

**FITTING THE PIECES TOGETHER**  
**THE ATTORNEY'S ROLE IN THE COLLABORATIVE PROCESS**

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**INITIAL CONSULTATION**

When a client walks into an attorney's office seeking dissolution of marriage, the attorney spends a great deal of time listening to the client. After hearing about the disputes in the marriage, the issues confronting the children, the concern about support issues, a description of assets and liabilities and so forth, it is incumbent upon the attorney to explain the various models that can be employed to achieve the dissolution, the risks and benefits of each model, neutral professionals involved, how the process works and what is expected from the parties.

**ETHICAL OBLIGATION AND INFORMED CONSENT**

The attorney has an ethical obligation, pursuant to Chapter 4, Rules of Professional Conduct Rule 4-1.2 of the Rules Regulating the Florida Bar to be sure that the client is fully informed before consenting to any specific model and has had explained the scope of the attorney's representation, the limitations imposed by the collaborative model specifically and the risks and benefits of the process. See page 31.

In addition, the attorney should assess whether the collaborative model is appropriate for the client by using the characteristics listed below.

**Characteristics To Consider**

Assessment by the attorney is essential. Reasonable inquiry should be made by the attorney for items numbers 14 and 15.

- Reasonable expectations
- Willingness to listen to the other party
- Willingness to participate
- Preference for privacy
- Personal motivation
- Able to cooperate respectfully
- Able to share all relevant information
- Able to acknowledge fault
- Able to take responsibility for her/his own choices
- Not wedded to having his/her day in court
- Would be comfortable to work with the other party in the same room
- Willingness to disclose sensitive information
- Willingness to work with and not against the other party for mutually acceptable results
- No substance abuse or mental health issues
- No history of a coercive or violent relationship

This list, though not complete, could be expanded with other characteristics gleaned from the experiences of other collaborative practitioners. The attorney should be as certain as possible when meeting with a client during an initial consultation, that the client has most of the qualifications listed above. Generally, it is easy to discern the individual who is not a “good fit”.

**Other Models**

The attorney should explain that the client has several models to choose from before deciding which model to use. The models of litigation, mediation, collaborative law and “soft negotiation” are set forth in the chart below and will answer many questions for the client but the attorney must be sure the client reviews the chart in the office to be sure the client understands the differences.

The chart below sets forth for the client what happens in litigation, mediation and in collaboration. The last column, titled “Soft Negotiation”, could end up in court.

X = Occurs in the model M = If no agreement, resort to litigation	Litigation	Mediation	Collaborative Law	Soft Negotiation
Each Party has counsel	X		X	X
Case filed immediately	X			
Case filed after agreement		X	X	X
Clients make decisions			X	
Judge makes decisions	X			M
Financial Disclosure occurs	X	X	X	X
Each party has other independent professional (Financial, Appraiser, etc.)	X			X
Neutral Professionals			X	May occur

X – Occurs in the model M = If no agreement,	Litigation	Mediation	Collaborative Law	Soft Negotiation

resort to litigation				
Disqualification provision in Participation Agreement			X	
Attorneys control process	X	If counsel present		X
Parties control process		Only if no counsel	X	
Court an option	X	X	only if process is terminated by parties or counsel	M
Hearings	X			M
Depositions	X			M
Subpoenas	X			M
Financial disclosure required	X	X	X	X
Participation Agreement			X	
Availability of Appeal	X			M
Transparency			X	
Privacy and Confidentiality		X	X	

It should be explained that “soft negotiation” is not really a model but a way to try to avoid court but keeping the option for litigation viable. Further it is necessary to have attorneys who are of the same mind set to try to work out an agreement for their clients. There are no meetings in soft negotiation as in the collaborative process, no signed agreement to avoid litigation and discovery takes place in an informal manner as the clients agree to defer filing until a settlement is reached.

