

**ETHICS GUIDELINES FOR COLLABORATIVE PRACTICE –
DISTRICT OF COLUMBIA, MARYLAND AND VIRGINIA**

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**MARYLAND COLLABORATIVE PRACTICE COUNCIL (MCPC)
ETHICS COMMITTEE**

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TABLE OF CONTENTS

INTRODUCTION TO ETHICAL GUIDELINES	1
1. INFORMED CONSENT	2
<i>A. An attorney has an ethical obligation to obtain the client’s informed consent to the limited scope of representation. The attorney must advise the client of alternative processes, as well as risks and possible consequences of entering into the Collaborative Process, prior to accepting representation in a Collaborative case.</i>	<i>2</i>
<i>B. A mental health professional has an ethical obligation to obtain the client’s informed consent to the risks and limitations of the service to be provided.</i>	<i>5</i>
<i>C. A financial professional has an ethical obligation to obtain the client’s informed consent. CPAs and CFPs should have a clear, mutually agreed upon engagement letter.</i>	<i>5</i>
2. PRIVILEGE AND CONFIDENTIALITY UNDER THE UCLA	6
<i>A. The UCLA creates a statutory privilege for Collaborative communications.</i>	<i>6</i>
<i>B. The parties can assert the UCLA privilege as to any Collaborative communication. Non-attorney team members can assert this privilege as to their own Collaborative communications. Attorneys cannot assert this privilege.</i>	<i>9</i>
<i>C. The UCLA provides statutory enforcement of the clients’ agreements as to confidentiality. .</i>	<i>9</i>
3. PRIVILEGE AND CONFIDENTIALITY APART FROM THE UCLA: IN ALL JURISDICTIONS THERE ARE PRIVILEGE AND CONFIDENTIALITY REQUIREMENTS IMPOSED BY STATE LAW AND BY PROFESSIONAL ETHICAL CODES.....	9
<i>A. In the Collaborative Process, the client’s expectation that information provided to his/her attorney will be shared with the team and the other party means that no attorney-client privilege is created with respect to the communication unless the client specifically tells the attorney not to share such communication.</i>	<i>10</i>
<i>B. Apart from the privilege created by the UCLA, once the client consents to share information, there is no privilege created with the mental health professional in the Collaborative Process.</i>	<i>13</i>
<i>C. Apart from the privilege created by the UCLA, there is no privilege created with the financial neutral in the Collaborative Process.</i>	<i>14</i>
<i>D. An attorney has an ethical obligation to maintain a client’s confidentiality. The attorney must obtain informed consent from the client to share the client’s otherwise confidential communications to the extent necessary to conduct the Collaborative Process and must follow the client’s instructions to keep information confidential within the Process.</i>	<i>14</i>

<i>E. A mental health professional has an ethical obligation to maintain a client’s confidentiality. The mental health professional must obtain informed consent from the client to share the client’s otherwise confidential communications to the extent necessary to conduct the Collaborative Process and must follow the client’s instructions to keep information confidential within the Process.</i>	23
<i>F. The financial professional has an ethical obligation to maintain a client’s confidentiality. The financial professional must obtain informed consent from the client to share the client’s otherwise confidential communications to the extent necessary to conduct the Collaborative Process and must follow the client’s instructions to keep information confidential within the Process.</i>	26
4. ATTORNEY’S ROLE AS ADVOCATE	27
<i>A. The Collaborative attorney has an ethical obligation to advocate for his or her client by providing competent and diligent representation. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.</i>	27
5. CLIENT’S RIGHT TO THE FILE.....	30
<i>A. The Collaborative lawyer must turn over the entire file to the client upon request of the client. This requirement includes turning over notes, off-line team e-mails and mental impressions.</i>	30
<i>B. Mental health professionals must consider jurisdictional statutes and profession-specific ethical rules to determine requirements for providing the file to the client. All social workers have an ethical obligation to provide the entire file to the client, if requested. All mental health professionals in D.C., according to statute, must provide the file to the client, if requested. In Maryland and Virginia, there are no ethical rules or statutes that require psychologists to provide the file to the client.</i>	32
<i>C. CPAs and CFPs must return original documents provided by the client. CPAs must return documents they have prepared if the documents are complete and paid for by the client. CFPs must return documents prepared by them in accordance with their engagement agreement.</i>	34
6. WITHDRAWAL OF PROFESSIONALS/TERMINATION	34
<i>A. None of the professionals can terminate a Collaborative Process. Only parties can terminate a Collaborative Process. Under certain circumstances, an attorney must withdraw from representation of a client in a Collaborative Process.</i>	34
<i>B. A mental health professional must balance his/her obligation to withdraw against his/her ethical obligations to the client.</i>	42
<i>C. CPAs and CFPs have an ethical obligation to withdraw if a client refuses to share or misrepresents important information or otherwise undermines the Collaborative Process.</i>	45

D. Upon successful completion of a Collaborative Process, all team members must remain in their team roles to protect the integrity of the Collaborative Process.	46
i. If the Collaborative Case concludes successfully, the attorney must remain in his or her Collaborative role in case the clients reconvene the Collaborative Process. If the case terminates unsuccessfully, the attorney is prohibited from representing the client in court or in any other matter related to the Collaborative matter, except for emergencies as provided in the UCLA.	46
ii. If the Collaborative case concludes successfully, the mental health professional must remain in his or her Collaborative role and cannot shift to an inconsistent role such as therapist or parent coordinator.	48
iii. The financial neutral may assist clients beyond the conclusion of the Collaborative Process only on tasks attendant to ending the Collaborative Process or, if the Collaborative Process is reconvened, serving as the financial neutral.	50
7. CONFLICTS OF INTEREST	51
A. An attorney may not represent a client if there is a significant risk that the attorney’s representation will be materially limited by the attorney’s responsibilities to another client or person or by the attorney’s personal interest.	51
B. A mental health professional should avoid conflicts of interest that might impair his/her impartial judgment.	52
C. CPAs and CFPs are required to disclose to the client all potential material conflicts of interest which may affect the relationship.	53

INTRODUCTION TO ETHICS GUIDELINES (JANUARY 2013)

In recent years, Collaborative Practice has become an increasingly popular alternative dispute resolution method in divorce matters. It provides the clients with the resources needed for divorce, including not only legal expertise, but also the expertise of financial and mental health professionals. The development of Collaborative Practice and the involvement of different professionals have raised new ethical questions, including how particular aspects of the Collaborative Practice comply with the standards set forth in the various codes of professional conduct governing each profession. In these Guidelines, we address how the ethical requirements impact each of the professions and we offer guidance that will enable professionals to protect themselves from an ethical standpoint, while also helping to ensure that our Collaborative community acts consistently and with the utmost integrity.

The task to develop these Guidelines was created after several Collaborative professionals were faced with difficult ethical questions in their cases. As a result, in July 2009 the Maryland Collaborative Practice Council (“MCPC”) formed an Ethics Committee to address those questions. The Co-Chairs of this committee, Robin B. Taub, Attorney at Law, Sue Soler, LCSW, and Anne (Jan) White, Attorney at Law, spearheaded the project, and with the help of their committee members, Debora May, CPA, Karen Freed, LCSW and Stuart Skok, Attorney at Law, researched the issues and prepared these Guidelines. Our mission was and continues to be to provide the Collaborative community with advice and guidance regarding what we believe to be the primary ethical questions. These Guidelines are not intended to be all-inclusive, but rather are intended to raise awareness and provide guidance with respect to the most important and difficult ethical questions.

We would like to give a special thank you to the following individuals who assisted in creating these Guidelines: Susan Butler, Attorney at Law, and Paul Smollar, Attorney at Law, from Virginia Collaborative Professionals, Leslie Kodet, paralegal at Paradiso, Taub, Sinay, & Owel, P.C. and Kristina Justh, law librarian at Pasternak & Fidis, P.C. We also want to thank MCPC for funding additional research by Brett Turner and National Legal Research Group.

We address the following issues: Informed Consent, Privilege, Confidentiality, Advocacy, the Client’s Right to the File, Withdrawal, Termination and Conflict of Interest. With respect to each issue, the Guidelines are broken down in terms of jurisdiction and profession. When relevant, we discuss the effect of passage of the Uniform Collaborative Law Act (“UCLA”), which has been enacted in the District of Columbia. In addition, we have included citations that identify the source documents so that the reader has them for his/her own information and analysis.

We hope that you will find these Guidelines helpful and that this will be the beginning of an ongoing dialogue within the Collaborative community to address ethical issues.

UPDATE (September 2017): In the summer of 2017 we updated these Guidelines to incorporate changes resulting from Maryland’s passage of the UCLA and to add other more current references and citations. Note that the Maryland UCLA applies to all areas of the law. The DC UCLA is limited to matters that arise “under the family or domestic relations law of the District of Columbia.” D.C. Code §16-4002(5). Thanks to Kristina Justh, law librarian at Pasternak & Fidis, Kelly Sullivan, paralegal at Paradiso, Taub, Sinay, Owel & Kostecka, and Brooke Hettig, attorney at Pasternak & Fidis, who provided valuable assistance in this update.

1. INFORMED CONSENT

A. An attorney has an ethical obligation to obtain the client’s informed consent to the limited scope of representation. The attorney must advise the client of alternative processes, as well as risks and possible consequences of entering into the Collaborative Process, prior to accepting representation in a Collaborative case.

An attorney has an ethical obligation to obtain the client’s informed consent to the limited scope representation in connection with a Collaborative case. The ABA Committee on Ethics and Professional Responsibility determined that Collaborative Practice is a permissible limited scope representation under ABA Model Rule of Professional Conduct 1.2. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-447 (“Ethical Considerations in Collaborative Law Practice,” Aug. 9, 2007). ABA Model Rule 1.2 provides that “a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹ A limitation is considered “reasonable” if the lawyer believes the client’s needs are well served by participating in the Collaborative Process. ABA Section of Dispute Resolution, Collaborative Law Comm. Ethics Subcommittee, *Summary of Ethics Rules Governing Collaborative Practice*, Discussion Draft 2009, 15 Tex. Wesleyan L. Rev. 555, 559 (2008-2009), citing N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics Op. 699, at 7-8. The Uniform Collaborative Law Act (“UCLA”) is likewise consistent in its guidance to lawyers: “[b]efore a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall . . . assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party’s matter.” UCLA §14(1); see also D.C. Code §16-4014.² This requirement was enacted by rule in Maryland in 2015. Md. R. 17-503. Before beginning a collaborative law process, the attorney shall “provide the client with information that the attorney reasonably believes is sufficient for the client to make an informed decision about the material benefits and risks of the collaborative law

¹ The rules of our three local jurisdictions are consistent with the ABA Model Rules. Md. Rule of Prof’l Conduct (“MD RPC”) 1.2(c) provides that an attorney may limit the scope of representation if the limitation is reasonable, the client gives informed consent, and the scope and limitation are set forth in writing. (Note that Maryland Rules have been renumbered to Title 19, Chapter 300 with internal references to the Model Rule number. For ease of reference, the Model Rule number is used in these Guidelines.) District of Columbia Rules provide that a lawyer may limit the objective of the representation if the client gives informed consent. D.C. Rule of Prof’l Conduct (“D.C. RPC”) 1.2(c). Va. Rule of Prof’l Conduct (“VA RPC”) 1.2(b) provides that a lawyer may limit the objectives of representation if the client consents after consultation.

² Consistently, the International Academy of Collaborative Professionals (“IACP”), Standard and Ethics (“SE”) § 2.2, provides:

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.

process.” Md. R. 17-503(a)(2); *see also* Comment 5 to Md. and D.C. Rules of Professional Conduct 2.1:

when a matter is likely to involve litigation and, in the opinion of the attorney, one or more forms of alternative dispute resolution are reasonable alternatives to litigation, the attorney should advise the client about those reasonable alternatives. [MD RPC 2.1 cmt. 5; *see also* D.C. RPC 2.1 cmt. 5.]

To obtain informed consent, counsel must: 1) provide adequate information and explanation regarding the risks, advantages, and disadvantages of the Collaborative Process; 2) advise the client of the attorney’s obligation to withdraw if the client withholds or misrepresents important information or otherwise undermines the Collaborative Process; 3) explain the disqualification requirement that requires the attorney to withdraw if the Collaborative case terminates prior to settlement (and results in litigation), and that such withdrawal may result in additional expense, delay and work for the client; 4) advise the client of possible risks associated with the voluntary disclosure and transparency of the Collaborative Process; 5) advise the client of other risks attendant to the client’s particular situation, the availability of alternative processes and respective risks and benefits of such processes; 6) advise the client as to what information will be protected if the Collaborative Process fails and the parties go to court; and 7) obtain the client’s informed consent to Collaborative Process principles, such as working for a resolution that meets the needs of both parties and the family, correcting mistakes, providing full disclosure of important information and sharing legal advice and expertise with the other party.³ ABA Model Rule 1.0(e) defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. *Accord* MD RPC 1.4 (b); D.C. RPC 1.4(b); VA RPC 1.4(b); *see also* D.C. Code §16-4014.

