

FACP COLLABORATIVE PROCESS ETHICAL STANDARDS

FLORIDA ACADEMY OF COLLABORATIVE PROFESSIONALS

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Prefatory Comments to Ethical Standards

The Florida Academy of Collaborative Professional's (hereinafter referred to a "FACP") mission is to transform how conflict is resolved through the Collaborative Process.

The Collaborative Process is a unique non-adversarial process that is intended to preserve a working relationship between the parties and to reduce the emotional and financial toll of litigation. Because this distinct dispute resolution model challenges professionals in ways that may not be addressed by the ethical standards of individual disciplines or other dispute resolution models, the FACP has recognized a need for these unique Ethical Standards.

FACP has adopted these Ethical Standards to promote the essential elements of the Collaborative Process and to establish core principles and requirements designed to advance the consistency of practice, to establish a common set of expectations for professionals and clients and to create a high level of integrity for the benefit of clients.

The Ethical Standards that follow are intended to:

1. Create a basic framework for ethical and professional conduct by the Collaborative Professional that is consistent with each professional's ethical responsibilities;
2. Provide a common set of values, principles, and standards to guide the decisions, conduct, and teamwork of the Collaborative Professional; and
3. Identify responsibilities of Collaborative Professionals to their clients, Collaborative colleagues, and the public.

FACP is not a regulatory body and these FACP Ethical Standards do not form a basis for determining whether a professional is subject to legal liability or disciplinary action.

Ethical Standards for Collaborative Professionals

(Adopted on **** 2019)

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I. GENERAL ETHICAL STANDARDS APPLICABLE TO ALL COLLABORATIVE PROFESSIONALS

1.0 Terminology. As used in these Ethical Standards:

- A. **“Collaborative Process”** as defined under § 61.56(4) Fla. Stat. means a voluntary process intended to resolve a Collaborative matter without intervention by a tribunal and in which persons sign a Collaborative Participation Agreement and are represented by Collaborative attorneys.

The Collaborative Process begins, regardless of whether a legal proceeding is pending, when the parties enter into a Collaborative Participation Agreement.

- B. **“Definitions”** are set forth under § 61.56(1) through (15) Fla. Stat. 2016. The statute defines the following:

- (1) Collaborative attorney
- (2) Collaborative law communication
- (3) Collaborative law participation agreement
- (4) Collaborative law process
- (5) Collaborative matter
- (6) Law firm
- (7) Nonparty participant
- (8) Party
- (9) Person
- (10) Proceeding
- (11) Prospective party
- (12) Record
- (13) Related to a collaborative matter
- (14) Sign

(15) Tribunal

1.1 Competence.

- A. Collaborative professionals must comply with all professional and ethical conduct requirements applicable to their respective professions.
- B. Collaborative professionals must be in good standing under the licensure or certification required by their respective professions.
- C. Collaborative professionals should at all times meet all requirements of the FACP Minimum Standards for Collaborative Professionals as may be adopted from time to time.
- D. Collaborative Professionals will respect the expertise, skill and experience of other members of the professional team. Collaborative professionals will not provide services for which they are not qualified by education, training or experience. Collaborative professionals will be mindful of the clients' individual circumstances and the overall circumstances of the matter that may require others to be on the Collaborative professional team or be involved as consultants.

Comment: *Collaborative professionals are confronted by financial, psychological, emotional, cultural, physical, and other factors that affect professional and client participation in the process. It is important for the professionals to be able to recognize these factors, as they will necessarily influence the Collaborative Process and client decision making. In fully addressing client needs, interests and goals, the Collaborative professional must be willing to turn to other professionals, such as lawyers with special expertise, mental health professionals, medical professionals, financial professionals, vocational specialists, specialists in the areas of physical*

disability, substance abuse, domestic violence, and others. In working with other specialists, Collaborative professionals and clients should fully understand how transparency, confidentiality and privilege will apply to those professionals.

1.2. Priority of Client Interests.

- A. Collaborative professionals must always place the interest of their clients above their own personal, financial or professional interests. Where the interests of a professional and any client(s) are or could be in conflict, that Collaborative

professional must either (1) decline to accept the matter, or (2) resign if the conflict cannot be disclosed, is not waived or is not waivable.

- B. Conflicts between the interest of a client and a professional include any circumstance where there is a risk that the professional's responsibilities under these Ethical Standards will be materially affected by a personal, financial or professional relationship with the client(s), a current or former client, a professional working on the matter, or a third person.
- C. A Collaborative professional must not accept a sum of money or a gift of more than nominal value for the referral of the professional's Collaborative client(s).

