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American Bar Association: Summary of Ethics Rules Governing Collaborative Practice

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This is a discussion draft and is not the policy of the American Bar Association or the Section of Dispute Resolution. Please direct any comments on this draft to the co-chairs of the Collaborative Law Committee, David A. Hoffman (DHoffman@BostonLawCollaborative.com) and Lawrence R. Maxwell, Jr. (lmaxwell@adr-attorney.com).

**AMERICAN BAR ASSOCIATION
SECTION OF DISPUTE RESOLUTION
COLLABORATIVE LAW COMMITTEE
ETHICS SUBCOMMITTEE¹**

**SUMMARY OF ETHICS RULES GOVERNING
COLLABORATIVE PRACTICE**

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1. Sherrie R. Abney (Texas), Jeanne M. Fahey (California), Karen S. Fasler (Washington), Lawrence R. Maxwell, Jr. (Texas), Paula H. Noe (Massachusetts), Ruth L. Rickard (Texas); John M. Lande (Missouri), ex officio; David A. Hoffman (Massachusetts), ex officio.

I. INTRODUCTION

The practice of Collaborative Law has become a major addition to the field of alternative dispute resolution in the United States, Canada, and other countries. In the U.S., three states (California, North Carolina, and Texas) have enacted statutes authorizing the use of Collaborative Law, and in 2007 the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws),² created a Drafting Committee to promulgate a uniform law authorizing the use of Collaborative Law. In the same year, the American Bar Association ("ABA") Section of Dispute Resolution created a Collaborative Law Committee. The ABA has also published the leading text on Collaborative Practice—Pauline Tesler's *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION*. In 2002, the ABA Section of Dispute Resolution awarded Pauline and the founder of the Collaborative Law movement, attorney Stuart Webb, the ABA's first "Lawyer as Problem Solver" Award. The International Academy of Collaborative Professionals, the leading organization in the Collaborative Practice field with more than 3,000 members, estimates that more than 10,000 lawyers and other professionals throughout the world have received Collaborative Practice training.

Collaborative Law (also known as Collaborative Practice, because it includes the use of not only lawyers but also other professionals, such as mental health professionals and financial planners) is a process in which all parties attempt to settle matters without resorting to litigation. All parties are represented by counsel and agree to keep discovery informal and cooperative, to hire joint experts if needed, to maintain the confidentiality of the negotiation process, and to engage in good faith, interest-based negotiation. If any party seeks intervention from a court on a contested matter, the Collaborative Practice attorneys must withdraw from representation and the parties then hire new counsel. One of the purposes of the Collaborative Practice Participation Agreement (the "Participation Agreement"), signed by the parties and acknowledged or signed by counsel, is to align everyone's incentives in the direction of settlement and to promote constructive problem-solving.

Empirical research has found that a problem-solving negotiation approach is often more effective than an adversarial approach.³ Stud-

2. This is the organization responsible for drafting such uniform laws as the Uniform Commercial Code, Uniform Arbitration Act, and Uniform Mediation Act.

3. See Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 167 (2002). This survey of lawyers revealed that 54% rated opposing counsel using a problem-solving approach as effective and 4% as ineffective compared with 9% of lawyers who rated an adversarial approach as effective and 53% as ineffective. *Id.* at 195.

ies have also shown that in traditional negotiations attorneys often have difficulty using more effective interest-based negotiation strategies because of mistrust in the other side's good faith.⁴ Collaborative Practice provides a structure and process that maximizes an attorney's ability to develop an atmosphere of trust and to safely engage in a more effective form of negotiation.

Numerous law review articles and state ethics opinions have addressed the question of whether Collaborative Practice is consistent with ABA Model Rules of Professional Conduct (and the various versions of those rules in the fifty states).⁵ The predominant view is that Collaborative Practice is consistent with the Model Rules. Ethics opinions in Minnesota (1997), North Carolina (2002), Maryland (2004), Pennsylvania (2004), Kentucky (2005), New Jersey (2005), and Missouri (2008), have approved the use of Collaborative Practice. Only one state, Colorado (2007), has said otherwise about one form of Collaborative Practice. (The Colorado Opinion states, in a footnote, that nothing prohibits the *parties* from signing an agreement that is not signed by their lawyers, in which the *parties* agree to hire new counsel if either party initiates litigation.) In August 2007, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477 (the "ABA Opinion"),⁶ which rejects the conclusions reached in the Colorado Opinion and squarely supports the use of Collaborative Practice so long as clients are well informed about the process. It is significant to note that the Missouri Opinion supporting the use of the Collaborative Practice was issued in 2008, after the Colorado Opinion and the ABA Opinion.

The purpose of this paper is to address ethical issues considered in the above-mentioned opinions, including: (1) limited scope representation, informed consent, and restriction on practice; (2) conflict of interests; (3) competence and diligence; (4) mandatory withdrawal provisions, including withdrawal due to client behavior and withdrawal requiring the court's permission; (5) zealous representation; (6) confidentiality and disclosure; (7) communications and advertising; and (8) collaborative non-profit organizations.