D.C. Code §16-4014 specifically provides that, before a prospective client signs the Participation Agreement, the lawyer must comply with the following specific requirements: (1) discuss with the prospective party the factors the lawyer reasonably believes relate to whether or not the Collaborative Process is appropriate for that particular matter; (2) provide the party with information sufficient to make an informed decision about the material risks and benefits of the Collaborative Process as compared with other options such as mediation, litigation, or traditional negotiation; (3) advise the client of how the Collaborative Process can and/or will terminate and that the lawyer (and the lawyer’s firm) cannot continue to represent him or her if the process is terminated unsuccessfully except in the event of emergency; (4) advise the client that participation in the Collaborative Process is voluntary and any party has the right to unilaterally terminate the process with or without cause; and (5) advise the client that the process will terminate if either party initiates a contested court proceeding, or seeks intervention by the Court. D.C. Code §16-4015 adds the requirement that the attorney must make a reasonable inquiry

³ *See* American Bar Association Formal Op. 07-447 (discussing ethical considerations in Collaborative Law Practice) for further detailed guidance on what a lawyer must do to ensure there has been informed consent as well as the Rules of Professional Conduct on informed consent applicable in the appropriate jurisdiction.

whether there is a history of a coercive or violent relationship and conditions the commencement of the process upon certain requirements to protect the client in such situations.

Md. R. 17-503 is almost identical to the two D.C. statutory requirements cited above. It omits the explicit requirement to inform the client that initiating contested litigation terminates the Collaborative process and it adds the requirement that the participation agreement must contain a certification by each Collaborative attorney that the elements of Rule 17-503 have been met.⁴ Md. R. 17-503(b). The Maryland participation agreements at Appendix G of the Protocol Resource for a Full Team Model: Collaborative Divorce by the D.C. Metro Protocols Committee, September 15, 2015 (hereafter “Protocols 2015”) contain this certification.

Both D.C. and Maryland require the lawyer to inquire about a history of a coercive or violent relationship and to make a reasonable determination that it is safe for the client to proceed in the Collaborative process. D.C. Code §16-4015 requires the lawyer to assess whether or not the client has a history of being in a violent or coercive relationship and whether it would be safe for such client to participate in the Collaborative Process. If such a history exists, by statute the attorney can commence or continue a Collaborative case only if the following requirements are met: the client, after being fully informed as required by statute, must request the Collaborative Process; and the attorney must reasonably believe that the client’s safety can be protected. D.C. Code §16-4015(c). Md. R. 17-503(a)(5), on the same subject, has a similar objective and provides more generally that a lawyer shall “make a reasonable effort to determine whether the client has a history of a coercive or violent relationship with another prospective party, and if such circumstances exist, [shall] determine whether a collaborative law process is appropriate.”

⁴ Rule 17-503(a). Informed Consent; Contents of Agreement

- (a) Requirements Before a Collaborative Law Process Begins. Before beginning a collaborative law process, an attorney shall:
- (1) discuss with the client factors the attorney reasonably believes relate to whether a collaborative law process is appropriate, including reasonably available alternatives to a collaborative law process;
 - (2) provide the client with information that the attorney reasonably believes is sufficient for the client to make an informed decision about the material benefits and risks of a collaborative law process;
 - (3) advise the client that participation in a collaborative law process is voluntary and any party has the right unilaterally to terminate a collaborative law process with or without cause;
 - (4) explain to the client that if the collaborative law process terminates prior to full resolution of all collaborative matters, the client will need to obtain another attorney or proceed without an attorney; and
 - (5) make a reasonable effort to determine whether the client has a history of a coercive or violent relationship with another prospective party, and if such circumstances exist, to determine whether a collaborative process is appropriate.

B. *A mental health professional has an ethical obligation to obtain the client’s informed consent to the risks and limitations of the service to be provided.*

Mental health professionals should obtain the client’s informed consent to Collaborative Process principles, such as working for a resolution that meets the needs of both parties and the family, making full disclosure of important information, and withdrawing from the process if the client withholds or misrepresents important information or otherwise takes unfair advantage of the Collaborative Process. Mental health professionals must also advise the client of their mandated reporting requirements for abuse or neglect of a child or other person. According to the Code of Ethics of the National Association of Social Workers ("NASW Code of Ethics") §1.03, social workers should provide services to clients only in the context of a professional relationship based, when appropriate, on valid informed consent. Social workers should use clear and understandable language to inform clients of the purpose of the services, risks related to the services, relevant costs, reasonable alternatives, client’s right to refuse or withdraw consent, and the time frame covered by the consent. Social workers should provide clients with an opportunity to ask questions.

According to the American Psychological Association, Ethical Principles of Psychologists and Code of Conduct ("APA Ethical Principles & Code of Conduct") § 3.10(a), (d) (Informed Consent), when psychologists conduct research or provide assessment, therapy, counseling, or consulting services, they are to “obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in [the] Ethics Code.” APA Ethical Principles & Code of Conduct § 3.10(a). Psychologists are to appropriately document written or oral consent, permission and assent. APA Ethical Principles & Code of Conduct § 3.10(d).

C. *A financial professional has an ethical obligation to obtain the client’s informed consent. CPAs and CFPs should have a clear, mutually agreed upon engagement letter.*

Both the Certified Financial Planner (“CFP”) and the Certified Public Accountant (“CPA”), *i.e.*, the financial professional designations that meet IACP qualifications to be on a Collaborative team, are subject to professional obligations to obtain the client’s informed consent. It is important for the financial neutral to advise clients at the outset and obtain their consent that there is no confidentiality within the process because the financial neutral is hired by both parties and is therefore required to share any information provided or developed with both parties. CFP Certification Standards Principle 5; American Institute of Certified Public Accountants ("AICPA") Code of Professional Conduct and Bylaws (hereafter “AICPA Code of Conduct”) § 1.700.001. The CFP professional and the client should mutually define the scope of the engagement before any financial planning service is provided, including circumstances under which the financial professional might be required to withdraw. Details about each party’s responsibilities, the time frames of the engagement, compensation, and conflicts of interest should be set out in writing in a formal engagement letter or letter of understanding, signed by both parties. CFP Board of Standards, Inc., Standards of Professional Conduct (hereafter “CFP Standards”) § 100-1, as amended July 2009; *see also* CFP Board’s Rules of Conduct (hereafter

“CFP Rules of Conduct”), Defining the Relationship with the Prospective Client, Rules 1.1, 1.2, 1.3.⁵

CPAs should likewise have a clear engagement letter that outlines their responsibilities in any planning situation. The engagement letter should explicitly detail whether the CPA firm is assuming the primary responsibility for the planning or is merely acting in an ancillary or secondary team role to other professionals. The CPA firm should fully disclose potential conflicts of interest and secure written approval from all parties if it undertakes to represent multiple parties in the transaction. All engagement letters or contracts should clearly specify for whom the practitioner is working and to whom information may be disclosed. AICPA Code of Conduct § 2.110.010.

2. PRIVILEGE AND CONFIDENTIALITY UNDER THE UCLA

A. *The UCLA creates a statutory privilege for Collaborative communications.*

In jurisdictions where the UCLA is enacted, such as the District of Columbia, D.C. Code §§ 16-4000-16-4022 (“D.C. UCLA”), Maryland, Maryland Courts and Judicial Proceedings (“MD CJP”) §§ 3-2001-3-2005 (“MD UCLA”), and Virginia, VA CODE §§ 20-168-20-187 (“VA UCLA”), the UCLA creates a statutory privilege for Collaborative Communications.⁶ The UCLA provides that “[a] collaborative law communication is privileged . . . , is not subject to

⁵ Certified Financial Planner Board of Standards, Inc. Practice Standards 100 Series: “ESTABLISHING AND DEFINING THE RELATIONSHIP WITH THE CLIENT 100-1: Defining the Scope of the Engagement

The financial planning practitioner and the client shall mutually define the scope of the engagement before any financial planning service is provided.

Explanation of this Practice Standard

Prior to providing any financial planning service, the financial planning practitioner and the client shall mutually define the scope of the engagement. The process of “mutually-defining” is essential in determining what activities may be necessary to proceed with the engagement.

This process is accomplished in financial planning engagements by:

- Identifying the service(s) to be provided;
- Disclosing the practitioner’s material conflict(s) of interest;
- Disclosing the practitioner’s compensation arrangement(s);
- Determining the client’s and the practitioner’s responsibilities;
- Establishing the duration of the engagement; and
- Providing any additional information necessary to define or limit the scope.

The scope of the engagement may include one or more financial planning subject areas. It is acceptable to mutually define engagements in which the scope is limited to specific activities. Mutually defining the scope of the engagement serves to establish realistic expectations for both the client and the practitioner [bold and italics omitted].”

⁶ Note that the DC UCLA applies only to matters that “arise under the family or domestic relations law of the District of Columbia,” D.C. Code § 16-4002(5), and the VA UCLA applies only to matters “between family or household members or [which arise] under the family or domestic relations laws.” VA CODE § 20-168.

discovery, and is not admissible as evidence.” D.C. Code § 16-4017; MD CJP § 3-2009; VA CODE § 20-182. A Collaborative Law communication is defined as a “statement, whether oral or in a record, or verbal or nonverbal, that . . . [i]s made to conduct, participate in, continue, or reconvene a collaborative law process; and . . . [o]ccurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.” D.C. Code § 16-4002(1); MD CJP § 3-2001(b); VA CODE § 20-168. Note that this privilege attaches to the communication itself and therefore all professionals and the clients are governed by this statutory privilege.

The UCLA provides for exceptions when there is no privilege or the privilege does not apply. The exceptions addressed in § 19(a) of the UCLA are based upon the belief that society’s interest in the information outweighs its interest in the confidentiality of the communications; whereas the exceptions addressed in § 19(b) of the UCLA apply when the relative strengths of the interest in confidentiality and society’s interest in disclosure can only be measured under the particular facts and circumstances. UCLA § 19 cmt.⁷

⁷ Section 19 of the UCLA sets out the limits of privilege and exceptions as follows:

(a) There is no privilege under Section 17 for a collaborative law communication that is: (1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public; (2) a threat or statement of a plan to inflict bodily harm or commit a crime of violence; (3) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or (4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privilege under Section 17 for a collaborative law communication does not apply to the extent that a communication is: (1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to the collaborative law process; or (2) sought or offered to prove or disprove abuse, neglect, abandonment or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Section 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the

The D.C. UCLA, the Maryland UCLA, and the Virginia UCLA follow the exceptions set forth in the UCLA. Information that is otherwise admissible in evidence does not become inadmissible solely because it is used in the Collaborative Process. D.C. Code § 16-4017(c); MD CJP § 3-2009(c); VA CODE § 20-182.C. There is no privilege in the following circumstances: when the information is available to the public, D.C. Code § 16-4019(a)(1), MD CJP § 3-2011(a)(1), VA CODE § 20-184.A.1; when the communication is a threat to inflict bodily injury or commit a violent crime, D.C. Code § 16-4019(a)(2), MD CJP § 3-2011(a)(2), VA CODE § 20-184.A.2; or when the communication is intentionally used to plan, attempt or commit a crime, or conceal an ongoing crime, D.C. Code § 16-4019(a)(3), MD CJP § 3-2011(a)(3), VA CODE § 20-184.A.3. The parties' signed agreements in the Collaborative Process are not privileged. D.C. Code § 16-4019(a)(4); MD CJP § 3 2011(a)(4), VA CODE § 20-184.A.4.

The privilege does not apply when the communication is (1) sought or offered to prove or disprove a claim or complaint of professional misconduct arising from or related to the Collaborative Law Process, D.C. Code § 16-4019(b)(1), MD CJP § 3-2011(b)(1), VA CODE § 20-184.B.1 or (2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult (unless protective services is a party to the process). D.C. Code § 16-4019(b)(2); MD CJP § 3-2011(b)(2), VA CODE § 20-184.B.2. D.C. also excepts from the privilege reports to the proper authorities of suspected domestic abuse. D.C. Code § 16-4019(a)(5). There is also no privilege if the Court determines that the need for the evidence substantially outweighs the interest in protecting confidentiality in a court proceeding involving a felony or misdemeanor or a rescission, reformation or defense with respect to a contract arising out of the Collaborative Process. D.C. Code § 16-4019(c); MD CJP § 3-2011(c), VA CODE §

evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in (1) a court proceeding involving a felony [or misdemeanor]; or (2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

....

(f) The privileges under Section 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

UCLA § 19(a)-(c), (f); *see also* D.C. Code §§ 16-4017 to 16-4019; MD CJP §§ 3-2009 to 3-2011.

20-184.C, . A person who prejudices another by revealing a privileged communication may not assert the privilege to block the prejudiced person from responding. D.C. Code § 16-4018(b); MD CJP § 3-2011(c), VA CODE § 20-183.B. The parties can also agree in advance in a signed record that all or part of the communications in the Collaborative Process are not privileged, assuming that the person who made the communication had notice. D.C. Code § 16-4019(f); MD CJP § 3-2011(f), VA CODE § 20-184.F.

B. The parties can assert the UCLA privilege as to any Collaborative communication. Non-attorney team members can assert this privilege as to their own Collaborative communications. Attorneys cannot assert this privilege.

According to the UCLA, the parties can refuse to testify and can bar others from testifying in discovery or court as to any communication made in the Collaborative Process. D.C. Code § 16-4017(b)(1); MD CJP § 3-2009(b)(1), VA CODE § 20-182.B.1. Moreover, nonparty participants (that is, team members other than attorneys) can assert a statutory privilege with respect to their Collaborative Communications.⁸ D.C. Code § 16-4017(b)(1); MD CJP § 3-2009(b)(2), VA CODE § 20-182.B.2. Note that because Collaborative attorneys are not nonparty participants under the statute, if both parties agree, an attorney in a Collaborative Process can be compelled to testify over the attorney’s objection in a court or discovery proceeding involving the same or related matter between the two parties. UCLA § 17(b); D.C. Code § 16-4017(b); MD CJP § 3-2009(b)(2), VA CODE § 20-182.B. The drafters of the UCLA stated that Collaborative attorneys “are not nonparty participants under the rules, as they maintain a traditional attorney-client relationship with parties, which allocates to clients the right to waive the attorney-client privilege, even over their lawyer’s objection.” UCLA § 17 cmt.; *see also* UCLA § 2(7); D.C. Code § 16-4002(8); MD CJP § 3-2001(g), VA CODE § 20-168. .

