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Let's Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law

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COMMENT

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I. INTRODUCTION

"Collaborative law" is a relatively recent phenomenon in the panoply of the legal world. Its birth traces back to Minneapolis in 1990.[1] Since that time, it has expanded fairly rapidly; collaborative law groups can now be found across the country.[2] Driven by promises that it reduces costs terms of in time, money, and personal acrimony, collaborative law has its ardent proponents, yet it also has raised questions concerning different aspects of its implementation.[3] Given the practice's growth in the last fifteen years and the stir it has created amongst commentators and practitioners, collaborative law deserves careful study. Describing the intricacies of the practice is beyond the scope of this comment, but a brief synopsis of the central features of the standard collaborative law arrangement will be provided to establish a foundation for the ultimate aim of the comment, which is to illuminate the interaction of the practice and various ethical issues.

It is the purpose of this comment to explore some of the major areas in which the Model Rules of Professional Conduct and a typical collaborative law arrangement may intersect, and to discuss the differences of opinion among the few state ethics committees that have commented on collaborative law. A deeper understanding of the relationship between the collaborative lawyer, the legal system, and society at large should help to foster greater awareness of the duties and responsibilities inherent in lawyer-client relationships created under the collaborative rubric.

1. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 4 (2005).

2. *Id.* at 3-4.

3. *See id.* at 4, 6; 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, 1325-29, 1340 (2003).

II. LEGAL BACKGROUND AND ANALYSIS

A. *Introduction to Collaborative Law and the Model Rules of Professional Conduct*

Collaborative law began as a reaction to what some saw as inadequacies and shortfalls of the traditional adversarial framework, both as a critique of litigation's inexact fit within the specialty area of family law, and as a generalized response to the core values of the traditional model.[4] The move away from litigation and towards the collaborative model was also motivated by a feeling that the attorney's traditional role was ill-suited for handling divorce.[5] Proponents of the collaborative model were discouraged by bitter prior experiences with client-spouses and their children, which were said to be caused by the inherent pressures of adversarial litigation. Critics of the traditional model included many lawyers who felt that the adversarial model fundamentally did not reflect their individual values. These lawyers perceived that litigation simplistically attempted to quantify complex life issues into dollars and that it artificially created a hyper-competitive environment. These lawyers criticized the traditional system for requiring them to subordinate their personal values to their professional duties.[6] These frustrations, coupled with a desire to create a greater degree of client satisfaction, led to efforts to develop a new dispute resolution method to supplement, or even replace, traditional litigation.[7] Rather than hesitate to negotiate at all or to negotiate positionally,[8] as is the practice in much of the traditional legal world,[9] collaborative lawyers seek to frame negotiation with a cooperative spirit that starts at the beginning of the matter and continues to its conclusion.[10]

Collaborative law arrangements are governed by written sets of ground rules. The parties and their lawyers sign a participation agreement that memorializes an exclusive focus on negotiation, mandates disclosure of all relevant information, and includes a "disqualification agreement" provision that stipulates that the lawyers involved will only represent the parties in negotiation and will not represent them in litigation. Either client (or both) may choose to withdraw from the agreement and pursue litigation.[11] Collaborative practitioners believe that this arrangement will create a paradigm shift for both the lawyer and the client, vis a vis the traditional adversarial model or even other forms of ADR such as mediation. Since the threat of litigation is removed from the realm of possibility of the collaborative lawyer and client, the parties should be free in four-way negotiations to identify essential interests of each client, setting the tone for a more cooperative

4. *See* MACFARLANE, *supra* note 1, at 2, 17.
5. *Id.* at 17.
6. *Id.* at 17-18.
7. *See id.* at 2-5, 19-21; *see also* Lande, *supra* note 3, at 1317.
8. Positional negotiation is a form of negotiating that involves taking fixed positions and arguing them to the other side, regardless of any underlying interests. Brad Spangler, *Positional Bargaining* (June 2003), http://www.beyondintractability.org/essay/positional_bargaining/ (last visited January 30, 2006).
9. *See* Lande, *supra* note 3, at 1317.
10. *See id.* at 1318-20; MACFARLANE, *supra* note 1, at 1-5.
11. John Lande, *The Promise and Perils of Collaborative Law*, 12 DISP. RESOL. MAG. 29 (Fall 2005).

atmosphere and allowing for all involved to work towards the ideal of a positive sum gain[12] for both parties.[13]

As will be discussed *infra*, collaborative law deviates from the norms of the traditional adversarial framework in several respects.[14] While the Model Rules of Professional Conduct (Model Rules)[15] are used as a framework for collaborative law, the rules lack specific guidelines for collaborative law. As such, and because few state courts and ethics committees have commented on the subject,[16] careful consideration of collaborative law in light of prevailing ethical standards is important for collaborative lawyers. As the Model Rules aptly state, "lawyers play a vital role in the preservation of society, and fulfilling this role requires an understanding by lawyers of their relationship to [the] legal system. The [Model Rules], when properly applied, serve to define that relationship."[17]

