

PROTOCOLS FOR BEST PRACTICES IN COLLABORATIVE FAMILY LAW¹

MASSACHUSETTS COLLABORATIVE LAW COUNCIL

These Protocols are designed to achieve the best Collaborative Law (CL) practices. They are intended to promote a uniform approach that will enable Collaborative professionals to attain the greatest likelihood of success for their clients. Using these Protocols will allow MCLC members to assure their CL clients that all participants will be operating within a consistent conceptual framework.

A. INITIAL ATTORNEY CONFERENCE WITH PROSPECTIVE CLIENT

1. Attorney will provide an overview of the dispute resolution options available, including Collaborative Law (CL), traditional negotiation, mediation, arbitration, and litigation.
2. Attorney will inform prospective Client that the parties will suspend their right to use litigation in the CL process.
3. Attorney will inform prospective Client of the relative risks and benefits of the CL process as they may pertain to the specific facts of the prospective Client's case.
4. Attorney will explain each component of CL, as set forth in these Protocols and the model Collaborative Family Law Process Agreement (see Addendum), including that:
 - a. The purpose of CL is to reach settlement of a dispute with dignity and respect without litigation;
 - b. Both Clients will engage Attorneys and a Coach (a mental health professional), as described in MCLC Membership Standards for Collaborative Practitioners, Sections 1 and 3, respectively;
 - c. Attorneys are required to withdraw if either Client chooses to proceed with litigation;
 - d. Complete and voluntary disclosure of all documents and facts relevant to reaching an agreement is required;
 - e. Constructive and respectful communication is expected of all participants;

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- f. Each Client is expected to participate at scheduled meetings and to set goals, generate options, evaluate choices, and reach agreements and compromises;
 - g. The focus is on Clients' underlying needs and concerns, including those of the children, rather than the positions a Client may take;
 - h. Transparency in the sharing of information and in honest and direct settlement discussions is a hallmark of CL;
 - i. Attorney/Client privilege remains in effect in CL, but it does not negate the obligation of Client and his/her Attorney to share all relevant information in the CL process;
 - j. Coach plays an integral role in the CL process as a neutral, who becomes informed about the Clients' communication dynamics, facilitates the ongoing process, and manages emotional content throughout the process,
 - k. Clients may jointly engage a Financial Professional (FP), as described in MCLC Membership Standards for Collaborative Practitioners, Section 2;
 - l. Clients may jointly engage additional experts, such as a business valuator or real estate appraiser, as needed; and
 - m. At the beginning of first Joint Meeting of Attorneys, Clients, and Coach, participants will sign the model Collaborative Family Law Process Agreement.
5. Attorney will describe the fee structure and the various services that will be provided during the CL process.

B. PROFESSIONAL TEAM COMMUNICATION AND RESPONSIBILITIES

- 1. Collaborative Attorneys will identify a Collaboratively trained mental health professional to serve as Coach on the professional Team (composed of Attorneys, Coach, and other neutral professionals as appropriate) in the Collaborative case.
 - a. Each Attorney will ask his/her Client to arrange a separate meeting with Coach prior to first Joint Meeting of Clients and Team;
 - b. Coach will inform Attorneys about his/her separate Client meetings in advance of first Joint Meeting;

- c. Coach and Attorneys will plan the case process; and
 - d. Coach will facilitate all Joint Meetings.
2. Before first Joint Meeting, Team will meet, in person or by phone, to address the following:
- a. Understanding Roles of Team members:
 - i. Describe his/her role and the role of other Team members;
 - ii. Discuss differing levels of CL experience among Team members; and
 - iii. Discuss transparency and confidentiality with respect to their professional roles.
 - b. Planning and Communication Among Team Members:
 - i. Prepare for each Joint Meeting by conference call or in person;
 - ii. Review and de-brief in person immediately after each Joint Meeting;
 - iii. Convene additional Team meetings as appropriate to address matters arising outside of Joint Meetings;
 - iv. Discuss how each Team member wishes to receive feedback;
 - v. Determine if communications among Team members are ever shared with Clients, and if so, the form and any limitations on content;
 - vi. Discuss use of email, potential pitfalls, and any limitations on content, if Team members wish to communicate by email; and
 - vi. Identify Team members' available dates for Joint Meetings prior to offering those dates to Clients.
 - viii. Establish a process to address challenges that arise within the Team;