C. The UCLA provides statutory enforcement of the clients’ agreements as to confidentiality.

The UCLA also provides that the parties can contract as to the degree of confidentiality to be accorded to their collaborative law communications. D.C. Code § 16-4016; MD CJP § 3-2008, VA CODE § 20-181. The parties, in the participation agreement, can decide to what extent they want confidentiality. The UCLA provides statutory authority for enforcing their agreement. . The professionals are bound by the parties’ decision as to how much confidentiality they desire.

3. PRIVILEGE AND CONFIDENTIALITY APART FROM THE UCLA: IN ALL JURISDICTIONS THERE ARE PRIVILEGE AND CONFIDENTIALITY REQUIREMENTS IMPOSED BY STATE LAW AND BY PROFESSIONAL ETHICAL CODES

In all jurisdictions, whether the UCLA has been enacted or not, there are privilege and confidentiality obligations for each profession based on state law and/or the ethical codes of

⁸ Nonparty participant is defined as a person other than a party and the party’s collaborative lawyer that participates in a collaborative law process. D.C. Code § 16-4002(8); MD CJP § 3-2001(g), VA CODE § 20-168.

conduct applicable to each profession. Privilege and confidentiality are distinct from each other. The requirements for privilege are different from the requirements for confidentiality. Privilege is governed primarily by statute. Confidentiality is governed by the professionals' codes of conduct.

All jurisdictions recognize attorney-client privilege and some form of mental health provider privilege. Many states, but only Maryland locally, recognize an accountant-client privilege. In jurisdictions without the UCLA, state law defines privilege protections and professional codes of conduct determine the client's right to confidentiality. As explained below, in non-UCLA jurisdictions, professionals' privilege obligations do not routinely apply to the clients' communications in a Collaborative process, and a client's decision to assert privilege and withhold important information may jeopardize the Collaborative Process. Notwithstanding the general absence of professional privilege protections in a Collaborative case, the professionals are bound by their obligations to the client of confidentiality as set forth in their professional codes of ethical conduct.

Clients traditionally have confidentiality expectations when dealing with attorneys, mental health practitioners, and financial professionals. It may not be clear to clients that "privilege," a term of art, is different from confidentiality in that a client's privilege protects his or her communications with a professional from being introduced into evidence in court or produced in court-based discovery. These privileges that arise with respect to confidential communications with a professional are evidentiary rules intended to protect the communication in the court context. Apart from privilege obligations, Collaborative professionals have ethical obligations imposed by their respective governing bodies to keep a client's information confidential.

In common usage, "confidentiality" is an umbrella term that encompasses both privilege and confidentiality. Indeed, in the participation agreements used in our area, D.C., Maryland, and Virginia, we have purposely used "confidentiality" as an umbrella term for both, because that term is more understandable to clients. However, as a term of art, "privilege" connotes that information cannot be introduced in evidence in court or compelled to be produced in court-based discovery proceedings. In other words, the information is protected from a third party who seeks to compel its production. The purpose is to encourage clients to fully communicate with the professional with the knowledge that their confidences will be kept secret by the professional and not shared. Generally, privilege is created by statute or rule; a few jurisdictions define it by case law. On the other hand, the professional's duty of confidentiality, used as a term of art, is broader. It arises from the ethics rules of the jurisdiction and the profession. It covers confidential information relating to the client, no matter its source, even if not provided by the client. It applies to all settings, including outside court proceedings. Moreover, the professional is bound by the specific instruction of the client as to who can have the information and who cannot. The client's instruction to share the information with particular persons does not invalidate its confidentiality as to other persons—as it would with respect to privilege. THOMAS E. SPAHN, *THE ATTORNEY-CLIENT PRIVILEGE, A PRACTITIONER'S GUIDE*, § 1.4 (Virginia CLE Publications).

A. In the Collaborative Process, the client's expectation that information provided to his/her attorney will be shared with the team and the other party means that no

attorney-client privilege is created with respect to the communication unless the client specifically tells the attorney not to share such communication.

Maryland attorney-client privilege is set forth by statute: “[a] person may not be compelled to testify in violation of the attorney-client privilege.” MD CJP § 9-108.

The attorney-client privilege applies only to confidential disclosures by a client to an attorney made in order to obtain legal assistance. *Peterson v. Maryland*, 444 Md. 105, 158, 118 A.3d 925, 955 (2015). The District of Columbia has established the same test for attorney-client privilege by case law. *Jones v. United States*, 828 A.2d 169, 174-75 (D.C. 2003). Virginia provides similar attorney-client privilege protection to communications intended to remain confidential. Va. Sup. Ct. R. 2:502 provides that application of attorney-client privilege is governed by case law. “Confidential communications between attorney and client made because of that relationship and concerning the subject matter of the attorney’s employment are privileged from disclosure, even for the purpose of administering justice.” *Banks v. Mario Indus.*, 274 Va. 438, 453, 650 S.E.2d 687, 695 (2007) (internal quotation marks omitted). If the client intends for an otherwise privileged communication to be disclosed beyond the attorney-client relationship, the privilege never arises. *Doe v. District of Columbia*, 2005 U.S. Dist. LEXIS 8578 at *8-*9 (D.D.C. May 11, 2005) (anything communicated by the client to his attorney, knowing that the attorney would report it to the court, was not privileged because there was no expectation of confidentiality); *United States v. Mierzwicki*, 500 F. Supp. 1331, 1334 (D. Md. 1980); *Elmer v. State*, 353 Md. 1, 21, 724 A.2d 625, 634 (1999) (Chasanow, J., dissenting) (“It is well recognized that information a client gives to an attorney to be conveyed to a third person is not privileged”); *Brewster v. Brewster*, 207 Md. 193, 202, 114 A.2d 53, 57 (1955) (client’s letter to his attorney, “written for the very purpose of securing a delay” from court, was not confidential); *Logan v. Oliver*, 96 A.2d 516, 517 (D.C. 1953).

Consequently, when the client signs an engagement agreement or a Collaborative participation agreement that provides that information provided by the client to the attorney will be disclosed to team members and the other party in the Collaborative Process, the effect is that no attorney-client privilege will attach to the client’s communications.

It is important that the client understand at the outset that he or she is making a commitment to disclosure to the other party and the team that is different from the traditional attorney-client privilege. It is critical for Collaborative attorneys, when explaining the Collaborative Process to clients, to make sure that the client is fully informed that, because the client expects and agrees for his or her information to be shared within the Collaborative Process, no attorney-client privilege arises (although the Collaborative Communications privilege will apply in UCLA jurisdictions). The provisions of an attorney’s engagement agreement should authorize such disclosure and also provide that the attorney can share the client’s information with prospective team members prior to signing the Collaborative participation agreement, in order to form a professional team and evaluate whether the case is appropriate for the Collaborative Process. Accordingly, from the signing of the engagement agreement, the client has been alerted that there is no expectation of attorney-client privilege, although clients in states which have passed the UCLA will be informed that their Collaborative communications are protected from disclosure in any subsequent litigation by the Collaborative Communications Privilege.

Note that prior to the client’s authorization to the attorney to share the client’s information—that is, prior to the client’s signing an engagement agreement that authorizes the attorney to share certain of the client’s communications or a Collaborative participation agreement, the client’s communications to the attorney are covered by the attorney-client privilege. It is important in the first consultation with the client to make clear what the expectation is as to confidentiality. If no agreements as to disclosure have been signed, absent specific agreement with the client to share the client’s information, attorney-client privilege would attach to the client’s confidential communications. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (hereafter “RESTATEMENT”) § 71.

Moreover, after the client has enrolled in the Collaborative Process, at any point thereafter, the client can reassert the attorney-client privilege with respect to a particular communication by making clear to the attorney that the specific communication cannot be shared. *Id.* When the client makes clear his or her intent to keep the communication confidential, the attorney is then bound by the attorney-client privilege and cannot share that particular communication with other team members or the other party unless the client authorizes the disclosure. *Id.* Such a request on the part of the client, if it violates the client’s obligation under the participation agreement to make full disclosure of all important information and if the client continues to assert confidentiality after the attorney’s explanation of the consequences, can trigger an attorney’s obligation to withdraw from the Collaborative Process. IACP SE § 3.10.

The attorney, after advising the client at the outset of the representation that attorney-client privilege does not attach to communications made in the Collaborative Process, must also advise the client that the client still has the right to assert attorney-client privilege with respect to a particular communication. If a new communication is to be privileged and protected from disclosure to the other party and other team members, the client must make a specific request that such communication not be shared. RESTATEMENT § 71. When the client makes such a request, the attorney is obligated to honor the client’s request to keep the communication privileged if the client persists in his or her intent to keep the information confidential, after discussion with the attorney of the consequences of such a decision for the Collaborative Process. MD RPC 1.6; D.C. RPC 1.6; VA RPC 1.6; RESTATEMENT § 71; *see also* IACP § 3.8 (requiring Collaborative professionals to counsel a client about the potential need for the professional to withdraw if the client continues to withhold information deemed by the professional important to disclose).

There are specific exceptions to attorney-client privilege. These include the following: 1) communications in which clients use attorneys’ services with the intent to commit a crime or engage in fraud or other wrongful conduct; 2) implied waivers to the privilege; 3) malpractice actions filed against the lawyer; or 4) other court filings in which the client puts at issue the legal advice and discussions with the attorney. SPAHN §§ 5.1-5.307; 7.701-7.1205. These exceptions should be explained to the client.

Additionally, a client’s communications in the presence of the other party or team members other than the client’s attorney are not privileged under traditional attorney-client privilege law because they are not communications made to the attorney in confidence. Note

that in D.C. and Maryland cases these communications will be protected by the Collaborative Communications Privilege of the UCLA.

B. *Apart from the privilege created by the UCLA, once the client consents to share information, there is no privilege created with the mental health professional in the Collaborative Process.*

Although all jurisdictions recognize a privilege applicable to mental health providers, these statutes and rules were enacted to protect confidences provided by patients in the course of diagnosis or mental health treatment.⁹ *Jaffee v. Redmond*, 518 U.S. 1 (1996). In *Jaffee* the United States Supreme Court endorsed the psychotherapist privilege, and upheld its extension to social workers, on the grounds that a psychotherapist-patient privilege serves an important public good of promoting the mental health of the citizenry by enabling patients to speak frankly in seeking mental health treatment. *Id.* at 15; *see also* EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGE* § 6.11.1 (2d Ed. 2009). Exceptions to the general rule in favor of full testimony are disfavored, and it is only due to the importance of this public interest that a mental health privilege exists. *Jaffee*, 518 U.S. at 9-10.

Many state statutes were passed prior to the creation of the Collaborative process in the early 1990's. Some statutes specifically limit their application to information provided for the purpose of diagnosis or treatment, and some refer more generally to professional services. These statutes and rules do not create a privilege in Collaborative cases, because the purpose of the privilege—to enable a patient seeking mental health treatment to speak frankly—is not present in the client's relationship with the divorce coach or child specialist in the Collaborative process. As a result, no privilege is created.

Moreover, in the Collaborative Process, once the client consents to share information with the other party and the team, the *sine qua non* for the privilege, the intent that the communication remain confidential, does not exist. As a result, in the Collaborative Process, there is no mental health privilege. IMWINKELRIED, §§ 6.8, 6.8.2 (2d Ed. 2009).

Prior to the client's decision to engage in the Collaborative Process and to consent to share his or her information, there may be a "gap" period between the time that the client first

⁹ MD CJP § 9-109 provides that the Maryland mental health privilege is only for diagnosis or treatment and consequently does not apply to mental health practitioners serving as Collaborative professionals. Similarly the language of Virginia Code § 8.01-400.2, which applies to social workers, and provides a privilege for persons seeking counseling, treatment, or advice, would not apply to social workers serving as Collaborative professionals. Only the D.C. statute and the Virginia statute for clinical psychologists have a statutory privilege sufficiently broad that it could be interpreted to apply to Collaborative practitioners. *See* D.C. Code § 14-307(a) which applies to information acquired while attending a client in a professional capacity and Virginia Code § 8.01-399, which applies to information acquired by physicians and clinical psychologists in attending a patient in a professional capacity. However, the United States Supreme Court in *Jaffe* clarified that the privilege only extends to mental health treatment. Consequently, these statutes should not be interpreted to extend the mental health privilege to mental health professionals working in Collaborative cases.

speaks to the mental health provider and the time the client signs either an engagement agreement for the Collaborative Process which authorizes sharing of the client's information or the Collaborative participation agreement. It may not be clear at the outset what the client's purpose is in seeking mental health services. During this "gap" time, the state laws and the professional's ethical codes determine whether a privilege exists. Consequently, it is important for the mental health practitioner to discern whether the client is seeking treatment or is considering and deciding to engage in the Collaborative Process. In any event, the mental health professional must be very clear with the client as to what privilege protections, if any, apply during this "gap" period. Apart from the requirements with respect to privilege, which restricts use of information in court, the mental health professionals must keep the confidentiality of their clients as required by their respective ethics rules. See the discussion in Section 3.E.