### **THE PARTICIPATION AGREEMENT AND THE DISQUALIFICATION PROVISION**

The attorney should provide the client with a copy of a Participation Agreement and allow the client to read it at his/her leisure. The Participation Agreement, a contract executed by parties and their respective counsel, sets forth the disqualification provision requiring that neither attorney can represent their individual clients if one or both of the parties decide to engage in a court proceeding to dissolve their marriage or if the collaborative process does not result in an executed settlement agreement. If a court proceeding follows the termination of the collaborative process, for the reasons stated above, the client should be made fully aware that further expenses will be incurred. It is the Participation Agreement with the disqualification provision that sets the Collaborative Process apart from all other models of dispute resolution.

Note: Clients who may be concerned about the disqualification clause should be told that if the parties are committed to the collaborative process, there is little chance of the case going to court. (Statistically, the rate of success of cases settling in the Collaborative Process is above 90%).

## **DECLARATIONS OF PRINCIPLES OF COLLABORATIVE LAW**

Incorporated into the Participation Agreement is the Declaration and Principles of Collaborative Law. A copy of this is attached to the Participation Agreement. The tone for the process is set by the Participation Agreement and the Declarations document and they require the parties to commit to protecting the respect and dignity of everyone involved in the process. Honesty and good faith underlie all negotiations. There are no threats or intimidations, no rudeness or “I” statements during the process. Positive behavior creates a safe environment for the clients and the professional’s model behavior for the clients. Each attorney is an advocate for his client but does not act in an adversarial manner.

## **PARTICIPANTS IN THE COLLABORATIVE PROCESS**

### **Neutral Mental Health professional (MHP)**

The usual cause of the breakdown in a marriage is a lack of communication. The attorney must explain to the client that the MHP is an integral part of the process. The parties who have children will need to co-parent their children during the dissolution process and for many years thereafter when all of the professionals are no longer involved in the parties’ lives. The MHP works with the parties to develop good communication skills and is effective in keeping the process from becoming derailed. Most importantly, the MHP does **not** provide therapy for either client. If therapy is indicated the MHP will refer the party (ies) to a therapist(s). Sometimes problems may arise and the client(s) may call the attorneys to resolve a problem that has arisen between the parties. This is where the MHP steps in and uses his/her skills to assist the parties in helping to work out the issue. MHPs have skills that, when implemented, help the parties resolve the issues, free up the attorney’s time and provide their expertise at a lower hourly rate than counsel. The MHP helps the parties move forward in the process and leave behind the “baggage” accumulated during the marriage.

The MHP meets with the parties, separately and sometimes together before the first team meeting. This meeting allows the MHP to establish rapport with the parties, gain information about them, their marriage and observe the communication and dynamics between them. The information learned helps the parties as well as the professionals throughout the process

## **NEUTRAL FINANCIAL PROFESSIONAL and FINANCIAL PLANNER (FP); CPA**

The attorney must explain that there are two different Financial Professionals that may be used in collaborative cases, depending on the needs of the parties and the issues involved. One is the financial planner and the other is a certified public accountant (CPA). The FP does the work as described below while the financial planner has an entirely different role.

The neutral CPA functions similarly to the neutral role that has gained popularity with judges in a traditional case. The difference is that the Collaborative Process is transparent and all

relevant information is known to everyone. This FP usually comes into the case after the first meeting and after the parties have met with him/her. The tasks are to prepare schedules for equitable distribution and support and, when required, to value a business, a professional practice or recommend an appraiser depending on the property to be appraised. This FP can do as much or as little as needed in the case depending on the issues and the financial abilities of the parties.

The financial planner serves an important role for matters in the future that should be addressed during the divorce. These include but are not limited to such items budgeting for the children's education, income from equitable distribution that may be used for or toward spousal support, health issues that may need funding, disability and long term care insurance and payment determined for religious rites of passage and children's weddings.

