

Collaborative Professionals of Washington

1st Annual Conference

**ETHICS
AND
COLLABORATIVE LAW**

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November 14, 2008

By J. Mark Weiss
Law Office of J. Mark Weiss, P.S.
1200 Fifth Avenue, Suite 1810
Seattle, Washington 98101
www.mark-weiss.com

J. MARK WEISS is rated one of the “Top 25” family law attorneys in Washington per *Washington Law and Politics* magazine. He is one of the most experienced Collaborative Law attorneys in the Northwest, with over 350 hours of training in basic and advanced Collaborative Law topics and interest-based negotiation and mediation, including training with the Harvard Negotiation Insight Initiative, and workshops with Ken Cloke and Chip Rose. Mark is a Fellow of the American Academy of Matrimonial Lawyers and serves on the Collaborative Law Committee for the National AAML. Mark was named 2005 “Ken Weber Attorney of the Year,” by the WSBA Family Law Section, and “Super Lawyer” by *Washington Law & Politics* Magazine. Mark was a member of the WSBA Family Law Section Executive Committee from 1997 to 2005, and Chair of the Family Law Section in 2003-04. He worked on drafting committees on GR 22 (including the 2006 amendments), GR 30, GR 31, and the 2006 amendments to GR 15. He was Secretary-Trustee of the King County Bar Association, and is currently Secretary of King County Collaborative Law.

NOTABLE QUOTES

"Collaborative Law, like other voluntary dispute resolution processes that responsibly promote settlement, encourages parties, with the expertise and support of their counsel, to reach agreements that are tailored to their interests and needs. Many parties to a dispute want the advice and support of counsel in helping them negotiate a settlement that Collaborative Law offers, while simultaneously reducing the prospect of an emotionally and economically expensive litigation process by agreement on ground rules for the negotiation process that increase the likelihood of settlement. The participation of counsel in Collaborative Law helps assure that parties enter the process with informed consent, that they have expert advice during the negotiation process and a measure of protection against improvident agreements. As in mediation, parties experience greater voice in the process of settlement through Collaborative Law than in a judicial resolution. The parties' participation in the process and control over the result contribute to greater satisfaction on their part. As in mediation, disputing parties can anticipate reaching settlement earlier in Collaborative Law than in litigation because of the controlled expression of emotions and voluntary exchange of information that occur as part of the Collaborative Law Process."

National Conference of Commissioners on Uniform State Laws, Prefatory Note to October 2007 draft of the Uniform Collaborative Law Act, at 4-5. (Citations omitted.)

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

RPC 1.4(b)

"... [W]hen a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

From Official Comment 5 to RPC 2.1.

ETHICS AND COLLABORATIVE LAW

By J. Mark Weiss

I. THE EXPLOSIVE GROWTH OF COLLABORATIVE LAW

A. Introduction

Collaborative Law was “invented” in 1990 by Minnesota lawyer Stu Webb. The International Academy of Collaborative Professionals currently estimates that in the United States approximately 20,000 attorneys have been trained in Collaborative Law. Thousands more have been trained in other countries, including Canada, England, Scotland, Wales, France, Australia, New Zealand, Switzerland, Germany, Kenya, and Uganda. Collaborative Law has successfully resolved tens of thousands of cases.

Collaborative Law did not reach the Northwest until relatively recently. It was first introduced in Washington about five years ago. The first training in Washington was in 2003. Despite its local youth, it is estimated that over three-hundred Washington lawyers have now been trained in Collaborative Law. There are organized Collaborative Law groups in King, Pierce, Snohomish, Thurston, Clark, Whatcom, and Spokane Counties. The largest local organization in the State is King County Collaborative Law, which has more than 100 members, including a growing number of full-time Collaborative practitioners.

B. Collaborative Law and the Bar

With rare exception, Collaborative Law has become accepted by the organized Bar. Nationally, both the American Academy of Matrimonial Lawyers and the American Bar Association ADR Section have Collaborative Law Committees. In Washington, the King County Bar Association has a Collaborative Law Section.

Contrary to some misleading headlines, *every* Bar association that has considered the ethics of Collaborative Law has determined that it can be practiced ethically.¹ In 2007, Colorado's voluntary bar association issued an ethics opinion that declared Collaborative Law unethical *per se* if the attorneys also signed the Participation Agreement with their clients,² but noted that Collaborative Law *could* be ethically practiced if the attorneys did not sign the Participation Agreement. Subsequent to the Colorado opinion, the ABA issued a formal ethics opinion³ that approved of Collaborative Law and held that the Colorado opinion turned on a faulty premise. In Washington, the WSBA last year published Informal Ethics Opinion 2170, which concludes that Collaborative Law can be ethically practiced. A copy of Informal Ethics Opinion 2170 is in the Appendix.