Mental health professionals may want to consult D.C. Code § 14-307(a) and, as to clinical psychologists, Va. Code Ann. § 8.01-399. The language of both is broad enough to create a mental health privilege that applies during the "gap" prior to the client's choice of process. Moreover, MD CJP § 9-109, the Maryland mental health privilege statute, and Va. Code § 8.01-400.2, which applies to social workers, both limit their application to treatment, and may also apply in this "gap" period, depending on the client's intent in meeting with the professional.

C. Apart from the privilege created by the UCLA, there is no privilege created with the financial neutral in the Collaborative Process.

There is no privilege applicable to the financial professional in the Collaborative Process except for that created by the UCLA. Of the three local jurisdictions, only Maryland has a statute addressing privilege with respect to financial professionals; that statute extends to CPAs only, not Certified Financial Planners.¹⁰ Since the client's consent to the role of the financial neutral in a Collaborative case requires consent to share his/her financial information, the statutory privilege with respect to CPAs does not apply in Collaborative cases.

D. An attorney has an ethical obligation to maintain a client's confidentiality. The attorney must obtain informed consent from the client to share the client's otherwise confidential communications to the extent necessary to conduct the Collaborative Process and must follow the client's instructions to keep information confidential within the Process.

As expressed in the Rules of Professional Conduct, a fundamental principle underlying the attorney-client relationship is that "the lawyer holds inviolate the client's secrets and confidences." D.C. RPC 1.6 cmt.4; accord VA RPC 1.6; MD RPC 1.6 cmt. 2 ("A fundamental principle in the client-attorney relationship is that, in the absence of the client's informed consent, the attorney must not reveal information relating to the representation."). The underlying purpose of this Rule is to promote the client's trust in the attorney and to encourage the client to communicate candidly. MD RPC 1.6 cmt.1. "The observance of the ethical

¹⁰ "[U]nless expressly permitted by a client . . . a licensed certified public accountant or firm may not disclose . . . [a]ny information that the licensed certified public accountant or firm, in rendering professional service, derives from . . . [the] client . . . or [t]he material of the client." MD CJP § 9-110(b).

obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.” VA RPC 1.6 cmt. 2.

Comments to the D.C., Maryland, and Virginia Rules of Professional Conduct address the overlap and distinction between privilege, as discussed above, and confidentiality. As explained in more detail by the Comments from D.C. RPC 1.6, quoted *infra*, whereas both confidentiality and privilege operate to protect a client’s communications from disclosure, confidentiality is a broader obligation than attorney-client privilege, which offers protection only as part of the court process:

The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the work product doctrine¹¹ in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege . . . [applies] in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. This rule [D.C. RPC 1.6] is not intended to govern or affect judicial application of the attorney-client privilege The privilege [was] developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure.

D.C. RPC 1.6 cmt. 6.

The attorney-client privilege is that of the client and not of the lawyer. As a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege....

Id. cmt. 7.

¹¹ Note that the work-product doctrine applies to documents and information “prepared in anticipation of litigation” and therefore is by definition inapplicable to Collaborative cases. Md. R. 2-402(d); D.C. Super. Ct. Dom. Rel. R. 26(b)(3); Va. Sup. Ct. R. 4:1(b)(3).

The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law; furthermore, it applies not merely to matters communicated in confidence by the client (*i.e.*, confidences) but also to all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (*i.e.*, secrets). This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client.

Id. cmt. 8; *see also* MD RPC 1.6 cmt. 3; VA RPC 1.6 cmt. 3.

MD RPC 1.6 does not use the term “secrets” but, similarly to D.C. RPC 1.6, extends to “information relating to the representation of a client.” MD RPC 1.6. The Comment to this Rule explains that “[t]he confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” MD RPC 1.6 cmt. 3. VA RPC 1.6 refers to “information gained in the professional relationship.”

MD RPC 1.6,¹² D.C. RPC 1.6,¹³ and VA RPC 1.6¹⁴ provide that a lawyer shall not reveal information gained in the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted pursuant to one of the listed exceptions (for example, to prevent death or serious bodily harm, or to prevent a crime or fraud for which the client has used the attorney's services). The attorney's duty of confidentiality arises with respect to prospective clients, before the attorney is hired. MD RPC 1.18; D.C. RPC 1.18; VA RPC 1.18. Therefore, until the attorney has explained how confidential information is intended to be shared in the Collaborative Process and obtained the client's informed consent to share the client's information with prospective team members, the attorney must keep the information confidential.

¹² MD RPC 1.6 Confidentiality of Information states:

(a) An attorney shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by section (b) of this Rule.

(b) An attorney may reveal information relating to the representation of a client to the extent the attorney reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud

that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the attorney's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the attorney's services;

(4) to secure legal advice about the attorney's compliance with these Rules, a court order or other law;

(5) to establish a claim or defense on behalf of the attorney in a controversy between the attorney and the client, to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the attorney based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the attorney's representation of the client; or

(6) to comply with these Rules, a court order or other law.

¹³ D.C. RPC 1.6 Confidentiality of Information states:

(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

(1) reveal a confidence or secret of the lawyer's client;

(2) use a confidence or secret of the lawyer's client to the disadvantage of the client;

(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

(c) A lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or

(2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

(e) A lawyer may use or reveal client confidences or secrets:

(1) with the informed consent of the client;

(2) (A) when permitted by these Rules or required by law or court order; and

(B) if a government lawyer, when permitted or authorized by law;

(3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client;

(4) when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a

confidence or secret in order to carry out the representation;

(5) to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee; or

(6) to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules.

¹⁴ VA RPC 1.6 Confidentiality of Information states:

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

(2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Because both privilege and confidentiality obligations of the attorney are designed to protect the client's information, the attorney must take the same actions to meet the requirements of the Rules of Professional Conduct for confidentiality as discussed above with respect to privilege. The attorney's engagement agreement should state that the attorney intends to use the client's information in talking to prospective team members in order to assess the appropriateness of the Collaborative Process and to form a team. When the client signs the attorney's engagement agreement or the Collaborative participation agreement, the terms of the contract should authorize the attorney to disclose the client's communications to the team and to the other party, but not to the outside world. Because the attorney's authority to share the client's information is based on the client's informed consent, the disclosure is limited according to the client's authorization. A client in the Collaborative Process can at any time decide to request that future communications be kept inviolate by the attorney. MD RPC 1.6; D.C. RPC 1.6; VA RPC 1.6. In such cases, the attorney must honor the client's request. However, depending on the importance of the information to the Collaborative Process, the attorney may determine that he or she must withdraw if the client continues to insist that the information not be shared. See discussion at Section 6. The attorney is responsible for explaining to the client confidentiality requirements and privileges in the Collaborative Process. D.C. Code § 16-4014; Md. R. 17-503(a)(2). When signing the Collaborative participation agreements currently in use in our local areas, the parties instruct the attorneys and other team members to keep their information confidential within the process.¹⁵ Specifically, the parties agree that the information shared in the Collaborative Process will not be introduced into evidence, subject to specific exceptions, and will not be shared by the professionals with the outside world. Typically, the parties agree to restrictions should they resort to litigation, *e.g.*, they bar subpoenaing Collaborative team members to testify in court and introducing into evidence documents prepared for and communications made in the Collaborative Process.¹⁶

¹⁵ Note that participation agreements vary as to whether the *parties* are allowed to share their information with persons outside the Collaborative Process, even though these agreements consistently obligate the professionals to keep the parties' information confidential from the outside world. See Protocols 2015, App. G. The UCLA specifically allows the parties to determine in their agreement the extent to which communications in the Collaborative Process will be confidential, subject to the existing law in the jurisdiction, as discussed in Section 2.C. See D.C. Code § 16-4016; MD CJP § 3-2008, VA CODE §20-181.

¹⁶ The Collaborative professional is obligated to discuss with the client expectations as to what information will be protected if the Collaborative Process fails and the parties go to court. D.C. Code § 16-4014; Md. R. 17-503, VA CODE §20-179. According to the terms of the participation agreements predominantly in use in our area, the client may not subpoena any of the team members or other neutral professionals who have assisted in the Collaborative Process, except by agreement of the parties and the subpoenaed professional or, in the case of the parties' attorneys, except by agreement of the parties (the agreement of the attorney to the subpoena is not required). Nor may the parties introduce into evidence any materials prepared for the Collaborative Process or communications made in the Process, subject to certain exceptions enumerated in the participation agreement. See Protocols 2015, App. G.

Once the UCLA is passed in a jurisdiction, it provides a statutory basis for enforcement of these non-admissibility and confidentiality provisions contained in a collaborative

participation agreement. With respect to the jurisdictions where the UCLA has not passed, will the provisions in the collaborative participation agreement that bar testimony of professionals and introduction of evidence and require confidentiality be upheld by the courts? There are, to date, no reported court cases in which a court has considered this question in the United States. There is a reported decision by the British Columbia (Canada) Supreme Court, in which a judge ruled that the parties could not violate the participation agreement to introduce evidence of an oral agreement made in the Collaborative Process. *Banerjee v. Bisset*, 2009 BCSC 1808 (B.C.S.C. Nov. 6, 2009).

Given the dearth of case law in this country addressing the enforceability of the collaborative participation agreement, we can turn to states that have not enacted the Uniform Mediation Act or a similar statute to see if their courts have upheld the enforceability of similar non-admissibility and confidentiality provisions of mediation agreements, despite the lack of a statute requiring enforcement. There is no case in Maryland which has ruled on this question.

There is authority in other states both for enforcing and not enforcing the terms of a mediation agreement. An early case in California held that a mediator cannot be compelled to testify. *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980) (holding that the public interest in maintaining the impartiality of federal labor mediations outweighed the benefits to be derived from their testimony about what occurred at a mediation). In the case of *Facebook, Inc. v. Pac. Nw. Software*, 640 F.3d 1034 (9th Cir. 2011), the U.S. Court of Appeals for the Ninth Circuit upheld the agreement between the parties (Facebook and the Winklevosses) that all communications made in mediation would remain confidential. In that case, the parties had signed an agreement stipulating that all statements made during the mediation were privileged and inadmissible in evidence. Later the Winklevosses sought to offer evidence of what was said in the mediation, claiming that Facebook misled them as to the value of shares received in settlement. The trial court excluded the evidence based on a local rule granting confidentiality to mediation discussions. The Ninth Circuit upheld the exclusion, but on different grounds, noting that the local rules did not apply since the mediation was not part of the court-ordered mediation program. Rather, the Ninth Circuit chose to enforce the confidentiality provisions of the mediation agreement, despite the lack of any protection afforded by statute or court rules. *But see Wilson v. Wilson*, 282 Ga. 728, 653 S.E.2d 702 (2007) (expressly requiring the mediator to testify as to whether a party to the mediation had capacity to contract and holding that a rigid rule of confidentiality would work against the basic objectives of mediation). Anecdotal experience in Maryland and the District of Columbia suggests that occasionally mediators have been unsuccessful in seeking to quash subpoenas to appear to testify.

Whether or not the court is inclined to uphold the terms of a collaborative participation agreement in states where the UCLA has not been enacted, the law in those states may bar admission of many communications made in the Collaborative Process under the general rule barring introduction into evidence of settlement negotiations as admissions. *See* Md. R. 5-408; Va. Sup. Ct. R. 2:408; *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984 (D.C. 2007).

Md. R. 5-408(a) provides that “[t]he following evidence is not admissible to prove the validity, invalidity, or amount of a civil claim in dispute: (1) Furnishing or offering or promising to furnish a valuable consideration for the purpose of compromising or attempting to

E. *A mental health professional has an ethical obligation to maintain a client’s confidentiality. The mental health professional must obtain informed consent from the client to share the client’s otherwise confidential communications to the extent necessary to conduct the Collaborative Process and must follow the client’s instructions to keep information confidential within the Process.*

Turning to the topic of the client’s right to confidentiality when dealing with mental health practitioners in the Collaborative Process, the client’s communications with the mental health professional are confidential according to the ethical rules of the mental health governing/licensing body. Mental health professionals, similarly to attorneys, must follow the client’s instructions as to what can be disclosed as part of the Collaborative Process and what must be kept confidential from the outside world.

Ethics codes for mental health professionals require mental health professionals to keep the client’s communications confidential unless otherwise specifically agreed to by the client or covered by an exception.¹⁷ Note that a mental health professional can communicate with collaterals outside the process (*e.g.*, a therapist) only when the client has signed a release.

compromise the claim or any other claim; (2) Accepting or offering to accept such consideration for that purpose; and (3) Conduct or statements made in compromise negotiations or mediation.”

VA. Sup. Ct. R. 2:408, in relevant part, provides that “[e]vidence of the following is not admissible on behalf of any party in a civil case—either to prove or disprove the validity or amount of a disputed claim, or to impeach by a prior inconsistent statement or by contradiction: (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim.”

As the New York court stated when considering a case in which the parties intended to be Collaborative but failed to sign the participation agreement, “it is not uncommon for the parties to agree to keep their settlement discussions between themselves; as noted, the law so provides anyway.” *Mandell v. Mandell*, 36 Misc.3d 797, 804, 949 N.Y.S.2d. 580, 586 (Sup. Ct. 2012). The court’s attitude toward the confidentiality provisions in a Collaborative Law agreement was that they were not anything special and were similar to the general law on use of settlement negotiations as evidence. *Id.*

When the Collaborative Process fails and the case is litigated, the rule against use of settlement negotiations as admissions will likely protect some, but not all, statements made in the Collaborative Process depending on the specific facts of the communication and its relationship to the claims in dispute.