- ix. Request assistance from an outside Collaborative professional if Team dysfunction interferes with the Collaborative process.
 - c. Acknowledging Attorneys' roles as Client advocates and Team members:
 - i. Attorneys balance Attorney/Client privilege with an obligation to share with Team his/her Client's perspectives and concerns that will assist Team in preparation for Joint Meetings;
 - ii. Attorneys share with Team his/her perspective on the role of law in CL process and how to address the law in Joint Meetings; and
 - iii. Attorneys communicate with each other outside of Joint Meetings to address concepts and process interventions without promoting positions to be advanced on behalf of his/her Client.
 - d. Managing Case and Procedural Matters:
 - i. Create a safe and positive environment for Clients;
 - ii. Provide options and/or arrangements for Clients to meet with neutrals (e.g., Coach or Financial Neutral) outside of Joint Meetings;
 - iii. Accept MCLC Protocols, understanding that if Team contemplates departing from any Protocol, it will carefully consider the options and provide a clear rationale for its choice; and
 - iv. Assure payment of professional fees.
- 3. Consistent with the communication expectations and responsibilities addressed in B.2. above, Team will prepare for the first and for each subsequent Joint Meeting, in-person or by telephone. Preparation will include the following:
 - a. Determine physical arrangements for Joint Meetings—location, refreshments, length of meeting, seating, and the like;

- b. Create Agenda for each Joint Meeting, or, if Agenda was developed at prior Joint Meeting, revise and/or confirm Agenda; and
- c. Address Joint Meeting Notes:
 - i. The Joint Meeting Notes will always include this header on the first page: “These Notes reflect confidential out-of-court settlement discussions and are not to be exhibited to the court or court personnel.”
 - ii. Attorneys alternate responsibility for taking notes at each Joint Meeting. Joint Meeting Notes will clearly and concisely report items agreed upon or identified for consideration, homework, and next Joint Meeting Agenda;
 - iii. The note-taker drafts and distributes Joint Meeting Notes to the Team within 48 hours of Joint Meeting, unless otherwise agreed;
 - iv. The other Attorney and Coach edit and return Notes to the drafter within 48 hours of receipt, unless otherwise agreed;
 - v. Each Attorney distributes edited Joint Meeting Notes to his/her Client; and
 - vi. Any further revisions are addressed and resolved at the next Joint Meeting.

C. ATTORNEY PREPARATION WITH CLIENT FOR FIRST JOINT MEETING

- 1. Fully discuss Collaborative Family Law Process Agreement.
- 2. Describe what to expect from Collaborative professionals at Joint Meetings:
 - a. Respectful communication;
 - b. Clear Team roles and boundaries;
 - c. Full disclosure of relevant information; and
 - d. Transparency except with respect to the confidential communications between Attorney and Client.

3. Discuss Client's role and responsibilities throughout CL process:
 - a. Complete all homework;
 - b. Participate in discussion of items on Joint Meeting Agenda;
 - c. Disclose fully relevant information (records, documents and facts);
and
 - d. Timely pay professionals' fees.
4. Review Client's interests, needs, priorities, motivations, and goals as well as those of Client's spouse.
5. Identify time-sensitive issues and/or special needs.
6. Describe Joint Meeting Agenda and Joint Meeting Notes as essential to the orderly CL process.
7. Prepare Client for each item on Joint Meeting Agenda.
8. Begin to identify and collect relevant documents and records.
9. Encourage Client to use information as it becomes available to explore options which may be mutually acceptable.
10. Help Client avoid developing specific positions, demands, and/or attachment to particular outcomes.

D. ROLE OF COACH

1. Coach will have phone contact with each Client to address basic questions about CL process, briefly describe Coach's role, and arrange in-person meeting with each Client separately prior to first Joint Meeting.
2. In initial meeting with each Client, Coach will:
 - a. Describe coaching agreement for CL process;
 - b. Discuss difference between coaching and therapy;
 - c. Explain that Coach does not keep secrets and discuss the purpose of transparency;

- d. Inform Client that Coach will share Client information with Attorneys and, as relevant, any other Team professionals, in order to advance CL process;
- e. Describe Coach's role as coach, facilitator, and neutral, including the following functions:
 - i. Inform Team members of relevant information obtained in Coach's meetings with Clients;
 - ii. Facilitate all Joint Meetings and Team meetings;
 - iii. Participate in Team pre-briefs and de-briefs of all Joint Meetings;
 - iv. Provide input on Joint Meeting Agenda;
 - v. Review and advise of any changes or additions to Joint Meeting Notes; and
 - vi. Work with Clients on communication or a parenting plan outside of Joint Meetings as agreed by Team.
- f. Explain Coach's professional ethical obligation as a mandated reporter;
- g. Help each Client identify goals for CL process;
- h. Assess each Client's resources and capacity for dealing with conflict;
- i. Discuss each Client's "triggers" and identify coaching interventions to assist Client in managing reactions;
- j. Address each Client's needs and concerns regarding CL process, including timing, pacing, and individual style of processing;
- k. Identify other issues that might impact CL process, such as domestic abuse, substance abuse, health, or mental health issues;
- l. Explain that Coach does not give legal or financial advice;
- m. Provide to Clients research-based information on the effects of divorce on children, as appropriate; and
- n. Advise Clients that after completion of CL case:

- i. Coach may remain a neutral resource regarding parenting decisions, provided the parenting issues are not the subject of anticipated or ongoing litigation; and
- ii. Coach may not provide therapy to the Clients or Clients' children.