This Article shows that, for the reasons set forth below, Collaborative Practice is consistent with the rules of ethics for lawyers and provides an important method for clients and attorneys to achieve fair

4. See John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 673-74 and n.247 (2007); see also Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 483 and nn.22-24 (2005).

5. Many references are made to the ABA Model Rules of Professional Conduct, but it is important to note that the laws, regulations, Rules of Professional Conduct, court rules, and Opinions promulgated in the individual jurisdictions are controlling.

6. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007), available at http://www.Collaborativelaw.us/articles/Ethics_Opinion_ABA.pdf.

settlements without the expense, delay, and acrimony that are, unfortunately, all too common when disputes are resolved in the litigation process.

II. LIMITED SCOPE REPRESENTATION

The ABA Committee on Ethics and Professional Responsibility has concluded that Collaborative Practice allows an attorney to limit the scope of his or her representation under ABA Model Rule 1.2(c),⁷ which states “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”⁸ Ethics opinions from New Jersey,⁹ North Carolina,¹⁰ Kentucky,¹¹ Pennsylvania,¹² Minnesota,¹³ and Missouri¹⁴ have all addressed limited scope representation as an integral component of Collaborative Practice. Even Colorado, which deemed Collaborative Practice impermissible on other grounds, has agreed that advance agreements to limit representation are ethical.¹⁵

The requirements for Collaborative Practice are the same limitations of the scope of other types of legal representation. The obligations concerning limited scope representation and informed consent are not new considerations for attorneys. It is well established that

7. *Id.* at 3.

8. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2008), available at http://www.abanet.org/cpr/mrpc/rule_1_2.html.

9. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 699, at 6 (2005), available at <https://www.collaborativepractice.com/lib/Ethics/NJ.op.pdf> (lawyers are permitted to impose some limitations on the nature of their practice).

10. N.C. State Bar Ass'n Formal Ethics Op. 1, at 2 (2002), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&from=4/2002> (“Rule 1.2(c) permits a lawyer to limit the objectives of a representation if the client consents after consultation”).

11. Ky. Bar Ass'n Ethics Op. KBA E-425, at 7 (2005), available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf (under the Collaborative Law agreement, the parties agree to a limited representation. Rule 1.2 recognizes limited representations).

12. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Ethics Op. (2004), available at <https://www.collaborativepractice.com/lib/Ethics/PA.op.pdf> (the version of Rule 1.2 now pending would permit a lawyer and client to agree on a limited scope of representation, provided the limitation is reasonable and the client gives informed consent).

13. Advisory Opinion Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center to Laurie Savran, Collaborative Law Institute (Mar. 12, 1997), available at http://bostonlawCollaborative.com/documents/Minnesota_Ethics_Opinion.doc.

14. Advisory Comm. of the Sup. Ct. of Mo. Formal Op. 124 (2008), available at <http://www.courts.mo.gov/page.asp?id=11696> (follow “Formal Opinion 124” hyperlink).

15. Colo. Bar Ass'n Ethics Op. 115, at 6 (2007), available at <http://www.cobar.org/index.dfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24/07/> (“[A] lawyer may also provide a client with some, but not all, of the work normally involved in litigation. . . . Thus, an advance agreement with the client to terminate or limit the representation is ethical.”).

attorneys must always act with diligence and in the best interests of their clients, no matter what the scope of representation entails. Attorneys are required to consider the facts of each case to determine whether a particular process is appropriate for a client and whether they, as attorneys, are competent to handle the issues at hand.

A two-pronged analysis is needed to ascertain whether a limited scope of representation is appropriate for a particular situation. The first prong involves a determination of whether the proposed limitation in scope is *reasonable under the circumstances*. The second prong addresses whether *informed consent* has been properly obtained.

A. *Is the Scope Reasonable Under the Circumstances?*

The state ethics opinions are cautionary and provide extensive guidance in determining if a limited scope of representation is appropriate. The New Jersey Opinion suggests that whether a limitation is “reasonable” is a determination that must be made in the first instance by the lawyer exercising sound professional judgment in assessing the needs of the client.¹⁶ The limitation is deemed reasonable if the lawyer believes his or her client’s needs are well-served by participation in the Collaborative process. The Opinion goes on to state, however, that given the harsh outcome in the event of failure, limited representation is clearly not reasonable if the lawyer believes there is a significant possibility that an impasse will result. The Pennsylvania Opinion recommends attorneys use case-specific and fact-specific analysis to determine whether the proposed limited scope of representation is reasonable under the circumstances and whether it will permit an attorney to deliver competent representation.¹⁷

B. *Has Informed Consent Been Obtained?*

The second prong of the analysis is whether the client has given informed consent. ABA Model Rule 1.0(e) defines informed consent as that which “denotes 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.”¹⁸

Model Rule 1.2(a) provides that the client has the right to make certain decisions regarding his or her case, and a lawyer shall abide by the client’s decision concerning the objectives of representation.¹⁹

16. N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics Op. 699, at 7–8.

17. Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility Informal Op. 2004-24, at 8.

18. MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2008).

19. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2008) (“(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on

This, of course, includes the right to retain a lawyer for a limited purpose such as pursuing settlement.

The ABA Opinion states that, as long as a limitation is reasonable under the circumstances and a client has given informed consent, nothing in Rule 1.2(c) suggests that limiting representation to a Collaborative effort is *per se* unreasonable. On the contrary, a limited representation may be entirely appropriate when a client has limited objectives for representation.²⁰

The New Jersey Opinion notes that clients must be made fully aware of both the significant limitations of the Collaborative Practice process, as well as the full range of alternatives, including the possibility of litigation. Additionally, the attorney must clearly explain to the client the consequences if the process fails and the attorney withdraws.

The Kentucky Opinion notes that the kind of information and explanation essential to informed decision-making must include the differences between the adversarial process and Collaborative Practice, the risks and advantages of each, any reasonably available alternatives, and the consequences of failure to reach a settlement agreement.²¹ The Opinion goes on to note that the Participation Agreement may touch on these concerns, but the Participation Agreement is unlikely on its own to meet the requirements needed to satisfy the informed decision-making process. The agreement should serve as a starting point but be amplified by fuller explanation and discussion. The Opinion notes, as well, that clients must be provided information about the possibility that additional time and costs may be associated with obtaining new counsel, or that one might feel pressured to settle in order to avoid having to seek new representation, and the potential for an opponent to effectively disqualify both counselors.²²

The Missouri Opinion notes the potential tension that may be created in Collaborative Practice between the client's interests and the attorney's interests due to the requirement that the attorney withdraw if the matter is not settled. The Opinion notes similar tension exists in many other attorney-client relationships, such as contingent fee cases. The Opinion concludes that the tension that may develop between the interests is not unreasonable, since the vast majority of attorneys will

behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

20. ABA Formal Op. 07-447, at 3.

21. Ky. Bar Ass'n Ethics Op. KBA E-425, at 4 (noting that the Collaborative Law agreement may touch on these concerns but is unlikely on its own to meet the requirements related to informed decision making. The agreement should serve as a starting point but be amplified by fuller explanation and discussion).

22. *Id.* at 7.

fulfill their ethical obligation to put their client's interests ahead of their own personal interests.²³

In order to encourage lawyers to take the steps necessary to explain Collaborative Practice to clients, at least one ethical opinion recommends that the exact scope of the representation be reduced to writing.²⁴ Another suggests that lawyers confirm in writing any explanations of Collaborative Practice, along with the client's consent to its use.²⁵ These recommendations comport with ABA Model Rule 1.5(b), which recommends that the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible, shall be communicated to the client, preferably in writing.

The various concerns cited in these opinions emphasize the need to proceed carefully, as is of course required in any attorney-client relationship. The ABA Opinion makes it clear that an agreement to provide limited scope representation does not eliminate the duty of an attorney to represent his or her client with diligence and competence.²⁶ Similarly, the Pennsylvania Ethics Opinion stresses that a limitation must not interfere with the ability of an attorney to comply with Rule 1.1 and its obligation to provide competent representation.²⁷

C. Rule 5.6 Restrictions on Practice Distinguished

The limitations in scope of representation that are contemplated under Model Rule 1.2 are distinct from those contemplated under Model Rule 5.6. Model Rule 5.6 addresses restrictions on the right to practice law such as a non-compete agreement restricting the practice of law by a lawyer departing from a firm.²⁸ The Kentucky Opinion notes that agreements contemplated under its Rule 5.6 are meant to apply to lawyers practicing together and settlement agreements between parties to litigation.²⁹ Thus, ABA Model Rule 5.6 does not ap-

23. Advisory Comm. of the Sup. Ct. of Mo. Formal Op. 124, at 1.

24. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Informal Op. 2004-24, at 9. (although the Pennsylvania proposed version of 1.5(b) does not require a writing at this point, it is preferable to specify in writing the scope of representation).

25. Ky. Bar Ass'n Ethics Op. KBA E-425, at 4.

26. ABA Formal Op. 07-447, at 4.

27. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Informal Ethics Op. 2004-24, at 6.

28. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2008) ("A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.").

29. Ky. Bar Ass'n Ethics Op. KBA E-425, at 7.

ply to the agreement that Collaborative Practice attorneys make in a four-way (or multi-party) agreement with the parties in a Collaborative Practice case.

III. CONFLICT OF INTEREST

Rule 1.7(a)(2) states that an impermissible conflict exists between a lawyer and client if there is a significant risk that the representation will be materially limited by a lawyer's responsibilities to a third person or by a personal interest of the lawyer. The ABA Opinion notes that representation is permissible where there is a conflict of interest if the client gives informed consent and the lawyer believes he or she is able to provide competent and diligent representation. Responsibilities towards third parties constitute conflicts if there is a significant risk that these responsibilities will materially limit the lawyer's representation of the client.