¹⁷ In pertinent part, the APA Ethical Principles & Code of Conduct provide:

Section 4.02, Discussing the Limits of Confidentiality:

- (a) Psychologists discuss with persons ... and organizations with whom they establish a scientific and professional relationship (1) the relevant limits of confidentiality and (2)

the foreseeable uses of the information generated through their psychological activities.

(b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.

Section 4.04, Minimizing Intrusions on Privacy:

....

(b) Psychologists discuss confidential information obtained in their work only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters.

Section 4.05, Disclosures:

(a) Psychologists may disclose confidential information with the appropriate consent of the . . . individual client/patient or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.

The NASW Code of Ethics § 1.07 Privacy and Confidentiality states:

(a) Social workers should respect clients' right to privacy. Social workers should not solicit private information from clients unless it is essential to providing services or conducting social work evaluation or research. Once private information is shared, standards of confidentiality apply.

(b) Social workers may disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client.

Prior to signing the engagement agreement, the mental health professional must keep the client's communications confidential unless the mental health professional advises the client in advance that there will be no confidentiality. The engagement agreement should clearly describe the client's right to confidentiality with the mental health professional in the Collaborative Process. *See* Protocols 2015, App. I. These aspects of the engagement agreement should be reviewed at the initial meeting to ensure that the client fully understands the nature of confidentiality with the mental health professional in the Collaborative Process. The mental health professional must explain that when the client signs the engagement agreement and/or participation agreement, the client specifically authorizes the mental health professional to disclose the client's communications to the other professionals on the team and the client's spouse or partner, but not to the outside world. The client may in the future change his or her mind and ask that certain communications not be shared, but, depending on the importance of the information, this would create a risk that the mental health professional might need to withdraw from the process. In such a situation, the mental health professional must explain that, when the client requests that information be kept confidential, the mental health professional has an

(c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable and imminent harm to a client or other identifiable person. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed.

(d) Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent.

(e) Social workers should discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality. Social workers should review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. This discussion should occur as soon as possible in the social worker-client relationship and as needed throughout the course of the relationship.

obligation to determine if this information is important to the process. If the mental health professional determines that it is important to the process and therefore needs to be shared with the professional team and the client's spouse or partner, the mental health professional must advise the client of this assessment. If the client refuses to authorize the mental health professional to share the information with the professional team and the other client, the mental health professional must keep the information confidential. APA Ethical Principles & Code of Conduct § 4.02; NASW Code of Ethics § 1.07; IACP SE § 1.4.¹⁸ The mental health professional must first counsel the client as to the possible need for the professional to withdraw if the client is in violation of his or her obligation to provide disclosure as required by the participation agreement. IACP SE § 3.8. If the mental health professional withdraws, he or she must do so in a manner that considers the client's well-being and without sharing the reason for the withdrawal. See the discussion at Section 6.B.

The mental health professional serving in the child specialist role has an additional ethical obligation. According to IACP SE § 3.7.B, a Collaborative practitioner serving as a child specialist shall inform the child about the child specialist's role and the limits of confidentiality as appropriate, taking into account the child's age and level of maturity.

All mental health professionals are mandated reporters of suspected abuse of a child or other person. Md. Code Ann., Fam. Law § 5-704; D.C. Code § 4-1321.02; Va. Code Ann. §§ 63.2-1509, 63.2-1606. Note that Virginia Code § 63.2-1509, which mandates reporting of suspected child abuse, also applies to mediators who are eligible to receive court referrals. Moreover, in Maryland and Virginia mental health practitioners have a duty to warn others if a professional believes there is an imminent danger that the client may harm him/herself or others. Md. CJP § 5-609; Va. Code Ann. § 54.1-2400.1. The D.C. statute permits, but does not require, the mental health practitioner to reveal information in order to warn others in situations such as these. D.C. Code § 7-1203.03. Should one of these situations arise, the mental health professional is no longer bound by confidentiality within the process and would be permitted and, with respect to child abuse, required to reveal information to others outside of the Collaborative Process.

F. The financial professional has an ethical obligation to maintain a client's confidentiality. The financial professional must obtain informed consent from the client to share the client's otherwise confidential communications to the extent necessary to conduct the Collaborative Process and must follow the client's instructions to keep information confidential within the Process.

Ethical guidelines of financial professionals provide for confidentiality of the client's communications and information. A CFP shall maintain confidentiality of all client information. A client, by seeking the services of a CFP, expects to develop a relationship of personal trust and

¹⁸ Note that the collaborative participation agreement, as revised by the D.C. Metro Protocols Committee in 2015, App. G, leaves withdrawal to the discretion of the mental health professional if a client withholds or misrepresents information required to be shared in the Collaborative Process or otherwise acts so as to undermine or take unfair advantage of the Collaborative Process.

confidence. This type of relationship must be built on the understanding that information supplied to the CFP will be confidential. To provide services effectively and to protect the client's privacy, the CFP will safeguard the confidentiality of such information. CFP Standards Principle 5.¹⁹ A CPA "shall not disclose any confidential information without the specific consent of the client." AICPA Code of Conduct § 1.700.001.01.

In the Collaborative Process the financial neutral represents both parties. Consequently, according to the engagement agreement and the participation agreement, the financial neutral has no obligation to maintain the client's confidentiality within the process. It is important for the financial neutral to advise clients at the outset and to obtain their consent acknowledging that there is no confidentiality within the process because the financial neutral is hired by both parties and is therefore required to share any information provided or developed with both parties. CFP Standards 100-1; AICPA Code of Conduct § 1.700.001. The financial neutral's confidential obligation is set forth in both the engagement agreement and the participation agreement, which state in detail the client's consent, *i.e.*, that the client's information can be shared within the Collaborative Process but not with the outside world. *See* Protocols 2015, App. G and K.

4. ATTORNEY'S ROLE AS ADVOCATE

A. The Collaborative attorney has an ethical obligation to advocate for his or her client by providing competent and diligent representation. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.

The attorney's advocacy role in the Collaborative Process is defined in the Rules of Professional Conduct with respect to competency, diligence, and the attorney's duty as an advisor. MD RPC 1.1, 1.3, 2.1; D.C. RPC 1.1, 1.3, 2.1; VA RPC 1.1, 1.3, 2.1. Some opponents of Collaborative Practice have argued that the attorney's Collaborative role is inconsistent with the attorney's duty to be a zealous advocate. To the contrary, the attorney's duty as an advocate extends to the Collaborative Process. The attorney handling a Collaborative case has the duty to provide competent and diligent representation to his/her client. *See* ABA Model Rules of Prof'l Conduct R. 1.1, 1.3; D.C. RPC 1.1, 1.3; MD RPC 1.1, 1.3; VA RPC 1.1, 1.3. Of the three jurisdictions, only the District of Columbia uses the term "zealous," as well as diligent, in its Rules. D.C. RPC 1.3 (a) ("A lawyer shall represent a client zealously and diligently within the bounds of the law"). Although both Maryland and Virginia no longer use the term "zeal" in their Rules, they mention it in their Comments to Rule 1.3, which require an attorney to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client." VA RPC 1.3 Comment [1]; *see also* MD RPC 1.3 Comment [1]. The

¹⁹ "Principle 5 - Confidentiality

Protect the confidentiality of all client information. Confidentiality means ensuring that information is accessible only to those authorized to have access. A relationship of trust and confidence with the client can only be built upon the understanding that the client's information will remain confidential."

attorney's advocacy role in the Collaborative Process is guided by the client's goals, needs and interests, including considerations of the interests of other family members. See Eckstein, Suzy and Wall, Annemarie, *Advocacy within the Collaborative Process: A Comparative Case Study*, Maryland Bar Journal, March/April 2012. This advocacy role complies with Rules 1.1 and 1.3, particularly when these Rules are read in conjunction with Rule 2.1, which in all three jurisdictions provides as follows:

Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

D.C. RPC 2.1; VA RPC 2.1; *see also* MD RPC 2.1.

Virginia goes even farther than the other two jurisdictions in spelling out in the Comments to its Rule 1.3 that there is an "appropriate collaborative component to zealous advocacy":

Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

VA RPC 1.3 cmt. 2.²⁰

These Comments to the Virginia Rules summarize how the Collaborative attorney's commitment to the client's interests, goals, and needs and the focus on problem-solving to this end comport with the Rules' requirements for competence, diligence, and zealous advocacy. *See also* Summary of Ethics Rules Governing Collaborative Practice, *supra*, which concludes that "[d]iligence includes consideration of a client's best interests, including (in a divorce case) the well-being of the children, family peace and economic stability."

To elaborate on the Collaborative attorney's role, his or her first duty is to determine whether the Collaborative Process is in the client's best interest, as discussed in more detail in Section 1 above. *See* IACP SE § 2.2. The attorney has numerous advocacy roles in the Collaborative Process: helping the client develop goals and evaluate possible resolutions against these goals; assisting the client with identifying and expressing his/her interests, goals and needs; making sure that the client's voice is heard in the process; modeling and teaching effective communication; making sure that the client is fully informed about facts, finances, and the law prior to evaluation and decision-making; guiding the Collaborative Process to resolution; encouraging the client to provide information that is important to the issues in the Collaborative

²⁰ The Committee Commentary to the Rule provides that "the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy." VA RPC 1.3 Committee Commentary.

Process; guiding the discussion from positional-based arguments to interest based discussions that focus on the client's needs; providing legal advice; assisting the client in evaluating options for settlement and whether the settlement meets the needs of both parties and their family; reviewing the settlement for legal sufficiency and drafting the agreement; supporting the expressed goals of the client and families; and handling uncontested divorce proceedings and retirement orders. In carrying out this role, the Collaborative attorney must be cognizant of the paradigm shift from the traditional attorney's advocacy role to the Collaborative advocacy role—from that of fighting on behalf of a client to that of assisting the client in making decisions by evaluating how options meet the interests, goals and needs of the parties and their family. *See* Eckstein, Suzy and Wall, Annemarie, "How Do We Advocate?" MCPC April 2009; Protocols 2015 pages 9-10; IACP SE § 3.2.

The Collaborative attorney has an obligation to provide legal advice to his/her client about the legal processes available to the client, the substantive law affecting the client's case, and the potential outcomes if the case is to be litigated. MD RPC 1.1, 1.3, 2.1; D.C. RPC 1.1, 1.3, 2.1; VA RPC 1.1, 1.3, 2.1. This duty to provide advice to the client extends beyond providing purely legal advice. MD RPC 2.1; D.C. RPC 2.1; VA RPC 2.1 The Comments to Rule 2.1 in all three jurisdictions caution the attorney against relying on legal advice alone:

[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for an attorney to refer to relevant moral and ethical considerations in giving advice. Although an attorney is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

MD RPC 2.1 cmt. 2; *see also* D.C. RPC 2.1 cmt. 2.

Virginia adopts the above Comment and goes farther, adding "[purely technical legal advice] could also ignore, to the client's disadvantage, the relational or emotional factors driving a dispute." VA RPC 2.1 cmt. 2.

A distinguishing feature of the Collaborative Process is that, after obtaining the client's informed consent to do so, the client's Collaborative attorney may provide legal advice in the presence of the other attorney and client, even when the legal advice is adverse to his/her client. In this way, provision of legal advice in the Collaborative Process differs from traditional legal practice. Protocols 2015, App. G.

Collaborative attorneys, in advising clients, make use of many reference points that the clients may consider, apart from the law, in making decisions. Such reference points might include: practical and financial realities; the relationship of the parties to each other and to their children; interests, goals and needs of both parties and their children; prior agreements and decision-making considerations that were successful for the parties; sense of fairness; cultural background; emotional issues; the client's goals; and other factors that relate to the particular client and/or family. *See* Protocols 2015, App. M. The Collaborative attorney seeks to elicit from the client information about all of the factors that may bear upon the client's choices and

decisions. Clients who choose not to litigate and, instead, hire Collaborative attorneys, employ attorneys who have been Collaboratively trained and are therefore better equipped to help the parties through the settlement process using interest-based negotiation rather than positional bargaining.

Note that the IACP Standards and Ethics impose an obligation on all professionals to assess the likelihood that the Collaborative Process can resolve within a timeframe appropriate to the situation and take actions appropriate to any concerns. IACP SE § 2.4.

5. CLIENT'S RIGHT TO THE FILE

A. *The Collaborative lawyer must turn over the entire file to the client upon request of the client. This requirement includes turning over notes, off-line team e-mails and notes of mental impressions.*

The Collaborative lawyer has an obligation to turn over the file to the client, upon the client's request, and also, at the client's request, to provide the client's file to the successor counsel. MD RPC 1.16(d); D.C. RPC 1.16(d); VA RPC 1.16 (e); *Att'y Griev. Comm'n of Md. v. Edib*, 415 Md. 696, 4 A.3d 957 (2010); D. C. Ethics Op. 333. The list of documents which the attorney is required to provide is very broad, including attorney work product, and it applies regardless of whether the client has paid the bill. No jurisdiction provides an exception to this obligation for personal notes or mental impressions of the attorney. Moreover, the District of Columbia and Virginia specifically require the release of such information to the client when requested by the client. In Maryland, MD RPC 1.16(d) provides that "[u]pon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fees or expense that have not been earned or incurred. The attorney may retain papers relating to the client to the extent permitted by other law."