C. Collaborative Law Statutes and Court Rules

In the United States, at least three states currently have statutes that specifically adopt Collaborative Law as a dispute resolution process.⁴ The National Conference of Commissioners on Uniform State Laws is currently drafting a Uniform Collaborative Law Act, which is on track for adoption in the summer of 2009. Besides the three states that have adopted statutes, at least one state has a statewide court rule approving of Collaborative Law.⁵

There are numerous local court rules pertaining across the United States. In Washington, Thurston County has adopted a local court rule pertaining to Collaborative Law.⁶ Pierce County has a Collaborative Law local rule under consideration.

¹ *E.g.*, Washington Informal Ethics Opinion 2170 (2007); American Bar Association Formal Ethics Opinion No. 07-447; Colorado Formal Ethics Opinion 115 (2007); Kentucky Ethics Opinion KBA E-425; New Jersey Advisory Committee on Professional Ethics Opinion No. 699; Minnesota Office of Lawyers Professional Responsibility ethics opinion (3/12/1997); 2002 North Carolina Formal Ethics Opinion 1; Pennsylvania Ethics Opinion No. 2004-24 (2004), Advisory Committee of the Supreme Court of Missouri Formal Opinion 124 (2008), Maryland State Bar Association Ethics Docket No. 2004-23.

² The Participation Agreement is the contract that officially commences the Collaborative Law process.

³ ABA Formal Ethics Opinion 07-447 (8/9/07)

⁴ States with collaborative law statutes include California (Family Code § 2013), North Carolina (N.C. Stat. § 50-71(1)), and Texas (Family Code § 6.603(b)).

⁵ *See* Utah Code Jud. Admin. R 4-510.

⁶ Thurston County local rule LSPR 94.12.

D. Collaborative Law Skills.

Collaborative Law is a *dispute* resolution process. It is not for parties who do not have disputes. It is a process where parties receive the support and learn the information necessary so they may resolve significant disputes without resorting to adversarial methods.

Because Collaborative Law does not use adversarial methods, lawyers who wish to practice Collaborative Law need additional skill sets. Unless you recently graduated from a law school where you took Collaborative Law and mediation classes,⁷ conventional law training or experience will not prepare you to competently practice Collaborative Law. Just as it is necessary to learn procedural and evidence rules to operate effectively in the courtroom, it is necessary to learn Collaborative Law skills and procedures to operate effectively in the Collaborative Law process.

One of the rudimentary skills for Collaborative Law professionals is what is commonly referred to as the “paradigm shift.” The paradigm shift can be described various ways, but at its heart is a different measure of success for Collaborative Law than is typically applied in conventional representation. That measure of success in Collaborative Law cases is achieving a resolution that is truly as durable as the circumstances will allow. A durable resolution is in the client’s best interests because it reduces the likelihood for the need for future legal services and leaves the parties better equipped for their futures.

Achieving a durable resolution instead of a temporary cease-fire requires that both parties not only accept the settlement when it is made, but also continue to accept it thereafter. Achieving that decree of durability requires a different set of procedures and a different way of negotiating. The “paradigm shift” represents the different approaches and qualities of interaction that the Collaborative Law professional will have with the clients and each other compared to traditional roles. In order to consistently achieve the

⁷ A handful of law schools around the country are formally teaching Collaborative Law in addition to mediation and a traditional legal curriculum.

objective of durability, the Collaborative Law attorney needs to learn how to interact with the client, the other party, and the other professionals, in a manner that is in alignment with the objective of seeking a durable resolution.

To arrive at a truly long-term solution, *both* parties' priorities and goals need to be openly yet safely be considered and discussed. Hence, the paradigm shift for the lawyer is from a role of controlling the case and defining the outcome to a role of guiding the client and spouse to a mutually satisfying outcome; and from a role of attempting to make arguments to "win" at the expense of one party to a role of ensuring that both parties' needs are truly met. Collaborative law uses the attorney's skills as problem solver, advisor, and facilitator.

When issues and disputes are not addressed, they also are generally not resolved. A key skill of Collaborative Law practitioners is to identify potential disputes and issues. In many ways, it is the role of the attorney to "lead the client into and through the conflict" to ensure that important issues and concerns are discussed and are not overlooked. The skilled practitioner will do so in a manner that allows the parties to choose to trade entrenchment for progress and resolution, while avoiding adding to the disputes or creating disputes that do not exist.

Attorneys seeking to practice Collaborative Law therefore need to learn the necessary protocols and skills so they can effectively participate in the Collaborative Law process, and productively facilitate difficult conversations. The required skills are *in addition* to solid skills and knowledge of substantive and procedural law; similarly, the skills *do not replace* skills and knowledge of substantive and procedural law. Both are required for competence. To work effectively in this model, lawyers need to learn how to productively facilitate rather than avoid conflict, and need to learn how to deploy interventions that allow the parties to productively discuss the issues that cause conflict.

At a minimum, attorneys should have specialized training in the Collaborative process and facilitative mediation techniques.⁸ While basic training is essential, new Collaborative lawyers also need experience and advanced training to become proficient. The skill level required to competently practice Collaborative Law is high, and differs significantly from what has traditionally been taught in law schools or can be acquired through conventional practice, and goes well beyond what introductory training can offer.

