

## ETHICS

## Ethical Issues in Collaborative Law

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Collaborative law is becoming increasingly popular, for reasons well stated by Pauline Tesler in her article in the Winter, 1999 issue of the *American Journal of Family Law* (Vol. 13, number 4, p. 215). In brief summary, collaborative law consists of lawyers and clients committing to resolving their issues by settlement, and not by litigation. Each party is separately represented, and both clients and lawyers commit to voluntary full disclosure of all relevant information. If settlement fails, the collaborative lawyers must withdraw, and turn over the case to litigation counsel. Experts are brought in, but only as neutrals. They too must also commit to withdrawing if settlement fails. The disincentive to litigation is the financial and emotional cost of starting over with new representation. (See Tesler, pp. 219–220.)

However, as with all innovations, newly created procedures bring with it new ethical issues to be resolved. For collaborative lawyers, those include issues of compulsory disclosure, and confidentiality.

The customary collaborative law agreement requires both the parties and their counsel to disclose all relevant information. The agreement is signed by all counsel and the parties. Does this give opposing parties rights to this disclosure from the other?

If so, what should the lawyer do who discovers that her client has relevant information that either has not been disclosed, or that the client refuses to disclose? The answer of the collaborative law people is that this non-disclosure is a break down in the collaborative process, requiring the lawyer to withdraw from the process. How can this be done without signaling to the other side that there is a non-disclosure lurking in the case? And how does this resolve the contractual obligation, if any, owed to the other party? Can clients contractually bind themselves to waive confidentiality if the lawyer should choose to honor the agreement and disclose the information? The ABA Ethics 2000 Commission's proposed Rule 1.0(e) on informed consent, and the comments, would appear to allow such binding waiver, if in writing and fully understood by the client.

### CONFIDENTIALITY AND DISCLOSURE

The collaborative agreement, of necessity, is quite careful to ensure that each party is separately represented by his or her own counsel, and that the lawyers do not represent the opposite party in the case. Thus, there is no confidentiality between counsel and the opposite party.

In most instances, information obtained in conferences with all parties and counsel present will be "information relating to the representation of a client" and thus protected from disclosure by all counsel present. The husband-wife evidentiary privilege would also protect compulsory disclosure by the spouses, although it would not prevent voluntary disclosure by either spouse. But there can be some circumstances where frank and open disclosure might require opposing counsel to reveal information harmful to the opposing party.

The best example could be cases where there has been skimming from a business. Skimming is the practice of taking cash from a business, which goes unreported to the Internal Revenue Service. This is not an uncommon practice, and a lawyer's ethical obligation is to not disclose past criminal activity of a client, but not be complicit in any future criminal activity of a client. However, the actual income earned from a business, reported or not, can be relevant to child support issues, alimony, or property division. And the opposing lawyer in a conference where there has been full disclosure of

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this past criminal conduct is the lawyer for the client, and not the opposing party. Unless this information could be considered protected as "information relating to the representation of a client," it is not protected by the confidentiality provisions of the ethics rules, and could be compelled.

Although the parties have agreed not to litigate the issues in the case, settlement agreements in most instances have to be submitted to a court for approval. Does the actual income have to be disclosed to obtain approval of a child support or alimony award based on true, rather than false, income figures. If this honest disclosure is made to the court, does that expose the clients to prosecution for tax fraud. If the lower figures, based on false income tax returns, are used in the calculation, does this violate the rules regarding candor to the tribunal? See ABA Rule 3.3. Would this obligate

both lawyers to report such professional misconduct on the part of the other, pursuant to ABA Rule 8.3. Such obligation to report would not trump confidentiality obligations under the ethics rules, but each lawyer has no confidentiality privilege with respect to the opposite party.

There are other examples of criminal, or other conduct committed during the marriage which, once disclosed, may not be protected from disclosure to the authorities. Should opposing counsel learn in a four way session, that the opposing party has engaged in inappropriate conduct with a child, it would seem that he or she would have no obligation to keep that information confidential, and, in fact, might have some obligation to report it. The client certainly has to be informed of this type of exposure, but a blanket waiver of confidentiality with respect to conduct resulting in possible criminal li-

ability makes informed consent particularly problematic.

## CONCLUSION

Collaborative law advocates quite appropriately point to the ethical obligations of a lawyer to resolve domestic relations disputes in the least harmful way possible, and contend this makes collaborative law an ethically superior way of resolving divorces. They also contend because collaborative law resolutions are more satisfactory to clients, incidents of malpractice arising out of the collaborative process would likely be lower than claims arising out of contentious adversarial divorces. (See Pauline H. Tesler, *Collaborative Law*, ABA 2001 (pp. 159-169).) They may be right. But collaborative law itself, in its novelty, presents ethical challenges to be resolved as the process develops.