MD RPC 1.16(d) has been interpreted in several Ethical Opinions: Md. Ethics Opinion 93-31 interprets this rule to mean that the actual contents of both active and inactive files must be made available to the client at reasonable times and may not be withheld on condition of payment for copying; Md. Ethics Opinion 89-11 provides that all documents are the property of the client; Md. Ethics Opinion 84-8 obligates the attorney to surrender "those items found in the file which the client of necessity needs to prosecute or defend his position or obtain his goal (81-33)." This Opinion presupposes that items requested are not otherwise available from a source other than the attorney and that the client would suffer serious disadvantage if the process of court was used to obtain the materials; Md. Ethics Opinion 97-18 provides that Rule 1.16 compels the attorney to take "whatever reasonably practical steps are necessary to protect [the] client's interest," which may include turning over work product.

Accordingly, attorneys should operate under the assumption that in Maryland, an attorney will be obligated to provide his or her file to a client at the client's request. MD RPC 1.16(d); *Att'y Grievance Comm'n v. Lee*, 393 Md. 546, 903 A.2d 895 (2006); *Att'y Grievance Comm'n v. Ober*, 350 Md. 616, 714 A.2d 856 (1998). See also *Att'y Grievance Comm'n of Md. v. Rand*, 445 Md. 581, 128 A.3d 107 (2015); *Att'y Grievance Comm'n of Md. v. Brigerman*, 441 Md. 23, 105 A.3d 467 (2014); *Fundamental Admin. Servs., LLC v. Andersen* 18 F. Supp. 3d 680 (D. Md.

2014). It is doubtful that a provision in the participation agreement by which a client waives the right to his file would be effective to negate the attorney's obligation under MD RPC 1.16(d) as the client has the right to withdraw such waiver at any time.

The District of Columbia imposes an even more explicit test than does Maryland and requires that the entire file of an attorney must be surrendered to the client, including notes containing mental impressions. D.C. RPC 1.8, 1.16(d). Rule 1.8 has been interpreted by several Ethical Opinions: D.C. Ethics Opinion 333 provides that upon termination of representation, an attorney is required to surrender to the client, or the client's representative, or successor, the entire file, including copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer. Pursuant to D.C. Ethics Opinion 250, assertion of a retaining lien on work product to secure payment by a former client of unpaid fees is disfavored and should only be applied where clear conditions of Rule 1.8(i) have been met (only when work product is not paid for and the client is able to pay and withholding will not create "a significant risk...of irreparable harm").

VA RPC 1.16 (d) and (e) provide that, upon termination of representation,

[a]ll original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession . . . are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments; official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or

her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of representation.

VA RPC 1.16(e).

In the event the client directs the Collaborative attorney to provide the file to the client's new attorney, the client's obligation in the participation agreement to keep the file contents out of evidence still applies, and, assuming that the Court will enforce the participation agreement, the new attorney cannot introduce the Collaborative communications into evidence absent one of the exceptions stated in the agreement. In jurisdictions in which the UCLA has passed, the statute prohibits the new attorney from introducing Collaborative communications into evidence, absent one of the statutory exceptions. D.C. Code § 16-4017; MD CJP § 3-2009, VA CODE §20-182,

In all three jurisdictions, team emails, whether labeled off line or not, as well as minutes, financial reports, flip chart pages, and other documents created for the Collaborative case, must be turned over to the client or the client's successor counsel if so requested. MD RPC 1.16(d); D.C. RPC 1.16(d); VA RPC 1.16(e).

B. Mental health professionals must consider jurisdictional statutes and profession-specific ethical rules to determine requirements for providing the file to the client. All social workers have an ethical obligation to provide the entire file to the client, if requested. All mental health professionals in D.C., according to statute, must provide the file to the client, if requested. In Maryland and Virginia, there are no ethical rules or statutes that require psychologists to provide the file to the client.

According to ethical guidelines, social workers are required to provide the client his or her file upon request, unless there is strong evidence that the release of the records would cause significant harm to the client.

The NASW Code of Ethics § 1.08 Access to Records states:

(a) Social workers should provide clients with reasonable access to records concerning the clients. Social workers who are concerned that clients' access to their records could cause serious misunderstanding or harm to the client should provide assistance in interpreting the records and consultation with the client regarding the records. Social workers should limit clients' access to their records, or portions of their records, only in exceptional circumstances when there is compelling evidence that such access would cause serious harm to the client. Both clients' requests and the rationale for withholding some or all of the record should be documented in clients' files.

(b) When providing clients with access to their records, social workers should take steps to protect the

confidentiality of other individuals identified or discussed in such records.

Other than for the client's emergency treatment, there are no specific ethical guidelines governing psychologists' obligations to release the file to the client.²¹

D.C. statutes require mental health professionals to turn their files over to their clients. D.C. Code §§ 7-1201.01 to -1208.07 (formerly D.C. Code §§ 6-2001 *et seq.*).²²

Maryland and Virginia do not have statutes requiring mental health professionals in Collaborative roles to turn over their files to their clients upon request (although, as discussed above, social workers are ethically bound to do so). Maryland's statute applicable to the client's right to his or her file from mental health professionals applies only to medical records which relate to health care, which in turn means "any care, treatment, or procedure by a health care provider: (1) To diagnose, evaluate, rehabilitate, manage, treat, or maintain the physical or mental condition of a patient or recipient; or (2) That affects the structure or any function of the human body." Md. HG § 4-301(f). This language is not sufficiently broad to extend to the services of divorce coaches or child specialists in the Collaborative Practice. Therefore, there is no statutory requirement for mental health professionals in Collaborative roles in Maryland to provide the client's file to the client, although, as discussed above, social workers are subject to an ethical obligation to do so.

The Virginia statute that requires turning over client records applies only to records of "health services," which are defined as "mental health therapy." Va. Code Ann. § 32.1-127.1:03. As a result of this restrictive wording, there is no statutory requirement for mental health professionals in Collaborative roles in Virginia to provide the client's file to the client, although, as discussed above, social workers are subject to an ethical obligation to do so.

Off-line team e-mails that are included in attorneys' files *are required to be released to the client by the attorneys in all three jurisdictions*. Other team members should keep in mind that the client has a right, through the attorneys, to see all of these emails that become part of attorneys' electronic or hard copy files.

Note that the statutory references in Maryland, the District of Columbia, and Virginia excluding personal notes from disclosure to the client do not apply to notes made in the

²¹ APA Ethical Principles & Code of Conduct § 6.03 Withholding of Records for Nonpayment provides: "Psychologists may not withhold records under their control that are requested and needed for a client's/patient's emergency treatment solely because payment has not been received."

²² D.C. Code § 7-1201.01(2) defines "client" as "any individual who receives or has received professional services from a mental health professional in a professional capacity." D.C. Code §§ 7-1202.01, 7-1202.05 and 7-1202.06 provide that, except if the "mental health professional reasonably believes that . . . [refusal to disclose] is necessary to protect the client from a substantial risk of imminent psychological impairment or to protect the client or another individual from a substantial risk of imminent and serious physical injury," the "mental health professional . . . shall disclose mental health information . . . upon the voluntary written authorization of the [client]."

Collaborative Process. In Maryland, there is no statutory right to withhold personal notes made in the Collaborative Process from the client.²³ In D.C. the exception for personal notes only applies if “access to such personal notes [is] strictly and absolutely limited to the mental health professional” except in cases of litigation by the client against the professional. D.C. Code §§ 7-1201.01(13), 7-1201.03. The Collaborative requirement for sharing information prevents application of this personal notes exception to notes made in the Collaborative Process. In Virginia the exception to disclosure applies only to psychotherapy notes, not notes made in the Collaborative Process. Va. Code Ann. § 32.1-127.1:03.

C. CPAs and CFPs must return original documents provided by the client. CPAs must return documents they have prepared if the documents are complete and paid for by the client. CFPs must return documents prepared by them in accordance with their engagement agreement.

Under ethical guidelines for CPAs and CFPs, the financial neutral must return the original documents and records provided by the client. For CPAs, *see* AICPA Code of Conduct § 1.400.200; for CFPs, *see* CFP Standards, Rule 3.10. For records prepared by the financial neutral, the ethical guidelines are different for CPAs and CFPs. CPAs must provide to the client, upon request, records prepared by the CPA, unless the preparation of such records is not complete or there are fees due from the client for preparing such records. AICPA Code of Conduct § 1.400.200. With respect to CFPs, there is no specific ethical rule addressing the issue of return of records prepared by the CFP. This would therefore be governed by the engagement letter of the financial neutral. *See* CFP Standards Practice Standard 100-1 “Defining the Scope of the Engagement.”

6. WITHDRAWAL OF PROFESSIONALS/TERMINATION

A. None of the professionals can terminate a Collaborative Process. Only parties can terminate a Collaborative Process. Under certain circumstances, an attorney must withdraw from representation of a client in a Collaborative Process.

The Rules of Professional Conduct governing when an attorney may withdraw and an attorney’s duties upon withdrawal are the same for Collaborative matters as for other cases. MD RPC 1.16(a), D.C. RPC 1.16(a), and VA RPC 1.16(a) provide for mandatory withdrawal by the attorney if the representation will result in violation of the Rules of Professional Conduct, if the client knowingly misrepresents material information, or if the client discharges the attorney.

²³ Note that Md. HG § 4-307(a)(6)(i), the “personal notes” subsection of this statute, does not apply to Collaborative practitioners, since the statute itself does not apply. In any event, notes made in the Collaborative Process are not covered by the personal notes exception because they do not meet the strict requirements of that subsection to be kept “in the mental health care provider’s sole possession for the provider’s own personal use” and not be disclosed to “any other person” except a supervising health care provider, consulting health care provider, or attorney of that provider. Md. HG § 4-307(a)(6)(ii). There is no exception that would apply to personal notes made in the Collaborative Process.

MD RPC 1.16(b), D.C. RPC 1.16(b), and VA RPC 1.16(b) provide guidance to attorneys as to when they *may* withdraw from a client's representation. In summary, withdrawal is permitted if "withdrawal can be accomplished without material adverse effect on the interests of the client" or is based on other good cause for withdrawal, including the client using the attorney's services for a course of action that the attorney reasonably believes is criminal or fraudulent, will result in perpetuating a crime or fraud, will result in taking action with which the attorney has fundamental disagreement or finds repugnant, or which fails to fulfill an obligation to the attorney.²⁴

²⁴ D.C. RPC 1.16 provides:

Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client has used the lawyer's services to perpetrate a crime or fraud;

(3) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(4) The representation will result in an unreasonable financial burden on the lawyer or obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult;

(5) The lawyer believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

MD RPC 1.16 provides:

Declining or Terminating Representation.

(a) Except as stated in section (c) of this Rule, an attorney shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Maryland Attorneys' Rules of Professional Conduct or other law;

(2) the attorney's physical or mental condition materially impairs the attorney's ability to represent the client; or

(3) the attorney is discharged.

(b) Except as stated in section (c) of this Rule, an attorney may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the attorney's services that the attorney reasonably believes is criminal or fraudulent;

(3) the client has used the attorney's services to perpetrate a crime or fraud;

(4) the client insists upon action or inaction that the attorney considers repugnant or with which the attorney has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the attorney regarding the attorney's services and has been given reasonable warning that the attorney will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) An attorney must comply with applicable law requiring notice to or permission of a tribunal when terminating

representation. When ordered to do so by a tribunal, an attorney shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another attorney, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The attorney may retain papers relating to the client to the extent permitted by other law.

VA RPC 1.16 provides:

Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with

notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is

Note that the Collaborative participation agreement incorporates these concepts by specifically *requiring* an attorney to withdraw if his or her client has withheld or misrepresented information that should properly be shared as part of the Collaborative Process, and continues to withhold and misrepresent such information or otherwise acts so as to undermine or take unfair advantage of the Collaborative Process, or in the event that either party initiates contested litigation. This requirement is permitted by Rule 1.16. Note that the UCLA does not require withdrawal from a Collaborative case by the attorney. Rather, the UCLA in Maryland, Virginia, and DC only addresses the attorney's obligations in the event of withdrawal or termination, but does not address the situations that would require withdrawal of counsel. *See* MD CJP § 3-2003; D.C. Code §16-4005, VA CODE §20-171. The collaborative participation agreement and the IACP Standards and Ethics impose this obligation for Collaborative practitioners. IACP SE § 3.10; *see also* Protocols 2015, App. G.²⁵

It is the attorney's responsibility, as well as the responsibility of other professionals, to counsel a client prior to withdrawal.²⁶ If a basis for withdrawal exists, the attorney must

not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

²⁵ IACP SE § 3.10 Circumstances that Require Resignation. A Collaborative Professional must resign under the following circumstances, provided that the professional has fulfilled the obligation to counsel and advise a client as set forth in Standard 3.8:

- A. The professional's client(s) intentionally misrepresents, withholds or fails to disclose material information, whether or not such information has been requested.
- B. The professional's client(s) takes unfair advantage of inconsistencies, misunderstandings, inaccurate assertions of fact, law or expert opinion, miscalculations, or omissions.
- C. The professional has a conflict of interest that is not disclosed or is disclosed but not waived.
- D. In any situation where, under the Participation Agreement or these Standards, the withdrawal of the professional is mandatory.

²⁶ IACP SE § 3.8 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.

nevertheless comply with his or her ethical obligations under Rule 1.16 in the course of withdrawal, including taking steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense which has not been earned or incurred. MD RPC 1.16; D.C. RPC 1.16.; VA RPC 1.16. In making the decision to withdraw, it will be important that, prior to the commencement of the Collaborative Process, the attorney obtained the client's informed consent to the possibility of withdrawal in certain circumstances outlined in the participation agreement. See the discussion at Section 1.A.

