

## COLLABORATIVE LAW

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## **22.1 INTRODUCTION**

### **(a) What is Collaborative Law?**

Collaborative law, also referred to as collaborative practice (CP), is an alternative dispute resolution process that is rapidly gaining in popularity in the United States and around the world. The concept of CP was originated in early 1990 by SW Webb, an attorney from Minnesota. While CP is most widely known and associated with domestic relations cases at this time, it has begun to grow in popularity in civil and probate law matters. The basic principle of collaborative law is that by agreeing to engage in the collaborative process, the parties commit at the outset of their dispute resolution efforts to attempt to settle their differences in a peaceful, positive, and respectful manner without recourse to litigation.

The basic premise of CP is that both parties are committed to reaching a negotiated agreement with the help and knowledge of professionals trained in collaborative law. The parties and their attorneys sign a "participation agreement" at the beginning of the

process in which they agree to the open exchange of all pertinent information, to respect the shared goals of the collaborative process, and not to resort to litigation. They also agree that if they are unsuccessful in reaching agreement through CP, each party will be compelled to retain new counsel before having recourse to the courts.

During the initial consultation with a potential client for whom the collaborative process might be an appropriate dispute resolution mechanism, the collaborative attorney discusses the dispute resolution processes available and summarizes the advantages and disadvantages of each process. The parties, with the assistance of their respective attorneys, must determine and agree among themselves whether the collaborative process is appropriate for their set of circumstances. The collaborative process may not always be the best option. For instance, where there is a strong history of domestic violence, mental illness, substance abuse, or the complete inability to communicate or trust the other party, the collaborative process might not be the best choice.

### **(b) What Are the Advantages of the Collaborative Process?**

CP enjoys several significant advantages when compared to litigation. It offers parties and attorneys alike a greater degree of control of the process of dispute resolution. In most instances, the collaborative process is less expensive and less stressful for the clients than traditional litigation. It may also be less time consuming than litigation since the parties and their counsel never relinquish control over the process to the inevitable delays and vagaries of the traditional judicial process. The pace of the collaboration is determined by the parties who chart their own course and move at a speed set by them. Another valuable advantage of the collaborative process is the privacy it provides to the parties by allowing their discussions to be held without public record and outside the forum of an open courtroom. Most significantly, CP has the potential to deliver a customized resolution with very specific provisions to address the unique concerns of a family or couple that might never have been considered in a traditional negotiated or litigated process.

## **22.2 THE COLLABORATIVE PROCESS: ISN'T THIS JUST LIKE MEDIATION?**

Mediation and collaborative law share the goal of settling disputes outside the courtroom. Both adopt a problem-solving approach to reaching agreement. However, barring these similarities, the processes are quite different. Whereas in the mediation context, spouses rely on each other to provide complete and accurate information, in the collaborative process, there is some built-in protection against incomplete or dishonest disclosure because the collaborative professionals are ethically bound to provide full, honest and relevant information. Most often, parties are required to sign sworn statements, sometimes under penalty of perjury, that they have honestly and completely disclosed all relevant financial and other information. In most jurisdictions, contracts that are based on material misrepresentation, misleading information, or material omissions are voidable as a matter of law. Lawyers drafting these agreements are careful to insist on honesty lest the contract that was so carefully crafted be set aside. Clients are admonished to avoid this outcome by truthful and full disclosure.

In mediation, parties negotiate directly with each other and each advocates for his or her respective interests. The mediator assists them in managing conflicts and keeping the conversations focused on problem solving. At the conclusion of the mediation process, and sometimes during it, the parties typically bring the product of their mediated negotiations to separate attorneys who each review and comment on the proposed terms of the agreement from the perspective of the party by whom the attorney has been retained. If there are suggested modifications to the proposed mediated agreement, the parties return to mediation to try to resolve them, or they seek out a different process to resolve their matter. Very rarely are these "review attorneys" in the room with the parties and the mediator at the same time. In the collaborative process, each party has an advocate in the room to help parties effectively articulate his and her specific interests and concerns during negotiations. While the parties are strongly encouraged to (and often do) vocalize their needs and interests in collaborative negotiations, each can also rely on his or her collaborative attorney to help communicate feelings and desires in a constructive manner. At the end of the collaborative process, the resulting agreement has already been vetted by the attorneys and needs only to be reviewed for its accuracy in conveying the parties' decisions reached during negotiations.