II. ADVANTAGES AND DISADVANTAGES OF COLLABORATIVE LAW

The success rate of collaborative law is high. Nationwide, it is estimated that parties leave the collaborative process without a settlement in fewer than five percent (5%) of cases. Of that small number of cases that do not settle in the Collaborative Law process, most have a substantially narrowing of issues due to the Collaborative Process, and the vast majority of those cases settle before trial. Empirical research has found high levels of client satisfaction with the Collaborative process.⁹

With data showing that as many as 75% of divorcing parties proceeding *pro se*, often not because of the inability to afford counsel but out of fear that attorneys will create problems instead of solve them, Collaborative Law can act to reach out towards parties who otherwise would be unrepresented, and provide them with the benefits of good legal advice and counsel.

Like all dispute resolution processes – from litigation to do-it-yourself – Collaborative Law has advantages and disadvantages. Under the Rules of Professional Conduct, the choice of process belongs to the client with informed consent. In terms of

⁸ Facilitative mediation is a form of mediation where both parties are in the same room together, usually without attorneys, and where the mediation is designed to “facilitate” a conversation between the parties based on what is important to them.

⁹ See Julie MacFarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (June 2005), available at: <http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf>.

selection of the process, informed consent means being able to explain the advantages and disadvantages of each of the process options.

A. Advantages and Disadvantages for Clients

1. Advantages for Clients

Compared to litigation¹⁰ or adversarial negotiation, Collaborative Law offers these advantages to clients:

- Clients have more control over decisions that affect them. The clients control the pacing of the case and decide the issues based on factors that are important to them. They can fashion a settlement that truly fits their individual needs, including issues that the law might not normally address. This can result in a resolution of higher quality than a settlement reached through a power-based model.
- Collaborative Law often (but not always) costs clients less than conventional representation. In the experience of this author, through a settlement (before trial), fees in a Collaborative Law case are often about 50-75% of a conventional case settled at a settlement conference, although fees sometimes exceed this range.
- Collaborative Law is much more private than litigation. Usually, only the minimum required documents are in the public record. In Washington, the separation contract that contains substantive property and spousal maintenance provisions is rarely filed with the court. There are no affidavits in the public record.

¹⁰ As used herein, “litigation” means an adversarial dispute resolution system using court procedures. It does not mean that the case is necessarily resolved at trial, but can be settled earlier, such as at a settlement conference.

- Clients often have the benefit of an interdisciplinary team to educate them on financial matters, child matters, and coaching. In addition to both lawyers, the neutral financial specialist analyzes financial documents to help ensure thoroughness and fairness.
- Because decisions are made by clients over a period of months in an open and non-coercive environment where they are encouraged to take time to think things through to ensure their proposals will work for them, compliance with settlements tends to be much higher. The need for enforcement is significantly reduced.
- It may be possible to reach settlements that are not possible in a conventional representation. For example, just the decision to delay filing a petition can make financing options available for clients that they would otherwise not have.
- Clients have counsel with them at every stage. Their attorneys act as legal advisors, drafters, process-guides, advocates, and facilitators. This helps ensure that clients' decisions are truly informed.
- Clients' schedules are more predictable. Sessions are scheduled. No one can unilaterally set a proceeding.
- Divorce is stressful under the best of environments. Litigation is stressful even for people who are not getting a divorce. Collaborative law does not eliminate the stress, but certainly does not add as much stress as litigation does, which may help clients' mental health.
- Conflict is bad for children. A non-litigated method of dispute resolution is better for children.
- Given the reputation of attorneys in popular folklore, clients have assurance that their Collaborative Law attorney is working solely for a settled outcome, and has

no conscious or unconscious pecuniary interest in litigation. Similarly, there is a higher likelihood that Collaborative Law attorneys have acquired additional non-litigation based dispute resolution skills, because litigation is no longer an available avenue.

- Collaborative Law is a process where clients often learn new communications skills. Those skills help them in future relationships, and in future conflicts.

Compared to mediation,¹¹ Collaborative Law offers these advantages to clients:

- Collaborative Law clients receive attorney support at every stage, including legal advice where appropriate. Legal issues are addressed by lawyers who understand them. The clients are truly assured informed consent with respect to their decisions.
- In Collaborative Law, clients have advocates with them who are integral to the process.
- Collaborative Law requires full and fair disclosure of all material and requested information and documents. The clients are expected to sign under oath that all material information has been exchanged, providing them the equivalent protection as discovery.
- Several sets of eyes review the financial materials for each client. The likelihood of information being overlooked is substantially reduced.

2. Disadvantages for Clients

Compared to litigation, Collaborative Law has these disadvantages for clients:

¹¹ As used here, “mediation” means that both parties are in the same room together, working with a mediator (who may not be an attorney) and usually without any attorneys representing parties present.