1.3. Confidentiality and Privilege.

- A. Confidentiality—General Rule. A Collaborative professional will not disclose information about the client(s) that was learned during the Collaborative Process, unless: (1) all affected clients consent; (2) the disclosure is mandated by law, including court or administrative order; (3) the professional has a reasonable belief that a client may harm persons or property; or (4) the information is related to child abuse or neglect, spousal abuse, the commission of a crime or fraud or as part of a plan to commit a crime, a public hazard or to a dispute or complaint concerning the professional's work or fees during the Collaborative Process.
- B. Confidentiality Before the Participation Agreement Is Signed. Before the Participation Agreement is signed, a Collaborative professional will not disclose a client's private information and confidences, except to the extent allowed by the client or that professional's ethics and professional responsibility requirements.

Comment: *Information shared between clients, or between prospective Collaborative Professionals, prior to the commencement of the Collaborative Process may not be protected by the evidentiary privilege for Collaborative communications where it exists. Professional ethics may require that communications remain confidential prior to a Participation Agreement being signed. Each Collaborative lawyer should ensure that confidentiality is explained to the client and that the client authorize the attorney to communicate what otherwise would be confidential information prior to the Participation Agreement being signed in the form of a consent to share and release information.*

- C. Protecting Privilege. A Collaborative professional will do all things necessary to ensure the privilege applies to the Collaborative Process.

Comment: § 61.58 Fla. Stat. governs the provisions of privilege of a collaborative law communication and must be followed, notwithstanding whether addressed herein.

1.4 Promoting the Collaborative Process. A Collaborative professional must be truthful, candid and forthright when promoting the Collaborative Process to potential clients.

II. COMMENCING THE COLLABORATIVE PROCESS

2.1 Required Process Disclosures.

- A. Prior to commencing the Collaborative Process, a Collaborative lawyer must inform the prospective client(s) of the full range of process options available for addressing any legal matter(s), and provide information reasonably necessary to enable the client to make an informed process choice.

Comment: This Ethical Standard parallels Rule 4-1.19 of The Florida Bar Rules of Professional Conduct by imposing requirements on the Collaborative Lawyer to provide clients information about the potential risks and benefits of each available process option, among other things. This information includes the possible relative financial costs and the impact on ongoing and future relationships. This Ethical Standard does not limit any Collaborative Professional from offering information about process options or an opinion about the appropriate process for the client's matter.

- B. Prior to commencing the Collaborative Process, a Collaborative professional must take reasonable steps to ensure that the client understands that the Collaborative Process (1) is voluntary, (2) can be terminated at any time, and (3) is subject to the requirements of Ethical Standards 3.1, 3.2, 3.3, 3.4, 3.12, and 3.13.

Comment: Because the exercise of the professional's responsibilities in the Collaborative Process may be different from the client's expectations, informed consent is extremely important. The professional must take reasonable steps to give the client a meaningful understanding about the process and expectations of the professional. Such steps will differ depending on the individual client, and could require dialogue and confirming writings. See Ethical Standards 2.5 and 2.6.

2.2 Commencement of the Collaborative Process. The Collaborative Process commences when a Participation Agreement is signed by the clients, and their

Collaborative lawyers have acknowledged in writing their representation in the Collaborative Process. This is provided under Florida Statutes § 61.57 and Rule 12.745 of the Florida Family Law Rules of Procedure, both of which provide guidance through the Collaborative Process.

- 2.3 Effective Participation in Process. A Collaborative professional must suspend the Collaborative Process or resign if the professional has a reasonable belief that a client is unable to effectively participate in the process.
- 2.4 Consideration of Likelihood of Reaching Resolution. Before a Participation Agreement is signed, and throughout the Collaborative Process, a Collaborative professional must assess the likelihood that a resolution can be reached in a manner consistent with these Ethical Standards and within a timeframe appropriate to the matter and to the client(s) circumstances. If a professional has a significant concern whether resolution can so be reached, the professional must take action appropriate to the concern.