### **22.3 COLLABORATIVE PROFESSIONALS: BUILDING A PROFESSIONAL TEAM**

#### **(a) Who Are the Players?**

While initially collaborative law was conceived as a dispute resolution process involving only attorneys and their clients, the idea of a multidisciplinary approach to the collaborative process has taken hold and is seen by many collaborative professionals as the most efficient and the most comprehensive way to assist parties in reaching an agreement. The premise of the "multidisciplinary approach" in CP is to build a team of professionals to help the parties successfully reach an agreement that is beneficial to both of them and takes into account the limitations of their common resources. The multidisciplinary approach in the context of collaborative divorce typically involves lawyers, financial professionals (financial specialists or financial coaches), mental health professionals (divorce coaches), and a child specialist, when appropriate. The goal of this approach is to involve professionals who have expertise and experience in discrete disciplines to help the parties facilitate a successful outcome on all levels: legal, financial, emotional, and parenting.

#### **(b) What Is Each Professional's Role in the Process?**

##### ***Lawyer***

Each party engages an attorney trained in the collaborative process to advise and educate that party with respect to the legal concepts relevant to the specific needs of a family. The collaborative attorney often helps the client to formulate realistic and reasonable expectations based on the resources available to the parties and the parties' legitimate needs. When necessary, the collaborative attorney counsels the client as to the most probable ranges of outcome in court if an agreement cannot be reached. At the same time, it is the duty of the collaborative attorney to advise the parties of the laws

applicable to their circumstances and to protect the collaborative spirit of the negotiations and keep the shared goals of the process at the forefront of negotiations. Parties engaged in the collaborative process are free to choose what, if any, legal rights and responsibilities will or will not be relied on in reaching their agreement. In other words, these collaborative clients are free to create their own rules and are not forced to rely on the often vague and ambiguous, frequently unpredictable, outcomes afforded by traditional litigation.

### ***Financial Professional***

In most instances, only one financial professional is retained to assist the parties in negotiating an agreement using the collaborative process. However, where the parties' finances are particularly complex, two or more financial professionals may be retained. The particular structure of the team is different from jurisdiction to jurisdiction. Collaborative professionals form organizations known as practice groups, each with its own agreed-on composition of the collaborative team. The role of the financial professional can become critical in reaching an agreement. Since the parties agree to an open exchange of financial information at the outset of the collaborative process, the financial professional is charged with gathering all necessary financial information from the parties, presenting it in an organized fashion to the attorneys and the parties, and helping educate the parties about their financial options for settlement. Similarly, as the financial specialist is retained by both parties, he or she is neutral and unbiased and typically in the best position to generate options for the parties without aligning with one party over the other.

### ***Mental Health Professional***

The emotional complexities of negotiating a divorce settlement can easily be overlooked, yet handling such issues successfully is a critical component in assisting the parties to reach a settlement. There may be either one or two mental health professionals (often referred to as coaches for the parties) on the collaborative team, depending on the issues that need to be resolved and the needs of the parties. The mental health professional(s) (MHP) typically meets with both parties and can do so either separately or together, depending on the circumstances. The MHP's role is to assess the respective emotional states of the parties, to identify the greatest emotional obstacles to settlement, and to help the other professionals on the team formulate a plan to assist the parties accordingly. Among their many benefits to the collaborative process, MHPs are highly skilled in communication strategies. MHPs, in effect, can teach clients a more effective method for advocating for self without alienating or offending the spouse. The MHP is also a resource to educate the attorneys and other members of the team about difficult issues, which can then be navigated more smoothly and more productively. Depending on the needs of the parties, the MHP may play a very comprehensive and central role throughout the process or may play a more discreet role. In the neutral coach model, one MHP is charged to assist both parties in dealing with the challenges of negotiating with someone with whom there exists long psychological or psychiatric histories. In the two-coach model, each client engages an MHP to help individually and in the group meetings.

It is important for the parties to understand that the role of MHP in the process is not therapeutic (i.e., the parties are not in therapy) and that their discussions with the MHPs are shared with the collaborative team and not protected by the typical confidentiality of therapy. In fact, it is the MHP's ability to explain and reframe the concerns, interests, fears, and perspectives of each party to the collaborative team that adds value to the process by helping the parties move past and constructively work through difficult issues.

### ***Child Specialist***

Another MHP, the child specialist, is often an integral part of the collaborative team where there are substantial disagreements or other issues between parents regarding the children, or where a child (or children) of the parties have special and complex needs. The child specialist may assist the parties in formulating parenting plans, time-sharing arrangements, and resolving other matters concerning the children. The child specialist brings value to the team by articulating the needs and concerns of children when parents are perhaps too distracted or otherwise in states of reduced capacity to fully appreciate the impact of the separation and divorce on the children. In essence, the child specialist gives voice to the children so that their needs, interests, and concerns are not overlooked.