B. Applying the Model Rules: Who is the Client?

The Model Rules do not provide a specific definition of "client," although in applying the rules governing the lawyer-client relationship, determining who is the client seems to be a necessary first step for determining the duties owed to him or her.[18] A lawyer-client relationship gives rise to a host of rights and duties that do not apply to a relationship between a lawyer and a third party.[19] In the collaborative law context, contemplating the lawyer-client relationship is of special concern in light of varying attitudes amongst collaborative law practitioners about precisely whom they serve. Some collaborative law practitioners do not wish to cast themselves as an advocate for a particular side,[20] while some see themselves

12. A positive sum relationship is a relationship between two entities which are, as a sum, better off as a result of participating in that relationship. Therefore, to each participating party, a positive sum gain is a gain greater than what could have been achieved had the party not participated in the relationship. A zero sum relationship, by contrast, is where the outcome of the relationship is a gain for one participant at the direct expense of the other. *See Free Definition: Define Positive Sum Relationship. What is Positive Sum Relationship?*, http://www.learnthat.com/define/view.asp?id=333 (last visited February 26, 2006).

13. *See* James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 433 (2002).

14. *See* Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 522-23 (2003).

15. *See* MODEL RULES OF PROF'L CONDUCT (2003). The term 'Model Rules' hereinafter refers to the American Bar Association's Model Rules of Professional Conduct. When appropriate, state deviations from the Rules will be mentioned as well.

16. *See* Lande, *supra* note 3, at 1329.

17. MODEL RULES OF PROF'L CONDUCT Preamble [13] (2004). There is some debate amongst commentators as to whether the Model Rules *should* apply to collaborative arrangements, in light of its design being apparently based on an adversarial worldview of the law. *See* Fairman, *supra* note 14, at 521-28. The focus of this comment, rather than question the merits of whether the Model Rules should apply to collaborative law, is to examine *how* it applies.

18. *See* Pa. Eth. Op., Informal Op. 2004-24, 2004 WL 2758094 at *3.

19. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0-1.18 (2004).

20. MACFARLANE, *supra* note 1, at 10. In fact, one lawyer interviewed in the study, in response to a question regarding challenges experienced as an advocate in a particular collaborative case, replied, "Oh, I never saw myself as being [an] advocate. I was primarily [the client's], and [the other lawyer's] and [the other client's], guide to their own capacity for having their internal behaviours be the right behaviours, vis-à-vis one another. And so, no, I never advocated anything. I advocated people trying to attain their best behaviours in a very unusual and time-compressed situation." *Id.*

as representing both the client and the nuclear family.[21] Though the two preceding examples may be somewhat unrepresentative of the thoughts of the general population of collaborative lawyers, they serve to illustrate the proposition that some collaborative lawyers may not be fully representing their clients.

State authorities have commented on the idea that some collaborative lawyers do not see themselves as fully representing their clients. For example, Pennsylvania terms this type of collaborative lawyer a "lawyer for the situation." This term is used to describe the lawyer who represents a client in part and another interest in part (such as the client's family, or the integrity of the collaborative structure). Pennsylvania law expressly forbids the idea of a non-advocate lawyer in any context, including in the collaborative setting.[22]

Other states do not explicitly delineate this position in their ethics opinions.[23] For example, Kentucky endorses an opposite view of lawyers who hold themselves out as representing both the client and other interests. This opinion first acknowledges the lawyer's role as an advisor, as a lawyer has the ability to advise the client on various non-legal, but relevant considerations. The Kentucky opinion further justifies a collaborative lawyer's duel representation by noting that, in certain situations, a lawyer "represents" two clients with disparate interests by acting as an intermediary.[24] Although practitioners in Model Rules jurisdictions cannot rely on the opinion's latter "intermediary" justification, a lawyer using the former "advisor" justification could conceivably argue that he or she is merely keeping the client's non-legal yet still relevant concerns in mind, such as state of mind or intrinsic happiness. The Kentucky opinion cites with approval one commentator who says that a lawyer's consideration of other interests along with the purely pecuniary, far from being a "lawyer for the situation," is performing *due diligence* for the client:

> Attorneys have an ethical obligation to competently and diligently represent the client. Collaborative family law does not change that. The collaborative family law process does necessitate consideration of the financial and emotional needs of both spouses, the children, and the family as a whole in working toward settlement, but the collaborative lawyer is expected to represent his or her client with the same due diligence owed in any proceeding. Due diligence includes considering with the client what is in the client's best interests, which includes the well being of children, family peace, and economic stability. If the collaborative family law

21. *See* Pa. Eth. Op., 2004 WL 2758094 at *3.