Comment: *The term “Resolution” is defined in the IACP Standards and Ethics as a written agreement signed by the clients addressing the issues in the dispute, and if required to be implemented or made enforceable, the agreement has been approved or ratified by a court or other authority. “Resolution” includes an agreement addressing some but not all of the issues if the clients have agreed that the remaining issues will not be resolved in the Collaborative Process.*

Comment: *In making the assessment, a Collaborative professional must consider whether the Collaborative Process can effectively address the clients’ specific circumstances, needs and concerns. If action is warranted, actions may include conferring with the client(s) about the professional’s concerns, conferring with the professional team, modifying the approaches and techniques used in the process, providing additional support for the client(s), helping the client(s) select professionals or a process more suitable for the circumstances, or declining or resigning from the matter.*

- 2.5 Fee Agreement or Confirming Writing. A Collaborative professional will provide the client(s) a written fee agreement (or other writing) that describes the scope and limitations of that Collaborative professional’s services to the client(s) in the Collaborative Process, the circumstances under which the professional may resign or terminate the process, and the professional’s fee structure and billing practices.

2.6 Required Participation Agreement. The Collaborative Process requires a written Participation Agreement that:

- A. Is consistent with these Ethical Standards and Florida law;
- B. Binds the clients and all Collaborative professionals to the Collaborative Process; and
- C. Includes these elements at a minimum:
 - (1) The prohibition of a Collaborative professional to participate in a litigation proceeding or other action which would terminate the Collaborative Process.
 - (2) The requirement to openly disclose information as provided under 3.1.
 - (3) The requirement to negotiate in good faith as provided under 3.3.
 - (4) The conditions under which a professional may resign or terminate the Collaborative Process.
 - (5) The conditions under which the Collaborative Process terminates as defined under § 61.57 Fla. Stat. and Rule 12.745 Fla. Fam. L.R.P.

Comment: Both the client(s) and the Collaborative professionals must be bound in writing to the Collaborative Process. It is not required that all be bound in the same document.

III. DURING THE COLLABORATIVE PROCESS

3.1 Disclosure of Information.

- A. The Collaborative Process requires the full and affirmative disclosure of all Material Information whether or not requested.
- B. The Collaborative Process requires clients and professionals to comply with all reasonable requests for information in a timely manner.

3.2 Advocacy in the Collaborative Process.

- A. A Collaborative professional will respect each client's self-determination, recognizing that ultimately the clients are responsible for making the decisions

that resolve their issues.

- B. A Collaborative professional will assist the client(s) in establishing realistic expectations in the Collaborative Process.
- C. When the matter relates to the care and support of children, elders or other dependents, a Collaborative professional will encourage the client(s) to consider the impact of decisions on the dependents.
- D. A Collaborative professional will consider the impact that the professional's experiences, values, opinions, beliefs, and behaviors will have on the Collaborative Process.
- E. A Collaborative professional will avoid contributing to interpersonal conflict of the clients, including when identifying and discussing the clients' interests, issues, and concerns.

3.3 Good Faith Negotiation.

- A. The professionals must act in good faith in all negotiations and in the Collaborative Process, and must advise the clients that the Collaborative Process requires good faith negotiation.
- B. Good faith negotiation requires that:
 - (1) Each client and professional takes a thoughtful and constructive approach on all unresolved questions in the interest of reaching agreements.
 - (2) Each client and professional comply with the Participation Agreement and any other formal and informal agreements made in the Collaborative Process.
 - (3) No client or professional take advantage of inconsistencies, misunderstandings, miscalculations, omissions, or inaccurate assertions of fact, law or expert opinion.
 - (4) No client or professional threaten to undertake a Proceeding to coerce a particular outcome on an issue to be resolved by the Collaborative Process.

Comment: Collaborative professionals should make diligent efforts to understand from the clients' perspectives what is most important to them. Collaborative professionals

should be mindful to respect the dignity of all involved and maintain a high standard of integrity in negotiations Collaborative professionals are not responsible for the behavior of clients, but should take reasonable steps to educate clients about the requirements of good faith negotiations. These interests, values, and priorities may go beyond traditional legal or other professional considerations. Clients who select the Collaborative Process have a reasonable expectation that their matter can and will be resolved by an agreement that is acceptable to all the clients. If the clients reach impasse, the professionals should encourage the clients to reconsider or create options that would be acceptable to all. This does not preclude a professional suggesting that a client consider seeking other opinions or terminating the Collaborative Process.

3.4 Professional Teamwork. Each Collaborative professional engaged in a matter has the responsibility, individually and with the other Collaborative professionals, to manage the Collaborative Process effectively, efficiently, and in a manner that advances the clients' common goal of reaching resolution. This responsibility includes:

- A. The obligation to inform the other professionals of facts or circumstances that are likely to impair or improve (1) the effective functioning of the Collaborative Process for the clients, (2) the likelihood of reaching resolution, and (3) the ability of the professionals to work effectively together.
- B. The obligation to monitor and coordinate the efforts of professional team members to avoid unnecessary delay and duplication of effort.
- C. The obligation to examine the impact of the professional's own conduct upon the functioning of the professional team and on the Collaborative Process. Each Collaborative professional must act in a manner that advances the interest of all clients in reaching resolution.