The ABA Opinion states that the contractual obligation to withdraw contained in the Participation Agreement creates a "responsibility to a third party" on the part of each lawyer, but states that this does not necessarily create a conflict of interest under Rule 1.7(a)(2).³⁰ The Opinion directly refutes the Colorado Opinion, which states that Collaborative Practice using a four-way (or multi-party) agreement is inherently impermissible because it creates a non-waivable conflict of interest under Rule 1.7(a)(2).³¹ The ABA Opinion rejects this conclusion of the Colorado Opinion because it views the limited-scope representation as consistent with the client's goal of Collaborative settlement.³² That is, no conflict arises from the foreclosing of the litigation alternative because the client has chosen to limit the Collaborative attorney's representation to negotiating a settlement.³³ The parties to the dispute may end the process at any time and continue their case in litigation, mediation, arbitration, or any other form of dispute resolution that the parties choose.

The Pennsylvania Opinion states that a conflict would exist under Rule 1.7(a)(2) if a lawyer concludes there is a significant risk the representation will be materially limited by the lawyer's own interests. The Opinion suggests, for example, a conflict might arise because the

30. See ABA Formal Op. 07-447, at 3.

31. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008) ("(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

32. See ABA Formal Op. 07-447, at 4.

33. The Committee agrees and further notes that litigation is at all times an alternative to the Collaborative process.

lawyer is interested in serving only as a Collaborative Practice attorney.³⁴ However, it is not obvious that simply being engaged for the limited purpose of Collaborative Practice would impair the lawyer's judgment or ability to advise a client to consider terminating the Collaborative process and proceed to litigation. Moreover, the Committee notes this consideration is not unique to Collaborative Practice. The desire to limit one's practice to a specific area is a consideration for all attorneys when accepting employment. Like any other lawyers, Collaborative Practice lawyers must reasonably believe they can provide competent and diligent representation to each client they agree to represent, just as trial attorneys must be cautious when accepting clients who wish to settle their disputes rather than move to the courtroom where trial attorneys' talents and interests lie.

IV. COMPETENCE

The Pennsylvania Opinion on Collaborative Practice considered the competence of the Collaborative Practice attorney under Pennsylvania Rule of Professional Conduct 1.1, which states that, "a lawyer owes a duty of competence to each of the lawyer's clients." The Opinion continues by stating, "Although many of the Rules of Professional Conduct permit client waivers, Rule 1.1³⁵ contains no such exception." The Opinion goes on to agree with the conclusion:

Anyone considering collaborative family law should have the necessary experience and knowledge to handle any family law matter and has a duty to seek the services of, or associate with, another lawyer or professional who is competent to handle those areas for which he may not be fully prepared.

The Pennsylvania Opinion is in keeping with the common understanding of the rule that lawyers must be competent in a particular area of the law or, if they are not, they must properly educate themselves or engage the assistance of another attorney who is competent to assist them in their representation of a client.

In this respect, Collaborative Practice attorneys are under the same ethical requirements as any other member of the Bar. There is no reason to believe that Collaborative practitioners will assume there is less of a duty of competence placed upon them than attorneys in any other type of attorney-client relationship. Collaborative attorneys, like all others, must have the legal knowledge, skill, thoroughness and preparation necessary to provide competent representation.

34. See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Informal Op. 2004-24, at 8.

35. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

A Collaborative Practice lawyer can obtain subject matter competence the same way as any other attorney—through experience, special training, study or association with another lawyer with the necessary expertise.³⁶ The skill of Collaborative negotiation is also an area in which the practitioner must be competent, since it represents a “paradigm shift”³⁷ from adversarial, positional bargaining. However, as the Rule contemplates, there are many ways for an attorney to attain the necessary skills and even a newly admitted lawyer can be as competent as an attorney with long experience.³⁸ Collaborative Practice groups throughout the United States and overseas require specialized training in Collaborative Practice in order to qualify for membership in those organizations.

To further define competent representation, the Pennsylvania Opinion makes clear that in representing a client, competence should not necessarily be equated with a maximum dollar settlement. The client may have other considerations, as set out in Rule 2.1, “such as moral, economic, social and political factors that may be relevant to the client’s situation.” These factors may include concerns regarding ongoing family or business relationships that could possibly be destroyed by the rigors of deposition or cross-examination in an adversarial setting. Moreover, these factors are precisely the reason the Collaborative process was originally developed. In many situations, the parties place higher importance on non-material interests, such as the welfare of the parties’ children in a divorce case. Open discussions between participants in the Collaborative process explore the interests and goals of the parties and create opportunities to consider and resolve

36. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 1 (“[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.”).

37. For a discussion of this paradigm shift, see PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2002) and SHERRIE ABNEY, *AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW* (2005).

38. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2 (“[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”).

issues that might become secondary or completely ignored if the emphasis of the dispute remains solely on “how much is the case worth?”