E. ROLE OF FINANCIAL PROFESSIONAL

1. At a Joint Meeting, Attorneys will identify issues that may require the expertise of a neutral and Collaboratively trained Financial Professional (FP).
2. At a Joint Meeting and prior to Clients' joint engagement of FP, Team, Clients, and prospective FP will discuss the role of FP and the expectations of Clients in working with FP:
 - a. FP's role is to provide objective financial information;
 - b. Clients are expected to provide full disclosure of information FP requests;
 - c. Unless otherwise agreed by Team, FP will not provide financial information to either Client separately during CL process; and
 - d. FP will not provide financial services to either Client after CL process ends.
3. FP, as a member of Team, participates in Joint Meeting to identify the scope and kind of financial analysis required and why it is needed. Joint Meeting participants will also address:
 - a. How FP will provide the analysis to Clients and Team;
 - b. How FP will communicate with Team and Clients; and
 - c. Whether Clients may meet with FP outside of Joint Meetings.
4. After FP has performed the financial analysis, FP will contact other Team members to schedule Team Meeting or meeting with Clients, as agreed, for the purpose of presenting the analysis. If FP meets alone with Clients, FP will provide follow-up to other Team members as soon as practicable.
5. FP will continue to participate in CL process after presenting the financial analysis as may be determined by Team and Clients.

6. After CL process ends, FP may remain a joint resource to Clients on any financial matter related to their divorce, but FP may not provide financial services to the Clients individually.

F. PROCEDURES FOR FIRST AND SUBSEQUENT JOINT MEETINGS

I. FIRST JOINT MEETING

1. Provide to participants First Joint Meeting Agenda as developed by Team. Participants will limit discussion to Agenda items.
2. Coach facilitates the meeting.
3. Each Team member makes a brief statement about his/her role in CL process.
4. Review together the Collaborative Family Law Process Agreement:
 - a. Attorneys and Coach highlight select items in each section of the Process Agreement to emphasize the expectations and responsibilities required of Attorneys, Coach, and Clients;
 - b. Address any questions or concerns of Clients; and
 - c. Attorneys, Coach, and Clients each sign Process Agreement, with each participant retaining a signed original.
5. An Attorney explains Joint Meeting Notes:
 - a. Purpose is to record agreements under consideration, key discussion points, homework, and next Joint Meeting agenda;
 - b. The Joint Meeting Notes reflect confidential out-of-court settlement discussions and are not to be submitted to the court in any subsequent litigation;
 - c. Attorneys alternate taking Joint Meeting Notes and, within 48 hours after Joint Meeting (unless otherwise agreed), send draft to other Attorney and Coach, for their prompt edits and comments;
 - d. After Team confirms Joint Meeting Notes, Attorneys send Notes to their respective Clients; and
 - e. Questions, concerns, and/or corrections are resolved at the next Joint Meeting.

6. Clients articulate their individual goals with assistance from the Coach, who writes goals for all to see. Goals are included in First Joint Meeting Notes. Coach acknowledges Clients' differing perspectives and any goals that overlap.
7. Coach elicits from Clients effective communication guidelines to insure a respectful process, and makes suggestions as appropriate.
8. Participants address any time-sensitive issue(s) as identified by either Client prior to Joint Meeting and included on Agenda. A short-term issue that is not resolved at First Joint Meeting is placed on Agenda for next Joint Meeting.
9. Participants identify all documents and records concerning the Clients' income, assets, and liabilities, and any other documents that may be relevant. Clients provide documents and information in an agreed upon time frame.
10. If time permits, begin discussion of a substantive issue as identified on the Joint Meeting Agenda.
11. Address substantive issues (at this and other Joint Meetings) as follows:
 - a. Describe the issue as broadly and fully as possible;
 - b. Identify information needed to help resolve it;
 - c. Identify the Clients' underlying interests, as distinct from their positions;
 - d. Generate options consistent with Clients' goals;
 - e. Agree on a reasonable range of outcomes;
 - f. Discuss the consequences or results of choosing each option;
 - g. Help each Client find the words to express his/her own needs and interests as they explore the possibility of resolution; and
 - h. Encourage Clients to speak for themselves and Attorneys to refrain from promoting positions.
12. Participants create Agenda for next Joint Meeting and schedule two subsequent Joint Meetings from dates earlier agreed upon by Team.