## **Part Six Alternative Dispute Resolution**

### **22.4 FINANCIAL PROFESSIONAL**

#### **(a) Role of the Financial Professional in the Collaborative Process**

Financial differences often strike at the heart of parties' motivations for seeking a divorce. In many instances, such differences also present the most vexing challenges to reaching collaborative agreements, as parties are forced to compete over limited resources and contemplate diminished lifestyles and real financial insecurity. Depending on the circumstances, the financial professional can play a pivotal role in helping the parties reach an out-of-court financial settlement. The advantage of using financial professionals is that the parties benefit from the knowledge and experience of a professional who is well versed in financial matters and is able to help resolve their specific financial issues while, in most instances, remaining neutral.

#### **(b) Benefits of Using a Financial Professional**

The financial professional must assess the financial position of the family unit as it currently exists and carefully examine the realities of each party's prospective financial position after the divorce is final under various settlement scenarios. The professional typically spends time working with both parties, either together or separately, educating them as to their assets and liabilities, valuing complex assets and liabilities, formulating possible solutions to help them achieve both shared and divergent financial goals, and assisting them in budgeting for future expenses in light of anticipated income streams and equitable distribution. Additionally, the financial professional often advises the parties regarding the tax consequences of various settlement options to assist them in making well-informed decisions and maximizing their combined wealth.

**(c) Neutral or Advocate?**

In particularly complex matters, the needs of the parties may call for the services of more than one financial professional. In most cases; a single neutral financial professional can meet the needs of the parties by assisting them in formulating financial settlement possibilities and assessing the financial ramifications of potential resolutions; however, there are instances in which the needs of one or both parties cannot be adequately met by a single neutral. Under such circumstances, each party may engage a financial professional to fully develop his or her respective settlement proposal based on individualized needs and resources and to advocate for the party's financial interests. Although the use of multiple financial professionals is not the norm in collaborative divorce, it is gaining momentum in some cases. Some cases require the expertise of professionals best suited to perform specific tasks, such as real estate or business valuation; others require an expert at cash flow analysis, budgeting, financial planning, or economic projection. Each case varies as to how best financial professionals can be utilized.

**22.5 COLLABORATIVE CONTRACT****(a) Collaborative Contract: What Is It?**

Once the parties have agreed to engage in the collaborative process, the attorneys prepare a participation agreement for signature. The participation agreement sets forth the parties agreement not to litigate and their commitment to the open sharing of information and documents. Both the parties and their collaborative attorneys sign the agreement before beginning the process. Other members of the team have agreements with the parties as well.

**(b) What Happens if the Contract Is Broken?**

Since the parties agree at the outset of the process to avoid litigation, one of the most common questions about collaborative law is: What happens if one or both parties violate the agreement? If the collaborative agreement is breached, and one or both parties institute litigation, the professionals involved in the collaboration must withdraw from the process and the parties are compelled to retain new counsel. At the heart of CP is the "disqualification clause" contained in all participation agreements. The clause states that should the process be concluded prior to an agreement being reached, and should one or both of the parties elect to resolve the dispute in court, the professionals on the collaborative team, including the attorneys, will not represent either client in court and will not participate in the litigation. In essence, these professionals are "disqualified" from in court. Thus, both parties and counsel have a vested interest in adhering to the collaborative process to settle the dispute or risk starting the process over should they violate the terms or the spirit of the participation agreement.

## 22.6 DISCLOSURE IN THE COLLABORATIVE PROCESS

One of the fundamental principles of CP is the commitment of the parties and their counsel to provide full disclosure. *Full disclosure* means that the parties are obligated to provide all information, whether requested by the other party or not, necessary to enable both parties and counsel to evaluate the matter and formulate informed settlement options.

Although parties engaged in CP do not insist on formal discovery as would be expected in traditional litigation (such as the exchange of formal written discovery requests and responses, written interrogatories, subpoenas, or depositions), collaborative attorneys often require that the parties provide sworn statements reflecting their income from all sources, their assets, and their liabilities, together with supporting documentation.

Collaborative attorneys are committed to providing all relevant information in order to adhere to the principle of full and open disclosure. If a collaborative attorney believes that his or her client is withholding vital information that compromises the ability of the other party to reach a well-informed decision and sign a fair agreement resolving the matter, that attorney is obligated to terminate participation in the collaborative process. Clients who choose CP are routinely reminded by counsel to strictly adhere to the principles of full and candid disclosure. As noted earlier, an agreement based on fraud, false information, material omission, or material misrepresentation is in jeopardy of being set aside if challenged in court. Unless parties are willing to disclose all relevant information, reaching agreement in any model of dispute resolution is simply a waste of time.



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