There is no evidence that the Collaborative process compromises a client’s right to competent representation.³⁹ Parties who have no desire to resolve their problems in court should be given the opportunity to use Collaborative Practice for the limited purpose of settling their dispute. By retaining collaboratively trained lawyers, clients employ attorneys that are better equipped to guide the parties through the settlement process with the use of interest-based negotiations rather than positional bargaining.⁴⁰

V. WITHDRAWAL

A. *Mandatory Withdrawal – i.e., Limited Representation*

The term “mandatory withdrawal” refers to withdrawal by the attorneys pursuant to the withdrawal provision in the Participation Agreement. The duty to withdraw in a Collaborative case generally arises when an impasse is reached or when any party wishes to terminate the Collaborative process. The term “withdrawal” is actually somewhat of a misnomer since the process is more accurately described by the term “limited-scope representation.”

There are some basic factors that must be considered as an attorney disengages from the process. Clients should always be informed regarding all reasonably available options for resolving disputes during any initial interview with an attorney. For the collaborative process to be successful, collaborative practitioners should screen potential participants. The process should be thoroughly explained, emphasizing the necessity of honesty and good faith, voluntary disclosure by the

39. See Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases (2005)*, available at http://www.nysba.org/Content/NavigationMenu58/ResourceLibrary/CommitteeonCollaborativeLaw/Emerging_Phenomenon_Collaborative_Family_Law.pdf. The Collaborative Practice community has grown in such a way as to assist attorneys to obtain and refine their skills. For instance, the IACP minimum standards for Collaborative attorneys provide that an attorney wishing to hold himself out as Collaborative obtain at least 12 hours of basic Collaborative training, at least one 30 hour training in client centered, facilitative conflict resolution training, and 15 aggregate hours of further skills training. See INT’L ACADEMY OF COLLABORATIVE PROF’LS MINIMUM STANDARDS §§ 2.2–4 (2004). Many local practice groups impose similar initial and ongoing training requirements.

40. Collaborative Practice attorneys are not faced with the dual tasks of adversarial behavior one week and attempts to settle the next. The Collaborative lawyers’ focus is one hundred percent on settlement. Forcing Collaborative attorneys to continue to represent their clients at trial could, in many instances, be a disservice to clients since some Collaborative lawyers are either not experienced in serious litigation or have simply lost the desire to be adversarial to the extent required to competently try a case. For some Collaborative lawyers the continued representation of a client would make no more sense than employing extremely adversarial trial lawyers to settle all client disputes through interest-based negotiation or telling a transactional lawyer, “You wrote the contract, so now you have to litigate the law suit.”

parties and counsel of information relevant to the negotiation, and mandatory requirement that counsel withdraw in the event that the dispute does not settle.

If these requirements are not fully explained by counsel during the screening process, the clients will have a second opportunity to become informed when they read the contract they must sign before the Collaborative process commences. Collaborative Practice requires the use of a contract referred to as the Participation Agreement. Collaborative Practice groups throughout the United States and overseas have developed several versions of the Participation Agreement, but they are all basically similar in content.⁴¹ These agreements plainly state the Collaborative Practice attorney will not continue to represent the client if the dispute goes to litigation.

The Collaborative process has been criticized for the possibility of leaving clients in a precarious position due to the withdrawal of their Collaborative counsel.⁴² For example, the Colorado Opinion notes that, "Where the client is of relatively meager means, the lawyer's withdrawal may be materially adverse to the client. Under such circumstances, the lawyer's withdrawal may be unethical." As discussed elsewhere, careful screening by the Collaborative Lawyer to determine if the dispute is a candidate for the Collaborative process will reduce the likelihood of taking on the client's dispute and then failing to settle it.⁴³ Furthermore, if the client is of very modest means, it is

41. This document may be equated to the "instructions" or a "manual" describing the operation of the Collaborative process. One such Agreement may be viewed on the Texas Collaborative Law Council (TCLC) website at www.Collaborativelaw.us. Texas Collaborative Law Council, Inc., Participation Agreement 1 (revised 2007). Page one of TCLC's Agreement lists the "Essential Elements of the Collaborative Process." *Id.* at 1. This list includes, "Full and Complete Disclosure of Relevant Information." *Id.* The requirements for disclosure of relevant information are discussed in detail on page three of the Agreement. *Id.* at 3. Page two of the Agreement addresses "Understandings" which explains that Collaborative lawyers must withdraw if the dispute goes to litigation: A Lawyer and any lawyer associated in the practice of law with that Lawyer may not serve as a litigation lawyer in the Dispute or in any other adversarial proceedings among any of the Parties; and this prohibition may not under any circumstances be modified. *Id.* at 2-3. All other terms of this Agreement may be modified by written agreement signed by all Parties and Lawyers. *Id.* at *passim*. Page four reiterates "The Lawyers' representation of the Parties is limited to the Collaborative process. Once the process is terminated, the Lawyers cannot participate in any manner in an adversarial proceeding. . . ." *Id.* at 4.