- In the event the process terminates without a settlement being reached, the clients need to retain new counsel and experts. This may cause them to incur additional fees and costs, and some delay. This downside may be partly mitigated by the possible narrowing of the issues that are litigated, and a possible “soft landing” to another process.
- Currently in the Northwest, there are still only a relatively small number of attorneys who are trained in Collaborative Law, which may limit clients’ choice of counsel. This is becoming less of an issue as more attorneys are trained and gain experience.
- Absent an emergency, no ability to seek unilateral relief from the court until the process has been terminated and the waiting period concluded.
- Some clients may choose the Collaborative Law process when it is not well-suited to them. However, that risk exists in all processes, including litigation.

Compared to mediation, Collaborative Law has these disadvantages for clients:

- Collaborative Law may be procedurally “heavier” than what they need. Not all clients need the protections and support that Collaborative Law inherently provides.
- Collaborative Law is usually more expensive than mediation.

B. Advantages and Disadvantages for Lawyers

1. Advantages for Lawyers

Compared to litigation, Collaborative Law offers these advantages to attorneys:

- More predictable scheduling. No unexpected motion work on collaborative cases.

- No need to draft or answer interrogatories or other formal discovery. All discovery is informal.
- No need to draft or respond to motions. No demand letters. No settlement conference letters.
- An opportunity to routinely work with cases based on advising and guiding clients, in a process that is much more streamlined and efficient than navigating court rules and adversarial conventions.
- Clients who resolve disputes (and who are committing to resolving disputes) pay their attorneys. Collection rates tend to be significantly higher.
- Less malpractice exposure, because clients who resolve their disputes are happier. It is believed that in 18 years, and many tens of thousands of Collaborative Law cases, there has been only one malpractice case filed against a Collaborative Law attorney anywhere.
- Lower overhead. Less support staff is needed because there is less paper, and less paper being delivered.
- Less stress for lawyers. Many experienced lawyers who start practicing Collaborative Law experience a revitalization of their career, and a law practice that is in greater harmony with their values – and in greater harmony with the reasons they became lawyers.
- The ability to cooperate is essential to function in Collaborative Law. As a result, there is a much higher level of collegiality among the Collaborative Law bar than in the bar in general.

- The opportunity to learn new skills, whose usefulness can extend well beyond the practice of the profession.

2. Disadvantages for Lawyers

Compared to litigation, Collaborative Law has these disadvantages for attorneys:

- While scheduling is predictable, the task of scheduling is substantially more time-consuming in collaborative cases. (And not billable.)
- Additional education and skill is required to practice Collaborative Law, together with additional continuing education. Practitioners should not only be and remain qualified in their substantive area of law, but also in the Collaborative Law process and dispute resolution techniques. As in all endeavors, for those who wish to become truly proficient, additional education and skill-building is required, which can take substantial time and effort.
- A significant investment of effort and funds is required to gain the necessary education and skills, and to convert a practice from a litigation practice to a Collaborative Law practice.
- Offsetting the decreased overhead and higher rate of collection is a decrease in billable hour efficiency, resulting from the time spent scheduling and activities/meetings that are necessary to function within a group, including meetings and briefings.

III. SUITABILITY OF COLLABORATIVE LAW FOR CASES

Collaborative law is a process that is designed to resolve disputes. While generally costing less than adversarial dispute resolution processes (*e.g.*, settlement conferences, motions, trials, etc.), it is not an inexpensive process. And, Collaborative Law is not right for everyone.

Collaborative Law depends on the ability to reach a negotiated agreement. While the structure of Collaborative Law by design compensates for power imbalances, no ADR process can compensate when parties lack the capacity or willingness to seek agreement. Hence, Collaborative Law may not be suitable for cases with active domestic violence, or when a party lacks capacity to participate or make informed decisions. It may also not be suitable for cases where one or both parties desire to use the process for improper means, such as to commit fraud.

IV. WASHINGTON’S RULES OF PROFESSIONAL CONDUCT AND COLLABORATIVE LAW.

The Rules of Professional Conduct (“RPCs”) do not specifically consider or address collaborative law. Preambles 2 and 3 of the RPCs speak to the various functions that lawyers serve, including advisor, advocate, negotiator, evaluator, and third-party neutral. Lawyers perform at least three of these roles in collaborative cases. When performing these roles, collaborative lawyers must abide by the RPCs as much as other lawyers.

1. Guiding Clients Towards Settlement.

One of the primary differences between collaborative law and conventional representation is the approach to settlements. Typically, in conventional representation, both parties try to make their best legal case and convince either the other or a neutral of the “better” legal position. In collaborative law, clients intentionally choose to avoid adversarial posturing and waive their right to pursue litigation for the duration of the process. Instead of incurring fees to prepare for a trial that is unlikely to occur, clients incur fees for services designed solely to the specific goal of reaching settlement. This orientation results in a shift in focus of all participants, lawyers and clients alike, from trying to overwhelm and coerce under a looming threat of litigation to fully-informed problem-solving and interest-based resolution.