Comment: *When a Collaborative professional fails to communicate effectively, that failure can impact the productivity and efficiency of the Collaborative Process. Similarly, an interpersonal dispute or stylistic difference between professionals, or between a professional and one of the clients, may negatively impact the ability of the professional team to effectively manage the process.*

3.5 Neutral Roles.

- A. A Collaborative professional who serves on a Collaborative matter in a neutral role must adhere to that role, and may not engage in any relationship that would compromise the Collaborative professional's neutrality. Except as

otherwise specified in Ethical Standard 4.4, working with any client(s) or their dependent(s) outside of the Collaborative Process is inconsistent with a neutral role.

B. A neutral Collaborative professional will give reasonable advance notice to the other professionals engaged in the matter prior to meeting with fewer than all the clients.

3.6 Financial Professionals. A Financial professional will not have any other business or professional relationship with a Collaborative client during or after the conclusion of a Collaborative matter, and will not sell or recommend the purchase of financial products or other services to a client in a matter which results in a financial benefit to the Financial Specialist.

3.7 Mental Health Professionals. A person who has acted in a counseling capacity for a client or clients will not serve in the role of Facilitator or Child Specialist on a Collaborative matter involving that client or the client's dependent. ["Facilitator" is interchangeable with Neutral Mental Health Professional].

Comment: A Collaborative professional serving as a Child Specialist will inform the dependent about the Child Specialist's role and the limits of confidentiality as appropriate, taking into account the dependent's age and level of maturity.

3.8 Professional Services after Resolution of Process.

A. Mental Health Professionals and Child Specialists. Mental Health professionals and Child Specialists may provide services following the resolution of the Collaborative matter, so long as the services remain consistent with their role in the Collaborative matter. The professionals must have the consent of all clients before providing services after resolution. A Mental Health professional or Child Specialist may not serve as an individual or joint therapist to the clients or to a client's dependent after resolution.

B. Financial Professionals. With the consent of the clients, a Financial professional may provide services following the resolution of a Collaborative matter, so long as the services do not violate Ethical Standard 3.6 and remain consistent with the Financial professional's role in the Collaborative matter.

Comment: There are times when additional work is needed to effectuate the terms of a Settlement Agreement or Parenting Plan. For instance, as a Financial professional, there may be a joint tax return that must be prepared for the signature and filing of the parties or future calculations required to give effect the resolution. For a Mental Health professional, it may be for continued dealings between the clients relating to the Parenting

Plan. So long as the professional is performing services for both clients; and so long as both clients agree to the continued roles of the professionals; and so long as the services relate to the continued issues set forth in the Agreements reached between the clients, the professionals should be entitled to their continued participation as professionals for both clients. This is for the benefit of both clients in not having to hire new professionals. The provisions for continued services is consistent with IACP Ethical Standard 4.4 A. and B.

3.9 Circumstances that Require Counseling Clients. If a Collaborative professional learns that a client is acting in a manner that (1) is inconsistent with any provision of the Participation Agreement, (2) impedes the efficient and effective conduct of the Collaborative Process, (3) uses the Collaborative Process to achieve an unfair advantage, or (4) otherwise undermines the integrity of the Collaborative Process, the professional will advise and counsel the client about the potential consequences of continuing the conduct including the risk that continuation of the conduct could lead to mandatory professional resignation and/or Termination of the process.

3.10 Resignation and Discharge.

- A. The resignation or discharge of a Collaborative lawyer does not terminate the Collaborative Process if, within the time specified by law or by the Participation Agreement, the client engages a successor Collaborative lawyer.
- B. The resignation or discharge of a Collaborative professional other than a Collaborative lawyer does not terminate the Collaborative Process if (1) the client(s) engages a successor Collaborative professional, or (2) the clients and all continuing Collaborative professionals consent to proceed without a successor professional.
- C. Any successor Collaborative professional must agree in writing to be bound by the Participation Agreement.