42. Concern regarding the parties being able to obtain new representation is addressed in the TCLC Participation Agreement on page seven. Upon notice to all Lawyers of termination of the Collaborative process, the Parties will observe a thirty day waiting period, unless there is an emergency, before requesting any court hearing, to permit all Parties to engage other lawyers and make an orderly transition from the Collaborative process to litigation or any other adversarial proceeding.

43. The mandatory withdrawal provision places a greater burden on both Collaborative lawyers and clients to settle. When a Collaborative lawyer's case does not settle, and therefore new counsel must be hired, the situation is similar to that of a litigator who is prepared to try a case but the client decides to settle it. In both situations, the lawyer's involvement in the case ends. This potential situation has given

highly unlikely the client is in a position to finance litigation, whether or not the client attempted to resolve the dispute in the Collaborative process. Moreover, the Colorado Opinion fails to account for the potential economic benefit of starting collaboratively. The process requires voluntary disclosure of all information relevant to settling the dispute. This eliminates much of the cost that accompanies traditional discovery, a process that is often financially and emotionally costly.

B. *Withdrawal Due to Client Behavior*

The Kentucky Opinion notes “the lawyer is encouraged to withdraw from the Collaborative process if his or her client fails to comply with the provisions of the agreement by withholding or misrepresenting information or otherwise acting in bad faith.” The Opinion then examines this question in light of Rule 1.16, which permits withdrawal if the “client insists upon pursuing an objective that the lawyer considers repugnant or imprudent” or if “other good cause for withdrawal exists.” The Kentucky Opinion concludes that if the client is in violation of one of the core provisions of the Collaborative agreement, “which both the lawyer and the client have signed,” then the lawyer has the right to withdraw. The Committee agrees that under these circumstances withdrawal would be the correct action on the part of the lawyer. By withdrawing, the lawyer would prevent the client from committing a breach of contract and possibly fraud while seemingly being aided by the client’s lawyer.⁴⁴

The Kentucky Opinion also discusses the sudden withdrawal of a Collaborative Practice attorney without explanation, noting, “If the Collaborative Law agreement, signed by the parties and lawyers, requires full disclosure by all, the withdrawal without explanation may violate the spirit of the agreement, unless the agreement also makes clear that the withdrawal may be ‘silent.’”⁴⁵ The Committee notes that silent withdrawal involves two responsibilities that must be recon-

rise to the question, “Will the Collaborative lawyer attempt to force the client to settle to prevent losing the case?” That possibility exists just as there is the possibility that a litigation lawyer will encourage a client to try a case that could be settled on reasonable terms. However, in the Collaborative situation, the client has been involved in each step of the process, participated in all settlement discussions, actively gathered information, and as a result is better informed to make decisions regarding whether or not settlement is reasonable or affordable.

44. In regard to the Colorado Opinion’s concern that “withdrawal would have a ‘material adverse effect’ on the client,” withdrawal appears to be a two-edged sword. On the one hand, withdrawal has the potential to harm the client’s interests; on the other hand, withdrawal to prevent a client from committing fraudulent acts, may prevent an adverse effect on the client’s interests.

45. Ky. Bar Ass’n Ethics Op. KBA E-425, at 5. For a detailed analysis demonstrating that Collaborative Practice does not violate a supposed duty of zealous advocacy, see John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1331–38 (2003).

ciled. Collaborative Practice attorneys have a duty of full disclosure, but they also must not violate the duty of confidentiality. It is highly unlikely that a client who is acting in bad faith will give the Collaborative attorney permission to explain the reason for withdrawal. The very act of a silent withdrawal should signal the other Collaborative attorney that good cause exists. This situation is similar to withdrawal by litigation counsel when the motion for withdrawal states that the attorneys and clients have irreconcilable differences. No one asks what those differences might be. Moreover, in the Collaborative process the parties are not communicating only by letter, e-mail, fax, and telephone. They sit in face-to-face meetings directly discussing their dispute. If one party is not acting in good faith, the other participants may realize this much more readily than they would in a litigated dispute, and the withdrawal of the other lawyer may be less of a surprise.

C. *Withdrawal with the Court's Permission*

The Kentucky, Pennsylvania, and Minnesota Opinions address Rule 1.16(c), which protects the clients' interests by requiring lawyers to seek the courts' permission to withdraw if the lawyers are attorneys of record in a Collaborative case that does not settle. As noted above, the Participation Agreement generally provides protection for the Collaborative participants by allowing a thirty-day moratorium on court intervention unless an emergency exists. This waiting period is designed to give the parties sufficient opportunity to obtain litigation counsel.

VI. ZEALOUS REPRESENTATION AND THE LAWYER'S DUTY OF DILIGENCE

The Kentucky Opinion addresses the issue of whether a lawyer's participation in the Collaborative process may be inconsistent with the duty of zealous representation.⁴⁶ The current Kentucky Rules of Professional Conduct no longer impose a duty of zeal, but rather impose duties of competence and diligence. The Opinion notes that although many current rules focus on the litigation aspects of lawyering and even mention "zeal" in their comments, this does not mean that the rules must be read to preclude non-adversarial representation. The Opinion cites Rule 2.1 as describing the attorney as an advisor and states that a lawyer may refer not only to the law, but also to other considerations such as moral, economic, social and political factors that may be relevant to a client's situation.