This role of attorney as advisor rather than gladiator is consistent with the RPCs, which specifically allow attorneys to prepare clients for settlement. The RPCs contemplate that cases will often come to conclusion through means other than through a

litigated outcome. Both within and without the legal profession, settlement is generally accepted as preferable to trial in most instances, particularly in family law matters. For example, RPC 1.2(a) provides in part: “A lawyer *shall* abide by a client’s decision whether to settle a matter.” (Emphasis added.) Under the RPCs, it is the client’s decision whether to settle, as occurs in collaborative law cases.

The RPCs do not require resorting to or preparing for litigation. Similarly, it is a myth that the RPCs require “zealous” representation – a word that lawyers sometimes use to rationalize litigious or obnoxious behavior. While once part of ethics rules, the antiquated requirement of “zealous” representation was repealed decades ago.

Instead of acting with zeal, like a zealot, RPC 1.3 requires that attorneys “... act with reasonable diligence and promptness....” Emphasizing the repeal of the old standard, Official Comment 1 specifically notes that lawyers are not required to press for every advantage that might be realized for a client, and that offensive tactics are not required by the obligation to act with reasonable diligence.

Similarly, RPC 2.1 specifically authorizes lawyers, when rendering advice to clients, to refer to considerations other than the law, including moral, economic, and social factors. Official Comment 2 of RPC 2.1 states that moral and ethical considerations “... impinge on most legal questions and may decisively influence how the law will be applied.” Working with clients to make decisions that are based on factors most important to them is therefore not merely authorized, but expressly contemplated as being part of a lawyer’s ethical duties.

2. Limiting Representation to Non-Litigation.

In collaborative law, clients specifically limit the scope of representation of both attorneys to a non-litigation role.

Clients choose to limit the scope of representation for multiple reasons. They may wish to limit the scope of representation to be assured that the attorneys are *truly* committed to settlement and have no conceivable financial incentive to litigate. Or, the clients may wish to limit the scope of representation to help build trust; by disqualifying their own attorney from litigation, a party can reassure the other that they are truly committed to working towards settlement. Others want to ensure that they have retained attorneys with the skill set to reach settlement through non-adversarial and non-coercive

means. Or, they may want to avoid polarization and damage to future relationships from the use of litigation methods, such as in co-parenting situations.

RPC 1.2(c) allows attorneys to limit the scope of representation so long as the limitation to the scope of representation is reasonable under the circumstances and the client gives informed consent. Official Comment 6 appears to specifically allow clients to consent to limit the scope to services that exclude resorting to litigation:

“[T]he terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

This Rule on its face would appear to allow clients to retain attorney advocates while excluding litigation as a “specific means that might otherwise be used...” This rule is commonly employed for that very purpose, for example with so-called “unbundled” services, and with transactional lawyers who are retained to negotiate, but not litigate, disputes. Informal Opinion 2170 specifically approves of limiting the scope of representation in this matter if the client gives informed consent.

3. Duty of Full Disclosure and Informed Consent.

While the RPCs provide that a client has the absolute say concerning settlement, attorneys have the obligation to provide adequate information to clients. That obligation extends to all attorneys, whether or not they practice collaborative law.

RPC 1.0(e) defines “informed consent” as denoting

... 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.

Prudence would dictate that the information also ordinarily be placed in writing.

RPC 1.4 requires all lawyers to consult with clients about the means by which the client’s objectives are to be accomplished to the extent reasonably necessary for the client to make informed decisions concerning the representation. Official Comment 5 notes that the client should be provided with sufficient information to intelligently participate in decisions concerning the *objectives* of representation and the *means* of representation.

Informed consent is, of course, required when a client restricts the scope of representation. Because the informed consent requirement applies to any “proposed course of conduct,” including the means by which a client’s objectives are to be accomplished under RPC 1.4, informed consent is similarly required whenever a lawyer proposes to resort to other dispute resolution processes, including litigation. Accordingly, even attorneys who are not collaboratively trained and who do not practice collaborative law, are required to provide clients with information concerning all available options, including mediation, collaborative law, arbitration, and mediation, as well as litigation. The official comments further support this view. Official Comment 5 to RPC 2.1 specifically provides in part:

... [W]hen a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

The informed consent requirement is therefore related to the duty to provide clients with candid advice under RPC 2.1. The role of advisor to their clients falls on all lawyers, collaborative and conventional. Official Comments 1 to 3 of RPC 2.1 describe the scope of an attorney’s advice quite broadly and should be carefully read:

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice 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 a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer 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.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however,

the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

The fact is, many clients want and need *advisors and counselors* (as in “counselors at law”) rather than merely litigation technicians. The RPCs not only approve of this role, but mandate it for clients who may be inexperienced in legal matters, such as many family law clients.

4. Competence.

RPC 1.1 requires that attorneys provide “competent representation” to the client. Official Comment 5 notes that the competent handling of a matter “includes ... use of methods and procedures meeting the standards of competent practitioners.”