Note that the attorney, as well as other professionals, are required to resign by the IACP Standards and Ethics "if the professional has a reasonable belief that a client is unable to effectively participate in the process." IACP SE § 2.3.

The attorney, if he or she withdraws, must also comply with his or her obligation to keep the client's information confidential unless the client has given informed consent to disclosure. MD RPC 1.6; D.C. RPC 1.6.; VA RPC 1.6. In the context of withdrawing from representation, even if the client has previously given informed consent to the sharing of his or her information with the team, it must be presumed that such consent does not extend to the reasons for withdrawal.

Given the ethical requirement that the attorney take steps to protect the client's interest during withdrawal, it would be the highly unusual case in which an attorney could ethically terminate a Collaborative case over the client's objection. Moreover, in UCLA jurisdictions, such as the District of Columbia, Virginia, and Maryland, only the parties can terminate a Collaborative case under the UCLA, and either may do so with or without cause, either by giving written notice or by proceeding in a contested court action on a matter related to the Collaborative matter. D.C. Code § 16-4005(d), (f); MD CJP § 3-2003(d), (f), VA CODE §20-171. If a Collaborative attorney is discharged or withdraws, the Collaborative Process may terminate, but only if the client does not replace the attorney as provided in the statute. D.C. Code § 16-4005(d)(3), (g); MD CJP § 3-2003(d)(3), (g), VA CODE §20-171. In other words, the attorney may withdraw, but the client has the right to continue the Collaborative Process by replacing the attorney. Even though an attorney cannot decide to terminate a Collaborative Process under the UCLA and ethically will likely be prohibited from terminating a case in non-UCLA jurisdictions because to do so might violate the legal duty to protect the client's interest, a Collaborative Process cannot proceed unless the withdrawing attorney is replaced with a successor Collaborative attorney, as spelled out in the UCLA. Irrespective of passage of the UCLA, one of the core requirements for a Collaborative Process is two Collaboratively trained attorneys. IACP SE § 3.9A.

In D.C., Maryland, and Virginia under the UCLA, “Termination” refers to a Collaborative case that ends by the client(s) terminating the case by notice or by proceeding in contested litigation; the term “conclusion” refers to the successful conclusion of a case as well as to its termination.²⁷ UCLA § 5(c)-(d); D.C. Code § 16-4005(c)-(d); Md. Code Ann, MD CJP § 3-2003 (c)-(d), VA CODE §20-171.C and D.²⁸

This UCLA provision providing that only a party may terminate a case is mandated by the UCLA and also by the Rules of Professional Conduct in D.C., Maryland, and Virginia.

²⁷ UCLA § 5(c), D.C. Code § 16-4005(c), MD CJP § 3-2003(c), and VA CODE §20-171 provide (with minor variations) that “[a] collaborative law process is concluded by: (1) The resolution of a collaborative matter as evidenced by a signed record; (2) The resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or (3) The termination of the process.”

²⁸ D.C. Code § 16-4005, and MD CJP § 3-2003 (with minor wording variations) on beginning and concluding a Collaborative Law Process, state, in pertinent part:

- (d) A collaborative law process terminates:
 - (1) When a party gives notice to other parties in a record that the process is ended; or
 - (2) When a party:
 - (A) Begins a proceeding related to a collaborative matter without the agreement of all parties; or
 - (B) In a pending proceeding related to the matter:
 - (i) Initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;
 - (ii) Requests that the proceeding be put on the tribunal’s calendar; or
 - (iii) Takes similar action requiring notice to be sent to the parties; or
 - (3) Except as otherwise provided by subsection (g) of this section, when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.
- (e) A party’s collaborative lawyer shall give prompt notice to all parties in a record of a discharge or withdrawal.
- (f) A party may terminate a collaborative law process with or without cause.
- (g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) of this section is sent to the parties:
 - (1) The unrepresented party engages a successor collaborative lawyer; and
 - (2) In a signed record:

However, without explanation or support, the drafters of the IACP Standards and Ethics state that professionals can terminate a Collaborative Process. IACP SE § 4.2. The IACP Standards run afoul of both the UCLA and the ABA and state Rules of Professional Conduct. The IACP Ethical Standards, when in conflict with the Rules of Professional Conduct for attorneys, must give way to the Rules of Professional Conduct. IACP SE § 1.1. As we conclude above, given the attorney's obligation under the Rules of Professional Conduct, it would be the highly unusual case in which an attorney could ethically terminate a Collaborative case over the client's objection. The UCLA and the Rules of Professional Conduct take precedence over IACP SE § 4.2.

B. A mental health professional must balance his/her obligation to withdraw against his/her ethical obligations to the client.

Although IACP Standards and Ethics require all professionals to withdraw if the client intentionally misrepresents or fails to disclose material information or otherwise “takes unfair advantage of inconsistencies, misunderstandings, inaccurate assertions of fact, law or expert opinion, miscalculations, or omissions,” the IACP Standards and Ethics must yield to the professional standards of the mental health professionals. IACP SE §§ 1.1, 3.10. The ethical standards of both the National Association of Social Workers and the American Psychological Association require the mental health professionals to avoid harm to their clients but also permit the professionals to consider the effects on others. NASW Code of Ethics § 1.01.²⁹ APA Ethical

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- (A) The parties consent to continue the process by reaffirming the collaborative law participation agreement;
 - (B) The agreement is amended to identify the successor collaborative lawyer; and
 - (C) The successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

- (h) A collaborative law process does not conclude if, with the consent of the parties, a party requests the tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.
- (i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

²⁹ 1.01 Commitment to Clients

“Social workers’ primary responsibility is to promote the wellbeing of clients. In general, clients’ interests are primary. However, social workers’ responsibility to the larger society or specific legal obligations may on limited occasions supersede the loyalty owed clients, and clients should be so advised. (Examples include when a social worker is required by law to report that a client has abused

Principles & Code of Conduct Principle A and § 3.04.³⁰ NASW Code of Ethics § 1.01 states that “[s]ocial workers’ primary responsibility is to promote the wellbeing of clients. In general, clients’ interests are primary.” However, the Code recognizes that on limited occasions the professional’s responsibility to society or to legal obligations may supersede the professional’s obligation to the client. *Id.* Psychologists are directed to “take reasonable steps to avoid harming their clients.” APA Ethical Principles & Code of Conduct § 3.04. However, their Code recognizes that conflicts may occur among psychologists’ obligations and directs them to attempt to resolve the conflicts “in a responsible fashion that avoids or minimizes harm” and to guard against situations that “might lead to misuse of their influence.” APA Ethical Principles & Code of Conduct" Principle A.

Also, the NASW Code of Ethics provides guidelines for termination of services by social workers, including providing advance notice, taking “reasonable steps to avoid abandoning clients who are still in need of services” and “withdraw[ing] services precipitously only under unusual circumstances, giving careful consideration to all factors in the situation and taking care to minimize possible adverse effects.” NASW Code of Ethics § 1.16³¹

a child or has threatened to harm self or others.)” NASW Code of Ethics §1.01.

³⁰ Principle A: Beneficence and Nonmaleficence

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work.” APA Ethical Principles & Code of Conduct Principle A.

3.04 Avoiding Harm

Psychologists take reasonable steps to avoid harming their clients/patients . . . and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.” APA Ethical Principles & Code of Conduct § 3.04.

³¹ The NASW Code of Ethics provides:

1.16 Termination of Services

The APA Ethical Principles & Code of Conduct provides guidelines for psychologists regarding withdrawal from therapy. Serving in a divorce coach or child specialist role is not therapy. However, the ethical guidelines may be generalized such that psychologists in a Collaborative role, when possible, should advise clients of the withdrawal prior to the withdrawal and provide referrals for mental health services as needed. APA Ethical Principles & Code of Conduct § 10.10 Terminating Therapy provides “(c) [e]xcept where precluded by the actions of clients/patients or third-party payors, prior to termination psychologists provide pretermination counseling and suggest alternative service providers as appropriate.”

Mental health professionals must look to these Codes in determining whether to withdraw as the divorce coach of a client. Also, under the IACP Standards and Ethics, the mental health professionals have an obligation to counsel their clients prior to withdrawal. IACP SE § 3.8. It is critical that these professionals advise their clients of their possible obligation to withdraw in certain circumstances at the outset of the Collaborative Process and obtain the client’s informed

(a) Social workers should terminate services to clients and professional relationships with them when such services and relationships are no longer required or no longer serve the clients’ needs or interests.

(b) Social workers should take reasonable steps to avoid abandoning clients who are still in need of services. Social workers should withdraw services precipitously only under unusual circumstances, giving careful consideration to all factors in the situation and taking care to minimize possible adverse effects. Social workers should assist in making appropriate arrangements for continuation of services when necessary.

(c) Social workers in fee-for-service settings may terminate services to clients who are not paying an overdue balance if the financial contractual arrangements have been made clear to the client, if the client does not pose an imminent danger to self or others, and if the clinical and other consequences of the current nonpayment have been addressed and discussed with the client.

....

(e) Social workers who anticipate the termination or interruption of services to clients should notify clients promptly and seek the transfer, referral, or continuation of services in relation to the clients’ needs and preferences.

consent. See discussion in Section 1.B. If such circumstances occur, the mental health professional, in deciding to withdraw, must consider the harm to the client as well as the professional's broader responsibilities, such as maintaining the integrity of the Collaborative Process and supporting the client's compliance with the Collaborative Process. In making this decision, the better informed the client is at the outset of the Collaborative Process, the more likely that harm to the client can be minimized if the decision is made to withdraw.

Note that all professionals are required to resign by the IACP Standards and Ethics "if the professional has a reasonable belief that a client is unable to effectively participate in the process." IACP SE § 2.3. Moreover, the IACP Standards and Ethics impose an obligation on all professionals to assess the likelihood that the Collaborative Process can resolve within a timeframe appropriate to the situation and take actions appropriate to any concerns. IACP SE § 2.4.

In sum, the mental health professional must minimize harm to the client in deciding whether to withdraw and in carrying out the withdrawal. When withdrawing, the mental health professional cannot share the reason for the withdrawal with the other team members or the other party. IACP SE § 1.4.A.

According to the terms of the Protocols participation agreement, the withdrawal by a divorce coach or child specialist does not, in and of itself, terminate a Collaborative case. However, depending on the reaction of the client and the team, the Collaborative Process may be negatively affected to the point that the professionals advise, or the clients conclude, that the Process cannot continue. Should a divorce coach or child specialist withdraw and the case continues, the team should discuss possible replacement of the professional. A Collaborative case may continue, with agreement of the parties and other professionals, without replacement of the divorce coach or child specialist.

C. CPAs and CFPs have an ethical obligation to withdraw if a client refuses to share or misrepresents important information or otherwise undermines the Collaborative Process.

The financial professional is obligated to withdraw if the client intentionally misrepresents or fails to disclose material information or otherwise "takes unfair advantage of inconsistencies, misunderstandings, inaccurate assertions of fact, law or expert opinion, miscalculations, or omissions," according to the IACP Standards and Ethics. IACP SE § 3.10. However, when in conflict, the IACP Standards and Ethics must yield to the professional standards of the financial professionals. IACP SE § 1.1. CFPs, in considering withdrawal, are obliged by their ethical rules to place the interest of their client ahead of his or her own, CFP Standards R. 1.4, and to counsel the client prior to withdrawal. IACP SE § 3.8. In the case of deceit or serious breaches of integrity, a CPA or CFP may be ethically obligated to withdraw

from representation of the clients. See AICPA Code of Conduct § 0.300.040; CFP Standards, Code of Ethics and Professional Responsibility, Principle 1-Integrity.

Note that all professionals are required to resign by the IACP Standards and Ethics “if the professional has a reasonable belief that a client is unable to effectively participate in the process.” IACP SE § 2.3. Moreover, the IACP Standards and Ethics impose an obligation on all professionals to assess the likelihood that the Collaborative Process can resolve within a timeframe appropriate to the situation and take actions appropriate to any concerns. IACP SE § 2.4.

D. Upon successful completion of a Collaborative Process, all team members must remain in their team roles to protect the integrity of the Collaborative Process.

When a Collaborative case concludes successfully, the Collaborative team remains available to be re-instituted at any time at the request of the parties to help the parties resolve future issues related to the original matter. All team members must take care to remain in their specific team roles to preserve the option for future involvement. The Collaborative divorce team remains available to the clients “in perpetuity.” The team can be called on at any point in the future should the clients find the team could be helpful in resolving any issues related to the divorce.

i. If the Collaborative case concludes successfully, the attorney must remain in his or her Collaborative role in case the clients reconvene the Collaborative Process. If the case terminates unsuccessfully, the attorney is prohibited from representing the client in court or in any other matter related to the Collaborative matter, except for emergencies as provided in the UCLA.

As long as the attorney remains in his or her Collaborative role, the Collaborative lawyer can continue representation in the same matter if the parties return to Collaborative Law for future resolution. The Collaborative attorney may also represent the client in any future matter unrelated to the parties’ Collaborative matter, including litigation on unrelated matters. D.C. Code §§ 16-4002(14), 16-4009(a); Md. R. 17-506; MD RPC 1.9(a); D.C. RPC 1.9; VA CODE §20-168, VA RPC 1.9(a). The UCLA defines “related to a collaborative matter” as “involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.” D.C. Code § 16-4002(14); MD CJP § 3-2001(n), VA CODE §20-168.