The Kentucky Opinion goes on to cite a recent article on collaborative family law⁴⁷ that stresses that the Collaborative Practice attorney

46. Ky. Bar Ass'n Ethics Op. KBA E-425, at 4.

47. *Id.* at 5 (citing Sheila M. Gutterman, *Collaborative Family Law – Part II*, COLO. LAW., Dec. 2001).

has the same ethical obligations to a client as any other lawyer to represent clients competently and diligently. Diligence includes consideration of a client's best interests, including (in a divorce case) the well-being of the children, family peace, and economic stability. If the Collaborative process is not in the client's best interests, the attorney is charged to advise the client to choose a different process tailored to his or her needs.⁴⁸

In many states, the duty to represent a client with zeal has been modified as a result of changes in the ABA Model Rules. The 1969 ABA Code of Professional Responsibility called on lawyers to represent clients "zealously" within the bounds of law (DR 7-101(A)). The ABA Model Rules of Professional Conduct, adopted in 1983, depart from this approach and emphasize competent and diligent representation. The term "zeal" appears in the preamble, but only in reference to litigation.⁴⁹ Although some states still employ elements of the Code of Professional Responsibility, most states have adopted some version of the Model Rules.

VII. CONFIDENTIALITY OF INFORMATION AND THE DUTY OF DISCLOSURE

The North Carolina Opinion raises the issues of client confidentiality and voluntary disclosure with regard to providing information about topics such as the finances of divorcing parties or information about adultery. The Opinion notes that attorneys must take these factors into consideration when advising clients about whether to choose Collaborative Practice as a process, and then use professional judgment to analyze the risks and benefits for each individual client.⁵⁰ The Opinion goes on to state that a lawyer may represent a client in the collaborative process if it is in the best interest of the client, the client has an opportunity to make informed decisions about the representation, the disclosure requirements do not involve dishonesty or fraud, and all parties understand and agree to the specific disclosure requirements. The lawyer must examine the totality of the situation and advise the client of the benefits and risks of participation in the process, including the benefits and risks of making and receiving certain disclosures (or not receiving those disclosures).⁵¹ The Committee notes that disclosure in the Collaborative process is limited to information that is relevant to settling a dispute.⁵² If there is other information that a party does not want to share during the Collaborative

48. *Id.*

49. MODEL RULES OF PROF'L CONDUCT preamble cmt. 2 (2008) ("As advocate, a lawyer zealously asserts the client's position. . .").

50. N.C. State Bar Ass'n Formal Ethics Op. 1, at 3.

51. *Id.* at 4.

52. This limitation on discovery requests will often eliminate searching many boxes of documents that normally would be exchanged during the litigation process.

process, the person receiving the request may refuse to disclose the information, but he or she must be truthful as to the existence of the information. A refusal to disclose may result in the requesting party terminating the process or deciding to continue without the requested information.

The considerations described above are particularly important when lawyers are engaged in client intake. It is also worth noting that the contractual duty of disclosure created by the Participation Agreement typically turns on the question of what information is "pertinent" or "relevant" to the case, and the question of what is pertinent or relevant may vary from one jurisdiction to the next.

VIII. COMMUNICATIONS AND ADVERTISING

ABA Model Rule 7.1 mandates that lawyers not make false or misleading communications about themselves or the specific legal services they will provide. The Maryland,⁵³ North Carolina⁵⁴ and Kentucky⁵⁵ Opinions address various issues related to communications, advertising, and direct contact with prospective clients as applied to the Collaborative process. The ABA Opinion makes clear that providing limited scope representation carries with it duties related not only to diligence and competence, but also to communication.⁵⁶ A lawyer must communicate adequate information about the rules and terms governing the Collaborative process, including advantages, disadvantages, alternatives, and the requirement that the Collaborative Practice attorney must withdraw if settlement does not occur and litigation is filed.⁵⁷ This is important not only to obtain informed consent, but also to comport with Model Rule 7.1.

The North Carolina Opinion applies Rule 7.1 to written communications. The Opinion assesses the propriety of brochures that describe the Collaborative process and its differences from litigation and other methods of dispute resolution. The Opinion notes that it is appropriate to include the names of lawyers along with a description of their training and commitment to the process as long as brochures comply with the Rules of Professional Conduct, including the duty to be truthful and not misleading.⁵⁸

The Kentucky Opinion defers to its Advertising Commission to evaluate whether specific content and methods of dissemination are

53. Md. State Bar Ass'n Ethics Op. 2004-23, at 1-3 (2004), *available at* <http://www.abanet.org/dch/committee.cfm?com=DR035000> (follow "Maryland Ethics Opinion on Collaborative Law" hyperlink).