Comment: *The Collaborative Process must terminate if a client does not hire a successor Collaborative Lawyer within the time specified as defined under § 61.57 Fla. Stat..*

3.11 Circumstances that Require Resignation. A Collaborative attorney must resign under the following circumstances, provided that the attorney has fulfilled the obligation to counsel and advise the client as set forth in Ethical Standard 3.9:

- A. The attorney's client intentionally misrepresents, withholds or fails to disclose material information, whether or not such information has been requested and after the client has been counseled by the attorney of the client's obligations concerning disclosure.
- B. The attorney's client takes unfair advantage of inconsistencies, misunderstandings, inaccurate assertions of fact, law or expert opinion, miscalculations, or omissions.
- C. Any of the professionals have a conflict of interest that is not disclosed or is disclosed but not waived. This applies to all professionals making up the team.
- D. In any situation where, under the Participation Agreement or these Ethical Standards, the withdrawal of the professional is mandatory.

Comment: *There may be circumstances when a professional has reached the conclusion that he or she cannot in good conscience continue to be effective in the process, or that the integrity of the process has been materially impaired in a manner that is not described above. In those circumstances, a professional may elect to resign.*

3.12 Notice of Resignation. If a Collaborative professional resigns, that professional will provide prompt written notification of the resignation to that professional's client(s), the other Collaborative professionals and, if permitted, to all clients.

3.13 Prohibition Against Participating in a Proceeding—General Rule.

- A. Except as provided in Ethical Standards 3.13.C and 3.14, a Collaborative professional and any other professional working in the same firm or in association with the Collaborative professional is prohibited from participating in or providing services with respect to any contested proceeding that involves substantially the same participants.

Comment: *Ethical Standard 3.13.A does not prohibit a Collaborative professional from providing services that are not related to a proceeding if allowed by Ethical Standard 4.4.*

- B. The prohibition in Ethical Standard 3.13.A may not be waived by the clients as to the attorneys representing the clients.
- C. The application of the prohibition to a professional working in the same firm or in association with the Collaborative professional does not apply if the Participation Agreement expressly exempts a professional who (1) is a member of an organization or firm providing services to the client without fee, or a

government agency, and (2) has been isolated from any participation in the Collaborative Process.

3.14 Exceptions to Prohibition Against Participating in a Proceeding.

- A. With the consent of all clients, a Collaborative Attorney may only initiate and take action in a proceeding as necessary to implement or make legally enforceable agreements reached in the Collaborative Process, including participating in procedures that are appropriate to preserve the ability of a court or other authority to approve such agreements and to enter a Final Judgment. This does not prohibit a Collaborative attorney from initiating a proceeding prior to commencement of the Collaborative Process.
- B. The Financial professional may not be retained, but the Participants may agree to utilize the work product of the financial professional for the court proceeding rather than having to commence the financial disclosures and information prepared by the Neutral Financial professional.

Comment: This exception does not modify the general rule in Ethical Standard 3.13.A and B that the clients may not consent to having a third party decide any contested issue without first terminating the Collaborative Process. Examples of permissible acts include initiating a proceeding to approve a resolution, or requesting a stay or continuance of a proceeding to preserve jurisdiction to approve an agreement reached in the Collaborative Process.

IV. **CONCLUDING THE COLLABORATIVE PROCESS**

4.1 Conclusion. The Collaborative Process concludes pursuant to the provisions of § 61.57 Fla. Stat.

4.2 Terminating Events. The occurrence of any of the following events terminates the Collaborative Process:

- A. A client or professional gives notice of termination, with or without cause.
- B. A client or a client's lawyer participates in a contested proceeding unless specifically allowed by Ethical Standard 3.14.
- C. A Collaborative professional resigns or is discharged and none of the exceptions under Rule 12.745(b)(3) Fla.Fam.L.R.P. apply.

4.3 Notice Requirement Upon Termination. If a Collaborative professional learns of a terminating event, the professional will notify the other Collaborative professionals.

4.4 Professional Work after Termination of Process.

- A. After termination of the process, a Collaborative professional will not provide any service for the client(s) that is either (a) adverse to any other client in the terminated Collaborative matter, or (b) related to the Collaborative matter, except as provided for under Ethical Standard 3.08.

Comment: *Ethical Standard 3.08 refers to resolution of the process, not termination.*

- B. After termination of the process, a Collaborative Professional may provide the professional's client(s) with referrals.
- C. After termination of the process, a Collaborative Professional may consult with a client about reinstating or resuming the Collaborative Process, and other dispute resolution process options that may be available. The Collaborative Professional may be retained by the client(s) in a resumed or reinstated Collaborative Process.

Comment: *See also Ethical Standard 3.13. This Ethical Standard does not prohibit changing the way in which negotiations are conducted within the Collaborative Process prior to termination. This Ethical Standard prohibits assisting clients in any negotiation or proceeding following termination.*