In the event that a Collaborative case terminates unsuccessfully, the attorney is prohibited from representing the client with respect to matters which are the same or related to the Collaborative matter. With respect to related matters, the Collaborative attorney cannot represent the client in any process other than the Collaborative process, resumption of the Collaborative Process, uncontested hearings, consent orders, or limited representation in emergency protective litigation during a Collaborative process in UCLA jurisdictions, as discussed below. D.C. Code § 16-4009; Md. R. 17-506, VA CODE §20-175. This restriction as to the attorney’s future

representation extends to the attorney’s firm. D.C. Code § 16-4009(b); Md. R. 17-506(b)(2); *see also* MD RPC 1.9(b); D.C. RPC 1.10; VA CODE §20-175, VA RPC 1.9(b). Note that Virginia has a limited exception for the firm to continue to represent a Collaborative client if the client qualifies for free representation based on income and the original Collaborative attorney is isolated. VA CODE §20-176.

This prohibition should not be interpreted to bar parties and their counsel from agreeing to adapt the Collaborative model to their specific needs, such as mediation or settlement negotiation, provided that they continue to be bound by the core principles of the collaborative participation agreement. Note that, in the event that the Collaborative Process is adapted, it would be wise to revise the engagement agreements and possibly the participation agreement to reflect the new format if it is inconsistent with the previously executed retainer and participation agreements.

The UCLA makes a significant exception to the prohibition of the Collaborative attorney representing the client in related litigation. The UCLA allows the attorney, in certain emergencies when the client lacks other representation, to continue the representation of the client in emergency litigation with the spouse or partner. Under § 7 of the UCLA, during the Collaborative Law Process, a court “may issue emergency orders to protect the health, safety, welfare, or interest of a party, family member, or other person.” D.C. Code § 16-4007; MD CJP § 3-2004, VA CODE §20-175.C.3. Under the D.C. statute, the Collaborative lawyer is authorized “[t]o seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, family member, or other person,” D.C. Code § 16-4009(c)(2), “until that person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.” D.C. Code § 16-4009(d). Note that the Maryland Rules provide that a Collaborative attorney may “request or defend against a request for an emergency order to protect the health, safety, welfare, or interest of a party or party eligible for relief” *during a stay* but does not specifically address the attorney’s role in emergency actions during a Collaborative process when there is no stay in effect.³² Md. R. 17-504(c). Arguably, MD CJP § 3-2007, which states that the subtitle does not affect the lawyer’s professional responsibility obligations, could allow the attorney to continue the representation until another attorney could step in—the same result as provided by the UCLA—if the engagement agreement and participation agreement contemplate this exception. The attorney’s engagement agreement for Maryland, the District of Columbia, and Virginia, and the participation agreement for Maryland, the District of Columbia, and Virginia), attached at

³² Md. R. 17-504 (c).

Proceedings During Stay. During a stay, a party and the party’s attorney may appear before a court to: (1) request or defend against a request for an emergency order to protect the health, safety, welfare, or interest of a party or party eligible for relief

Appendices H and G, respectively, of the Protocols, contemplate this exception. Protocols 2015, App. G, H.

ii. If the Collaborative case concludes successfully, the mental health professional must remain in his or her Collaborative role and cannot shift to an inconsistent role such as therapist or parent coordinator.

Mental health professionals must remain in their Collaborative roles upon successful conclusion of a Collaborative case and cannot change roles *vis-a-vis* the client (e.g., change from a divorce coach to a therapist) as this would violate ethical guidelines.³³ NASW Code of Ethics § 1.06; APA Ethical Principles & Code of Conduct § 3.05; IACP SE §§ 3.5. 4.4 A, 4.5.³⁴

³³ Note that the same role restriction applies at the beginning of a Collaborative case. A therapist cannot assume a role as a divorce coach or child specialist in a Collaborative case involving his or her patient. IACP SE § 3.7.

IACP SE § 3.7 Mental Health Professionals.

A. A person who has acted in a counseling capacity for a client or clients will not serve in the role of Coach or Child Specialist on a Collaborative matter involving that client or the client's dependents.

³⁴ IACP SE § 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 Standard 4.4, working with any client(s) or their dependent(s) outside of the Collaborative Process is inconsistent with a neutral role.

....

4.4 Professional Services after Resolution of Process.

A. Child Specialists and Coaches. Child Specialists or Coaches may provide services following the Resolution of a Collaborative matter, so long as the services remain consistent with their role in the Collaborative matter. A Child Specialist or neutral Coach must have the consent of all clients before providing services after Resolution. A Coach or Child Specialist may not serve as an individual or joint therapist to the client(s) or to a client's dependent after Resolution.

....

4.5 Professional Work after Termination of Process.

A. After Termination, 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.

B. After Termination, a Collaborative Professional may provide the professional's client(s) with referrals.

Should the Collaborative matter conclude successfully, with the consent of all parties, the mental health professional can assist the client and family in the future while diligently remaining exclusively in his/her Collaborative role. For the coach, this role would include assisting the client in answering questions or addressing concerns about the parenting plan, helping the client maintain the boundaries that were established by the parenting plan, helping the client maintain the communication protocols established and/or resolving impasses on parenting issues. Coaches should also inform clients during the Collaborative Process that once the settlement agreement is finalized, the individual coach is available to each client in a continuing way as described above. The child specialist can assist the family in addressing questions concerning a child's needs and continuing adjustment to the parenting plan. If the mental health needs are beyond the defined role of the coach or child specialist, the mental health professional must refer the client to a therapist or other more appropriate provider. IACP SE § 4.4.A.

If the Collaborative case terminates unsuccessfully, the mental health professional may refer the clients for mental health needs. NASW Code of Ethics § 1.01; APA Ethical Principles & Code of Conduct § 3.05; IACP SE § 4.5.B.

The NASW Code of Ethics § 1.06 Conflicts of Interest states:

(c) Social workers should not engage in dual or multiple relationships with clients or former clients in which there is a risk of exploitation or potential harm to the client. In instances when dual or multiple relationships are unavoidable, social workers should take steps to protect clients and are responsible for setting clear, appropriate, and culturally sensitive boundaries. (Dual or multiple relationships occur when social workers relate to clients in more than one relationship, whether professional, social, or business. Dual or multiple relationships can occur simultaneously or consecutively.)

APA Ethical Principles & Code of Conduct § 3.05 Multiple Relationships states:

(a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1)

C. After Termination, 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.

at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.

A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.

iii. The financial neutral may assist clients beyond the conclusion of the Collaborative Process only on tasks attendant to ending the Collaborative Process or, if the Collaborative Process is reconvened, serving as the financial neutral.

The financial neutral will not be able to represent or assist either one of the parties or their respective attorneys in any role other than completing tasks attendant to the end of the Collaborative Process. The financial neutral must preserve his or her role at the conclusion of the process. In no event may the financial neutral serve in a different role, for example, providing accounting services, serving as a financial planner or selling financial products. *See* IACP SE §§ 3.5, 3.6, 4.4B, 4.5.³⁵ The financial neutral can complete any tasks agreed upon in the final

³⁵ IACP SE § 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 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 Specialists. A Financial Specialist 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.

....

settlement agreement that represent tasks that need to be done in order to fully complete the process and implement the final settlement agreement. *Id.* Examples of tasks that may need to be completed by the financial neutral would be the completion of the income tax returns for the parties for the transition year, reviewing a qualified domestic relations order, assisting the parties with the calculation of any needed transfers under the pension orders and/or assisting with the calculation of tax deductible process expenses. The financial professional’s engagement agreement and the participation agreement should clearly set forth these limitations.

7. CONFLICTS OF INTEREST

A. *An attorney may not represent a client if there is a significant risk that the attorney’s representation will be materially limited by the attorney’s responsibilities to another client or person or by the attorney’s personal interest.*

For attorneys, the Rules of Professional Conduct define what constitutes a conflict of interest and in what circumstances the conflict can be waived. Pursuant to Rule 1.7 (a)(2) of the ABA Model Rules of Professional Conduct, and the corresponding state Rules of Professional Conduct, an impermissible conflict exists between counsel and client if there is a “significant risk that the representation . . . will be materially limited by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer.” ABA Model Rules of Professional Conduct, R. 1.7(a)(2); *see also* MD RPC 1.7(a)(2); D.C. RPC 1.7(b)(4); VA RPC 1.7(a)(2). ABA Formal Op. 07-0447 notes that representation is permissible, however, if the client gives informed consent regarding such conflict and the lawyer reasonably believes that he or she can provide competent and diligent representation to the client. MD RPC 1.7(b), D.C. RPC 1.7(c), VA RPC 1.7(b). IACP SE § 1.3 C provides that “[p]rior to seeking waiver of a conflict between the interests of the client and the professional, the professional must candidly advise the client(s) of the benefits

4.4 B. Financial Specialists. With the consent of all clients, a Financial Specialist may provide services following the Resolution of a Collaborative matter, so long as the services do not violate Standard 3.6 and remain consistent with the Financial Specialist’s role in the Collaborative matter.

....

4.5 Professional Work after Termination of Process.

A. After Termination, 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.

B. After Termination, a Collaborative Professional may provide the professional’s client(s) with referrals.

C. After Termination, 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.

and risks of the professional's involvement including how the conflict could impair the professional's objectivity, competence or effectiveness." Note that no waiver can be requested by the attorney unless the attorney first determines that a waiver is permissible under the attorney's Rules of Professional Conduct. IACP SE § 1.1.

B. *A mental health professional should avoid conflicts of interest that might impair his/her impartial judgment.*

According to ethical guidelines for both social workers and psychologists, mental health professionals serving in Collaborative roles must consider conflicts which could impact their abilities and take steps to avoid harm to the client.

According to the NASW Code of Ethics § 1.06, Conflicts of Interest:

(a) Social Workers should be alert to and avoid conflicts of interest that interfere with the exercise of professional discretion and impartial judgment. Social workers should inform clients when a real or potential conflict of interest arises and take reasonable steps to resolve the issue in a manner that makes the clients' interests primary and protects clients' interests to the greatest extent possible. In some cases, protecting clients' interests may require termination of the professional relationship with proper referral of the client.

(b) Social workers should not take unfair advantage of any professional relationship or exploit others to further their personal, political, or business interests.

(c) Social workers should not engage in dual or multiple relationships with clients or former clients in which there is a risk of exploitation or potential harm to the client. In instances when dual or multiple relationships are unavoidable, social workers should take steps to protect clients and are responsible for setting clear, appropriate, and culturally sensitive boundaries. (Dual or multiple relationships occur when social workers relate to clients in more than one relationship, whether professional, social, or business. Dual or multiple relationships can occur simultaneously or consecutively.)

(d) When social workers provide services to two or more people who have a relationship with each other (for example, couples, family members), social workers should clarify with all parties which individuals will be considered clients and the nature of social workers' professional obligations to the various individuals who are receiving services. Social workers who anticipate a conflict of interest among the individuals receiving services or who anticipate having to perform in potentially conflicting roles (for example, when a social worker is asked to testify in a child custody dispute or divorce proceedings involving clients) should

clarify their role with the parties involved and take appropriate action to minimize any conflict of interest.

Similarly, the ethical principles of the American Psychological Association provide that psychologists should refrain from taking on a professional role if their judgment and objectivity might be impaired.

The APA Ethical Principles & Code of Conduct § 3.06 Conflict of Interest states as follows:

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.

IACP SE § 1.3 provides guidance for all professionals with respect to conflicts of interest, including requirements for seeking a waiver of conflicts. Note that the above ethical guidelines for psychologists and social workers do not mention waiver as a possibility. The mental health professional is obligated to follow his or her professional ethical guidelines, which take precedence over the IACP Standards and Ethics. IACP SE § 1.1.

C. CPAs and CFPs are required to disclose to the client all potential material conflicts of interest which may affect the relationship.

The CFP Standards of Professional Conduct, Rules of Conduct 2.2(b) require the CFP to disclose to a client or prospective client likely conflicts of interest, including any relationship that has a potential to “materially affect the relationship.” *Accord* CFP Code of Ethics and Professional Responsibility, Principle 4-Fairness.

The AICPA Code of Conduct § 1.110.010 requires full disclosure of all conflicts of interest that could in the CPA’s professional judgment be viewed by the client or other appropriate parties as impairing the CPA’s objectivity. A conflict of interest may occur if a CPA performs a professional service for a client or employer and the CPA or his or her firm has a relationship with another person, entity, product, or service that could, in the CPA’s professional judgment be viewed by the client or other appropriate parties as impairing the CPA’s objectivity. If the CPA believes that the professional service can be performed with objectivity, and the relationship is disclosed and consent is obtained from such client, employer, or other appropriate parties, the rule shall not operate to prohibit the performance of the professional service. When making the disclosure, the CPA should consider the confidentiality requirements of AICPA Code of Conduct § 1.700.001.01.

Consistent with the professional ethics requirements, IACP SE § 3.5.A requires a Collaborative Professional who serves on a Collaborative matter in a neutral role to adhere to that role and not engage in any relationship that would compromise the professional’s neutrality. IACP SE § 3.6 prohibits a financial neutral from having “any other business or professional

relationship with a Collaborative client during or after the conclusion of a Collaborative matter” and from selling or recommending financial purchases or products. The financial neutral may assist the clients in completing the tasks specifically assigned to them by the clients’ written, final agreement. IACP SE § 1.3 sets forth guidelines as to avoiding conflicts of interest. Note that under IACP SE § 1.3.C, which sets requirement for seeking waiver of a conflict, the financial neutral may not seek waiver unless otherwise permitted under the financial neutral’s professional ethical guidelines. IACP SE § 1.1. *See also* AICPA Code of Conduct § 1.100.010.

4816-9568-9803, v. 4