54. N.C. State Bar Ass'n Formal Ethics Op. 1, at 1-3.

55. Ky. Bar Ass'n Ethics Op. KBA E-425, at 8.

56. ABA Formal Op. 07-447, at 3.

57. *Id.*

58. N.C. State Bar Ass'n Formal Ethics Op. 1, at 2.

appropriate in communications with the public.⁵⁹ Similarly, the Maryland Opinion does not address advertising head-on, but recommends that attorneys review a corresponding ethics opinion and Maryland Rules 7.1 through 7.5 to ensure that their activities do not run afoul of these specific requirements.⁶⁰

Because the rules regarding lawyer advertising differ substantially from one state to the next in the United States, lawyers are well advised to review the advertising rules in their jurisdictions. The ABA Model Rules cited here may differ significantly from those adopted by individual states. The ABA recently released a 118-page document outlining these differences.⁶¹

IX. COLLABORATIVE NON-PROFIT ORGANIZATIONS

The Kentucky Opinion discusses Rule 6.2 concerning membership in legal services organizations. It notes that lawyers are free to join law-related organizations that advance their professional development as long as activities do not violate the Rules of Professional Conduct.⁶² This Opinion is consistent with ABA Model Rule 6.3, which permits lawyers to serve in public or charitable organizations such as Legal Aid and the Public Defender.⁶³

The Maryland Opinion addresses the potential for formation of Collaborative dispute resolution non-profit organizations that also include mental health professionals and investment advisers. The Maryland ethics committee approves of non-profit organizations that include professionals other than lawyers where the purpose is to educate the public and promote the use of Collaborative Practice. However, the Opinion advises caution when it comes to the “marketing activities” of such organizations. The Maryland committee expresses concern about the potential to use this type of organizational structure purely as a means to feed one’s own law practice. It also cautions about the potential to become a referral service, particularly if the organizational set-up does not fall within Maryland’s safe harbor provisions that permit certain types of legal referral organizations so long

59. Ky. Bar Ass’n Ethics Op. KBA E-425, at 8.

60. Md. State Bar Ass’n Ethics Op. 2004-23, at 2.

61. See Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct (Apr. 15, 2009), *available at* <http://www.abanet.org/cpr/professionalism/state-advertising.pdf>.

62. Ky. Bar Ass’n Ethics Op. KBA E-425, at 8 (noting that it is impossible to assess whether activities are permissible without knowing what the organization plans to do).

63. *Id.* In Section 8 of the draft Uniform Collaborative Law Act (“UCLA”) (as of August 2008), drafted by a committee of the Uniform Law Commission, an exception to the “imputed disqualification” rule is created for non-profit organizations that provide Collaborative legal services for low-income people – in other words, under the UCLA, a lawyer in such an organization could represent an individual without disqualifying the entire organization from representing that individual if litigation was necessary. UNIF. COLLABORATIVE LAW ACT § 8 (Discussion Draft 2008).

as the fees charged by the organization are solely for membership and not based on the number of cases referred.⁶⁴

The North Carolina Opinion states that it is possible for an attorney member of a Collaborative family law organization to send brochures and information about the Collaborative process to an unrepresented spouse, provided that the lawyer complies with the limitations on communications with unrepresented persons set forth in its Rule 4.3.⁶⁵ The communication is not considered a prohibited solicitation under Rule 7.3(a) if a lawyer will receive no financial benefit from the Collaborative Practice organization as a result of the other spouse's employment of another Collaborative family law organization lawyer.⁶⁶ However, the Opinion cautions that lawyers must not give advice to unrepresented spouses other than general descriptions of the process and advice to secure a lawyer. They may also provide a list of lawyers who ascribe to the process, but may not refer the spouse to a specific lawyer. Additionally, a lawyer may not give an unrepresented spouse specific advice about the risks or benefits as they apply to his or her situation.

X. CONCLUSION

The ethical Opinions issued to date arise from Collaborative Practice in the area of family law. Most of the ethical questions raised by Collaborative Practice are the same as those in the more traditional practice of family law and other areas of civil law practice.

The Collaborative process is expanding into other areas of law, and undoubtedly other ethical considerations will surface. The Committee believes that the analysis of the ethical opinions issued to date should provide a framework for ethical considerations that may arise in the future in various areas of law practice.

Although Collaborative Practice requires the application of the ethics rules to new circumstances and a new dynamic, applying the ethics rules consistently with their underlying principles has presented no insurmountable conflicts in Collaborative Practice.

In sum, the clear consensus of ethics opinions to date in the United States is that Collaborative Practice is consistent with the canons of

64. Md. State Bar Ass'n Ethics Op. 2004-23, at 1-3.

65. N.C. State Bar Ass'n Formal Ethics Op. 1, at 1. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2008) ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.")

66. N.C. State Bar Ass'n Formal Ethics Op. 1, at 3.

ethics and offers clients and their attorneys an efficient, cost-effective, and for those who prefer it, a potentially more satisfying method for resolving disputes.