22. *Id.*

23. *See, e.g.*, 2002 N.C. Eth. Op. 1, Formal Op. 2002 WL 2029469.

24. *See* Ky. Bar Ass'n Eth. Op. KBA E-425 at 4 (2005); *see also* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2004). *But see* MODEL RULES OF PROF'L CONDUCT Preamble [2] (2004) (a lawyer in an advisory capacity "provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications."). Further, note that unlike KY. SUP. CT. R. 3.130(2.2), which provides that the lawyer may act as an intermediary between clients assuming certain conditions are met, there is no equivalent in the Model Rules – the provision governing this circumstance has been deleted. MODEL RULES OF PROF'L CONDUCT R. 2.2 (2004). However, a lawyer may under the Model Rules act as a third-party neutral, so if the parties involved were no longer characterized as the lawyer's clients, this scenario would comport with the Rules, assuming other ethical responsibilities were met. *See* MODEL RULES OF PROF'L CONDUCT R. 2.4 (2004).

process is not in the client's best interests, the attorney is charged to advise the client to choose a different system, tailored to his or her needs.[25]

Although considering all relevant criteria is important in representing a client and is indeed a part of due diligence, it does not adequately justify situations where the collaborative lawyer's other interest is the integrity of the collaborative process. In such a case, it is difficult to categorize the lawyer's commitment to a set of procedures as being part of the client's non-legal interests, so due diligence alone cannot adequately explain or justify the collaborative lawyer representing interests other than those of his or her client.

C. Applying the Model Rules: Conflicts of Interest

At one level, applicability of the ethical rules when representing multiple clients depends at least in part on how the collaborative arrangement is classified. For example, a collaborative arrangement in the family law setting, formed with the objective of protecting the interests of both spouses, raises the question of how the arrangement should be classified. The Pennsylvania opinion indicates a concern that some collaborative lawyers could be interpreting the collaborative process as one where the lawyer represents the interests of both spouses.[26] If this was the case, Rule 1.7, which addresses conflicts of interest amongst current clients,[27] would need to be applied to the situation to determine compliance.[28] On the other hand, if the consideration of the other spouse's interests (or the interests of the family as a whole) is not considered to be representation of a second client, but rather, valid considerations relevant to the lawyer's advisory capacity to the first client, these rules would arguably not need to be applied.[29] Resolution of this question appears to be factual in nature. Norms within collaborative law are in an emerging stage,[30] and this includes practitioner attitudes about precisely which interests the lawyer considers himself or herself to represent.[31] The Pennsylvania opinion takes a position at one end of the spectrum of the state ethics opinions that have addressed collaborative law in terms of the ethical concerns in representing

25. Sheila M. Gutterman, *Collaborative Family Law–Part II*, COLO. LAW., Dec. 2001, at 57.

26. *See* Pa Eth. Op. 2004-24, 2004 WL 2758094 at *4.

27. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004).

(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. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Id.

28. *See* Pa. Eth. Op., 2004 WL 2758094 at *4.

29. *See* Ky. Eth. Op. at 4.

30. *See* MACFARLANE, *supra* note 1, at 12.

31. *See id.* at 8-11.

multiple clients. The opinion acknowledges that Rule 1.7 requires consideration of what the lawyer's intentions are, but does not create a per se rule that collaborative arrangements necessarily have a multiple client conflict of interest.[32]

On the opposite end of the spectrum is the Kentucky opinion, which does not appear to contemplate the conflicts of interest issue. The Kentucky opinion would likely classify a lawyer's consideration of both spouse's interests, or a lawyer's decision to not advocate a particular position in support of the collaborative process, as within the lawyer's advisory function and thus must not advocate a particular position or course of action.[33] However, according to Rule 2.1, a lawyer is primarily a legal advisor, not a moral advisor.[34] The intent of Rule 2.1 seems to be at least a partial attempt to acknowledge a common dynamic within the lawyer-client relationship—that non-legal considerations such as morals and the client's familial relationships are sometimes inextricably linked with the legal questions facing the client.[35] Additionally, part of the intent behind the rule is that it is designed to maximize the lawyer's ability to communicate effectively with clients who may not always expect advice in purely technical legal terms.[36]

In short, although Rule 1.7 does not explicitly preclude a lawyer from attempting to advise the client about relevant concerns regarding the client's spouse or family, it makes a point to note that there are certain matters that are beyond the scope of the legal profession and may be more appropriately handled by a different professional.[37] Therefore, Rule 2.1 does not seem to be a completely satisfactory explanation in regards to precluding the applicability of Rule 1.7. Rule 2.1 does not obviate the duty of loyalty inherent in Rule 1.7. Further, Rule 2.1 seems to be intended as a truism, codifying that which lawyers already know and do.