Given the profound differences in orientation between conventional representation and collaborative practice, it follows that an attorney cannot practice collaborative law without first learning the “methods and procedures” of collaborative law that meet the standards of competent practitioners in the field. With the “paradigm shift” required to competently practice collaborative law, both collaborative law training and interest-based mediation training are considered essential to achieve the lowest level of competence for practicing collaborative law. Achieving such level of competence would also be consistent with the ethical standards of the IACP as well as most, if not all, collaborative practice groups in Washington.

5. Confidentiality.

Collaborative law cannot work without transparency and full disclosure of material information. Clients specifically agree in writing to provide all such information, and at the conclusion of the case confirm in writing that they have provided such information. Additionally, the attorneys are authorized and required to withdraw if a party does not abide by the requirements of the collaborative agreement. The undertaking to provide information is a key assurance that the collaborative process provides the structure to allow both parties to build trust and negotiate a resolution.

It is important that collaborative practitioners advise their clients how their responsibilities and rights concerning information under their collaborative law participation agreement differ from conventional representation, so that the clients give

informed consent. This is particularly true in light of the authorization to reveal information granted by RPC 1.6(b)(3), which specifically authorizes attorneys to:

...reveal information relating to the representation of a client 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 lawyer's services....

RPC 1.6(b)(3) therefore allows collaborative lawyers to protect the collaborative process by preventing their own clients from perpetrating a fraud through the withholding of material information or engaging in other malfeasance. Official Comment 14 to RPC 1.6 provides that lawyers should first seek to persuade the client to take action to obviate the need for disclosure. Doing so is ethically appropriate, even in conventional litigation. But such efforts to encourage honesty are an essential feature of the collaborative process.

Because the obligation in the collaborative process is so different from the standard litigation mindset of limiting disclosure of information, informed consent by the client is important. In *In re Disciplinary Matter of Utevsky*, WSBA Bar News (May 1999), an attorney was held to have violated the prior version of RPC 1.6 for revealing his client's settlement position to a mediator without his client's permission. RPC 1.6 prohibits lawyers from revealing information related to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure fits into certain exceptions, such as the exception in RPC 1.6(b)(3) quoted above. Additionally, to effectively manage a collaborative law case, collaborative attorneys and other team members need to be able to communicate some information about their clients' case, analogous to the exchange of certain information in any negotiation.

Best practices would be for each collaborative attorney to fully advise their clients of the benefits and risks of undertaking to provide information, including between team members, in advance of entering into a participation agreement that authorizes such communications. While not required by any rule, such information is best followed-up in writing when possible. It is important that clients understand the process before entering

into it, and enter it with full knowledge of both its potential benefits and its potential risks.

The policy behind RPC 1.6 is to ensure that clients are encouraged to seek legal assistance and then communicate frankly with their attorney about potentially damaging topics, so they can get advice to take or refrain from wrongful conduct. *See* Official Comment 2 to RPC 1.6. In the collaborative context, attorneys would be required to keep such discussions confidential absent specific authorization to make disclosure.

Paradoxically, despite the greater transparency of the collaborative process for those engaged in it, collaborative law may provide greater confidentiality to the parties themselves. Instead of having disputes decided in a forum based on evidence in the public record, parties resolve their own issues in a manner that preserves their privacy. In a family law case, often only the petition and final orders are in the public record; in a civil case, there may be no public record at all.

6. Truthfulness in Statements to Others.

RPC 4.1(a) requires attorneys to not knowingly make a false statement of material fact or law to a third person in the course of representing a client. This applies in all situations, and therefore also in collaborative law proceedings. The requirements of RPC 4.1(a) are consistent with the undertakings of parties in the collaborative law process.

APPENDICES

- A. WSBA Informal Ethics Opinion 2170
- B. IACP Ethical Standards for Practitioners



Informal Opinion: 2170
Year Issued: 2007

The inquiring lawyer asks if it is proper under the Rules of Professional Conduct for a Washington family law attorney to enter into a four-way agreement with his or her client, the opposing party, and the opposing party's lawyer? The four-way agreement is a cornerstone of a dispute resolution system described as "collaborative law," in which all participants commit to settlement through negotiation without resort to traditional litigation, after each provides full and honest disclosure of all information to each other. Each side retains a lawyer of the party's choosing who assists in the negotiation process. Experts, such as accountants, appraisers, and mental health professionals, are also employed as needed. The lawyers limit the scope of their representation to achieving resolution through non-adversarial processes, and agree to withdraw from the representation if negotiation is unsuccessful and there is ensuing adversarial litigation.

Since the collaborative law process in a family law setting involves a limitation on the scope of a lawyer's representation of the client, under RPC 1.2(c) it is permissible if the limitation is reasonable under the circumstances and if the client gives informed consent. The limitation is reasonable if, at the outset, the lawyer in the exercise of sound professional judgment believes the client's interests are likely to be well-served by participation in the collaborative law process. The predicates of the client's informed consent include a consideration of the objectives of the client, the potential benefits and risks of the collaborative law process, and the availability of other alternatives.

Informal opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Informal opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official opinion of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Informal opinions are based upon facts of the inquiry as presented to the committee.