13. At end of Joint Meeting, each Attorney checks in with his/her Client privately, followed by Team debrief without Clients present.

II. SUBSEQUENT JOINT MEETINGS

1. Participants are provided an Agenda, either as agreed upon at last Joint Meeting or as developed by Team prior to this Joint Meeting. Participants will limit discussion to Agenda items.
2. Coach facilitates Joint Meeting.
3. Coach or Clients read their goals from First Joint Meeting Notes. Coach asks Clients to confirm or revise goals.
4. Participants review homework from last Joint Meeting.
5. Participants identify any homework or actions to be taken before next Joint Meeting and agree on reporting process.
6. Participants address other items on Agenda.
7. Participants create Agenda for next Joint Meeting.
8. Each Attorney debriefs with his/her Client privately, followed by Team debrief without Clients present.

G. DRAFTING THE SEPARATION AGREEMENT

1. At a Joint Meeting, Attorneys describe the process for drafting the Separation Agreement (Agreement).
2. Drafting Attorney will use neutral language in Agreement.
3. The first draft may include standard language that appears in well-drafted separation agreements provided each client is equally affected. The draft may also include suggested substantive provisions that may be helpful, but may not have been specifically discussed at Joint Meetings, provided such provisions are clearly marked in bold, "Not Agreed."
4. Drafting Attorney will provide draft Agreement to other Attorney for edits and comments. Attorneys will work together to produce a draft that best represents Clients' agreements. They will also identify for the Clients provisions that were not discussed or that require further discussion.
5. Attorneys will agree on the language of the first draft and all subsequent drafts before either Attorney provides any draft Agreement to his/her Client.

6. Coach will review any parenting plan incorporated into Agreement.
7. FP will review any sections in Agreement relevant to FP work.
8. Attorneys will coordinate to provide their respective Clients with any draft Agreement or revisions at an agreed time. Once Attorneys agree on changes, they will agree on when to send revised drafts to Clients.
9. Team will adhere to the principles of CL process throughout the drafting and revising of Agreement. Coach will facilitate the drafting process as needed.
10. All major substantive discussions about draft Agreement, and confirmation that Agreement is in final form, will take place in Joint Meeting(s).

H. CONCLUDING THE COLLABORATIVE PROCESS

1. Explain to Clients how and when the professionals exit from the CL process:
 - a. Attorneys accompany Clients to court for the uncontested hearing;
 - b. Coach may bring closure to involvement in the case through a final contact with Clients by phone, e-mail, or letter; and
 - c. FP may bring closure to involvement in the case through a final contact with Clients by phone, e-mail, or letter.
2. Team confirms that all professionals' bills have been paid, retainers have been accounted for, and refunds, if any, have been sent to Clients.
3. Team meets soon after conclusion of case (non-billable time) to improve the quality of CL practice by:
 - a. Evaluating Team's work in the case;
 - b. Discussing successful or unsuccessful interventions; and
 - c. Identifying at least one procedural skill each professional learned or that was reinforced by this case experience.

I. TERMINATION OF THE COLLABORATIVE PROCESS PRIOR TO SETTLEMENT

1. The Collaborative process is terminated upon the occurrence of any of the following events:
 - a. The withdrawal of one or both Parties pursuant to the Collaborative Family Law Process Agreement;
 - b. The withdrawal of an Attorney pursuant to the Collaborative Family Law Process Agreement, provided no successor Collaborative counsel continues in the case; or,
 - c. Either party seeks court intervention.
2. Once the Collaborative process is terminated, each Attorney will:
 - a. Inform other Team members of the termination of the case;
 - b. Cooperate to facilitate the transfer of the case to successor counsel, if any;
 - c. Inform successor counsel that the entire Collaborative Law process, including all written submissions and communications, oral or written offers, promises, statements, and settlement terms, made by the Clients, Attorneys, or experts in connection with the Collaborative Law process, shall be treated as settlement discussions for the purposes of the rules of evidence and other relevant provisions of state and federal law, and therefore are not to be introduced as evidence, except for information and documents that are otherwise discoverable; and
 - d. Inform successor counsel that Clients' Collaborative Family Law Agreement precludes the issuance of a subpoena for the testimony of any Collaborative professional in the matter.
3. Team Meeting will be convened as soon as feasible to address the items in section H.3. a., b., and c. of these protocols (non-billable time).