## **PARTIES' CONDUCT**

### **Listening**

The attorney must emphasize the importance of listening in the process. It is essential that each party be heard by everyone in the process but especially by the other party. It is unlikely that both parties will have the same perception of a disputed issue but if each party listens and hears what the other one is saying, it often causes an "aha" moment and allows the listening party to better understand how the other spouse sees the issue and opens up the opportunity for discussion, exploration of options and ultimately, resolution of the issue.

### **Expectations of Conduct**

A copy of the Expectations of Conduct should be reviewed with the client during the initial consultation and when the attorney prepares the client for the first joint meeting. (A copy is provided in the material for your use).

## **CONFIDENTIALITY AND PRIVACY**

The attorney should emphasize to the client the confidentiality of the discussions that occur during the team meeting. In addition, because all meetings take place in professional offices or wherever all agree, there is privacy that does not exist in a court room.

## **FEEES AND COSTS**

The discussion of fees and costs is important to the client as well as to the attorney. All professional fees and costs are paid from marital assets.

## **HOW COLLABORATIVE PROCESS BEGINS**

### **Attorneys Contact One Another**

Once a client chooses the collaborative model, retains counsel and the spouse has done the same, the attorneys communicate, discuss the recognizable issues and the necessity of the

neutral professionals such as Mental Health and Financial who will be a part of the process and who will complete the collaborative team. The Mental Health professional, if used, is typically chosen by the attorneys, the parties are contacted as well as the MHP and the parties schedule appointments with the MHP.

### **Feedback from MHP to Attorneys**

After meeting with the parties, the MHP contacts the attorneys and provides relevant information to the attorneys for the first team meeting. Together the three discuss the agenda that will be used to guide the first meeting and schedule the time and date for the first team meeting.

### **First Team Meeting**

The parties, their attorneys and the MHP attend the first team meeting and use an agenda to guide them through the meeting. Emphasis is placed on the Expectations of Conduct. It is up to the MHP and the attorneys to ensure a safe environment for the clients. If a power imbalance between the parties is evident, the professionals make concerted efforts to keep the imbalance in check.

Thereafter, the attorneys, who guide the parties, provide a synopsis of the process as follows:

- Identify issues
- Gather relevant information
- Explore various options
- Develop Settlement Models
- Negotiate to resolution

All communications during the process are confidential within the team, ensuring privacy for the parties. The attorneys should again emphasize this aspect of the process. The parties have the opportunity to identify their goals and the issues they need to resolve. After the issues have been identified, the Participation Agreement (PA) and the Declaration of Principles are reviewed. The manner in which the Participation Agreement is reviewed before signing it is up to the attorneys. Some prefer having the PA read aloud and others and the clients to read it silently before it is signed. Once the PA has been executed, the Collaborative Process is firmly in place. Without a signed PA, the case cannot be considered to be collaborative.

The determination of the “date of filing” date should be made at the first meeting. The matter should be discussed if the attorneys had not already done so before the first meeting.

The parties are asked to provide relevant information prior to the next meeting. If the attorneys recommend a financial professional (FP) to become part of the team, the parties will schedule appointments with the FP. The FP may prepare the sworn financial statement depending on the needs and financial abilities of the parties but the sworn statement should be provided very early in the process so marital and non-marital assets are identified.

Adhering to an agenda keeps the team focused on the issues and tasks to be accomplished. Immediate concerns should be addressed at the first meeting and tasks should be assigned to the parties. The next meeting is scheduled just before the meeting ends. Meetings should not exceed two hours. And the process begins.....

### **Debriefing**

After the meeting, debriefing occurs between attorney and his/her client to get feedback from the client and to answer any concerns of the client. Thereafter, the professionals debrief by either scheduling a tele-conference or remain after the meeting to discuss their reactions, concerns and constructive criticism about the meeting. The MHP has had the opportunity to observe spoken and body language and can bring insights/comments to the attorneys. Suggestions may be made to improve, if necessary, the next meeting and one of the attorneys agree to draft a memorandum of what occurred at the meeting. The memorandum will be provided to the team to review. Thereafter the memorandum is signed by the clients and the team participants who attended the meeting.

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