Ethical Standards For Collaborative Practitioners

Preamble Collaborative Practice differs greatly from adversarial dispute resolution practice. It challenges practitioners in ways not necessarily addressed by the ethics of individual disciplines. The standards that follow:

- 1) Provide a common set of values, principles, and standards to guide the Collaborative practitioner in his or her professional decisions and conduct,
- 2) Create a framework of basic tenets for ethical and professional conduct by the Collaborative practitioner, and
- 3) Identify responsibilities of Collaborative practitioners to their clients, to Collaborative colleagues, and to the public.

General Standards

1. **Resolution of Conflicts between ethical standards.**

1.1 Any apparent or actual conflict between the Ethical Standards governing the practitioner's discipline and these Standards should be resolved by the practitioner consistent with the Ethical Standards governing the practitioner's profession.

2. **Competence.**

2.1 A Collaborative practitioner shall maintain the licensure or certification required by the practitioner's profession in good standing and shall adhere to the Ethical Standards governing the practitioner's discipline.

2.2 A Collaborative practitioner shall have completed a minimum of twelve hours of Collaborative Practice/Collaborative Law training or Interdisciplinary Collaborative training consistent with IACP Minimum Standards for Collaborative practitioners, prior to commencing a Collaborative case or engaging in Interdisciplinary Collaborative Practice.

2.3 A Collaborative practitioner shall practice within the scope of the Collaborative practitioner's training, competency, and professional mandate of practice, as specified by the IACP Minimum Standards for Collaborative practitioners. The practitioner shall be mindful of the client's individual circumstances and the over-all circumstances of the case that may require the involvement of other professionals, both within and outside of the Collaborative process.

Comment

As Collaborative practitioners experience a greater diversity in their client population they become confronted by more complexity in physical, psychological and emotional factors affecting the client. It is important for the practitioner to be able to recognize these factors, as they will necessarily influence the Collaborative process and the client's decision making. It is even more important for the practitioner to recognize the limits of his or her ability to effectively deal with these factors and with the client's response to them. In fully addressing the client's needs, interests and goals, the Collaborative practitioner must be willing to turn to other professionals both within and outside of the Collaborative process, such as mental health professionals, medical professionals, financial professionals, vocational specialists and possibly rehabilitation counselors in the areas of physical disability, substance abuse, and domestic violence.

3. Conflicts of Interest.

3.1. A Collaborative practitioner shall disclose any conflicts of interest as defined by the practitioner's respective professional guidelines and Ethical Standards.

Comment

Upon full disclosure of a conflict of interest, the client(s) affected may waive the conflict in writing consistent with the practitioner's professional guidelines.

4. Confidentiality.

4.1 A Collaborative practitioner shall fully inform the client(s) about confidentiality requirements and practices in the specific Collaborative process that will be offered to the clients.

4.2 A Collaborative practitioner may reveal privileged information only with permission of the client(s), according to guidelines set out clearly in the Collaborative practitioner's Participation Agreement(s) or as required by law.

Comment

The rules of confidentiality are among the most important core values of the legal and mental health professions. Those standards may be modified by the terms of the Collaborative practitioner's fee and/or participation agreement with the client(s), so long as the modifications are consistent with the ethical standards of the practitioner's discipline. A competent Collaborative practitioner will be knowledgeable regarding the requirements of his/her professional standards pertaining to the necessity of obtaining a client's informed consent, and shall provide sufficient information to enable the client to give informed consent.

5. Scope of Advocacy.

5.1 A Collaborative lawyer shall inform the client(s) of the full spectrum of process options available for resolving disputed legal issues in their case.

5.2 A Collaborative practitioner shall provide a clear explanation of the Collaborative process, which includes the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process.

5.3 A Collaborative practitioner shall assist the client(s) in establishing realistic expectations in the Collaborative process and shall respect the clients' self determination; understanding that ultimately the client(s) is/are responsible for making the decisions that resolve their issues.

5.4 A Collaborative practitioner shall encourage parents to remain mindful of the needs and best interests of their child(ren).

5.5 A Collaborative practitioner shall avoid contributing to the conflict of the client(s).

Comment

This section highlights the special obligations undertaken by the Collaborative practitioner that specifically result from the unique nature of Collaborative Practice. Psychologists and social workers are free to recommend outcomes to their client(s) believed to be in the client(s)' (or the clients' family's) best interest, provided that they take care to do no harm. The traditional model of lawyering includes advocacy by the lawyer for the client's position so long as that position is legally supportable. Thus, this section has particular impact for lawyers because it reflects the considerations underlying law society and bar association rules in a number of jurisdictions. For example, Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct recognizes that the role of the attorney encompasses more than providing purely technical legal advice. As the Comment to Rule 2.1 explains, the attorney's advice can properly include moral, ethical, and practical considerations, and may indicate that there is more involved in resolving a particular dispute or even the client's entire case than strictly legal considerations. In Collaborative practice, the practitioner specifically contracts with the client(s) to provide advice that recognizes a full range of options for dispute resolution and takes into consideration relationship and family structures when looking at the possible outcomes for the client(s).

