests of collaborative professionals and law firms.