6. Disclosure of Business Practices.

6.1. A Collaborative practitioner shall fully disclose to the client(s) in writing his/her respective fee structure, related costs, and billing practices involved in the case.

6.2 A Collaborative practitioner shall be truthful in advertising his/her Collaborative practice and in the solicitation of Collaborative clients.

7. Minimum Elements of a Collaborative Participation and/or Fee Agreement

7.1. A Collaborative Participation Agreement and/or Fee Agreement shall be in writing, signed by the parties and the Collaborative practitioners, and must include provisions containing the following elements:

A. Pertaining to Full Disclosure of Information

1. No participant in a Collaborative case, whether a Collaborative practitioner or a client, may knowingly withhold or misrepresent information material to the Collaborative process or otherwise act or fail to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process;
2. If a client knowingly withholds or misrepresents information material to the Collaborative process, or otherwise acts or fails to act in a way that undermines or takes unfair advantage of the Collaborative process, and the client continues in such conduct after being duly advised of his or her obligations in the Collaborative process, such continuing conduct will mandate withdrawal of the Collaborative Practitioner and if such result was clearly stated in the Participation and/or Fee Agreement, the conduct shall result in termination of the Collaborative Process.
3. In the event of a withdrawal from or termination of the Collaborative process, the Collaborative practitioner shall notify the other professionals in the case.

B. Prohibiting Contested Court Procedures

1. Undertaking any contested court procedure automatically terminates the Collaborative process;
2. A Collaborative practitioner shall not threaten to undertake any contested court procedure related to the Collaborative case nor shall a Collaborative practitioner continue to represent a client who makes such a threat in a manner that undermines the Collaborative process.

3. Upon termination of the Collaborative process, the representing Collaborative practitioners and all other professionals working within the Collaborative process are prohibited from participating in any aspect of the contested proceedings between the parties.

Practice Protocols

8. Consent.

8.1 Each Collaborative practitioner shall obtain written permission from his/her client(s) to share information as appropriate to the process with all other Collaborative professionals working on the case.

9. Withdrawal/Termination.

9.1 If a Collaborative practitioner learns that his or her client is withholding or misrepresenting information material to the Collaborative process, or is otherwise acting or failing to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process, the Collaborative practitioner shall advise and counsel the client that:

- A. Such conduct is contrary to the principles of Collaborative Practice; and
- B. The client's continuing violation of such principles will mandate the withdrawal of the Collaborative practitioner from the Collaborative process, and, where permitted by the terms of the Collaborative practitioner's contract with the client, the termination of the Collaborative case.

9.2 If, after the advice and counsel described in Section 9.1, above, the client continues in the violation of the Collaborative Practice principles of disclosure and/or good faith, then the Collaborative practitioner shall:

- A. Withdraw from the Collaborative case; and
- B. Where permitted by the terms of the Collaborative practitioner's contract with the client, give notice to the other participants in the matter that the client has terminated the Collaborative process.

9.3 Nothing in these ethical standards shall be deemed to require a Collaborative practitioner to disclose the underlying reasons for either the professional's withdrawal or the termination of the Collaborative process.

9.4 A Collaborative practitioner must suspend or withdraw from the Collaborative process if the practitioner believes that a Collaborative client is unable to effectively participate in the process.

9.5 Upon termination of the Collaborative process, a Collaborative practitioner shall offer to provide his/her client(s) with a list of professional resources from the Collaborative practitioner's respective discipline from whom the client(s) may choose to receive professional advice or representation unless a client advises that he or she does not want or need such information.

Ethical standards specific to particular Collaborative roles

10. Neutral Roles

10.1 A Collaborative practitioner who serves on a Collaborative case in a neutral role shall adhere to that role, and shall not engage in any continuing client relationship that would compromise the Collaborative practitioner's neutrality. Working with either or both client(s) or with their child(ren) outside of the Collaborative process is inconsistent with that neutral role.

A. A Collaborative practitioner serving as a neutral financial specialist in a Collaborative case shall not have an ongoing business relationship with a Collaborative client during or after the completion of the Collaborative case, but may assist the clients in completing the tasks specifically assigned to them by the clients' written, final agreement. Such assistance may not include the sale of financial products or other services.

B. A Collaborative practitioner serving as a child specialist may assist the family in divorce related matters for the child(ren.) Such assistance may not include becoming the child(ren)'s therapist.

C. A Collaborative practitioner serving as a neutral coach may assist the family in divorce related matters. Such assistance may not include acting as a therapist for one or both parties.

11. Coaches/Child Specialists

11.1 A Collaborative practitioner who serves in the role of coach on a Collaborative case shall not function as a therapist to the Collaborative practitioner's client after the case has ended. Coaches should remain available to continue to help the clients/family address specific divorce issues after the divorce is final. A therapist for a client shall not serve in the role of coach or child specialist on a Collaborative case involving a client with whom the therapist has acted in a therapeutic role.

11.2 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.