A collaborative lawyer who "doesn't advocate" for a particular side, or one who does not fully represent his or her client, should thus analyze the relationship under Rule 1.7.[38] Under this rule, a concurrent conflict of interest exists between clients in two situations: (1) where there are directly adverse interests of clients;[39] and (2) where there is a significant risk that representing a client will be materially limited by the lawyer's responsibilities to another person or a personal interest.[40] Notwithstanding a concurrent conflict of interest, representation may generally proceed in the collaborative context if two[41] conditions are met: (1) the lawyer

32. *See* Pa. Eth. Op., 2004 WL 2758094 at *3.

33. *See* MACFARLANE, *supra* note 1, at 10; Ky. Eth. Op. at 4.

34. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. [2] (2004).

35. *See id.*

36. *See id.* cmt. [3].

37. *See id.* cmt. [4].

38. As stated above, Rule 1.7 is conceivably not universally applicable in all collaborative law situations, at least with respect to the multiple clients question (though it should still be kept in mind with regard to concurrent conflicts of interest between a lawyer's representation of a client and a third party or the lawyer's own interests). In the same study by Dr. Macfarlane, another lawyer replied:

> I absolutely think I have a special responsibility to my client. I mean, I am their attorney. I am her attorney or his attorney and there is no question in my mind that that is my primary duty. I mean, that's what my job is, that's what I'm being retained for, and if that's not the case, there can be a mediation with two mediators who are neutrals.

MACFARLANE, *supra* note 1, at 8.

39. MODEL RULE OF PROF'L CONDUCT R. 1.7(a)(1) (2004).

40. R. 1.7(a)(2).

41. There are generally four conditions that must be met, however two of these (that the representation not otherwise be prohibited by law and that the representation not involve the assertion of a claim

reasonably believes he or she can provide competent and diligent representation to each affected client; and (2) each affected client gives written informed consent.[42]

It is probable that a lawyer representing two spouses could have a conflict of interest, either because the interests of the two spouses are directly adverse or because representing one spouse will be materially limited by the representation of the other spouse. Although the provision regulating directly adverse interests is most commonly associated with litigation, the comments to Rule 1.7 make it clear that directly adverse conflicts can arise in other contexts as well.[43] Hence, it is possible that some collaborative arrangements could involve directly adverse interests. In the specific example mentioned above, not advocating *any* position does not appear to rise to the level of a directly adverse conflict, as a directly adverse conflict from the lawyer's vantage point would not seem to arise until the lawyer advocated for each client.[44] The collaborative arrangement could have a greater chance of running afoul of the conflicts of interest rules because there may be a significant risk that representation of one client will be materially limited by another client, third party, or personal interest of the lawyer. A conflict of this sort effectively cuts off alternatives that would otherwise be available to the client in a more traditional legal setting. The pertinent factors to consider in determining a conflict of this type are (1) the degree of likelihood that a difference in interests will eventuate, and (2) if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or will foreclose courses of action that reasonably should be pursued on behalf of the client.[45] A lawyer hired to represent one client but who nonetheless does not advocate for either side arguably has placed a material limitation on the representation of his or her client, not necessarily by the relationship to the other spouse, the children, or the family as a whole,[46] but by the lawyer's personal interest in functioning in an alternate definition of "lawyer."[47] Other collaborative lawyers may approach representation with the goal of promoting the integrity of the collaborative process over any other consideration,[48] which is arguably also a personal interest that materially limits representation of the client.

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by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal) are unlikely to apply to collaborative law arrangements and thus are not discussed. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2004).

42. *Id.* Kentucky's applicable rule is substantively the same as the Model Rule with one notable exception – informed consent need not be written, although an attorney wishing to represent two clients in a single transaction must explain the implications of the representation, including the risks and advantages it entails. *See* Ky. SUP. CT. R. 3.130(1.7) (1990).

43. For example, the comments acknowledge that directly adverse conflicts can also arise in the transactional context. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [7] (2004).

44. *See also id.* at cmt. [6].

45. *Id.* at cmt. [8].

46. Although "representing" a somewhat nebulous entity such as the family is arguably neither a second client nor a third party, Pennsylvania suggests that the family could conceivably be regarded as a client and thus subject to Rule 1.7, although it acknowledges the difficulties inherent in classifying it as such. *See* Pa. Eth. Op *supra* note 18, at 5.

47. *See* MACFARLANE, *supra* note 1, at 9. Some of the collaborative practitioners interviewed in Dr. Macfarlane's study prided themselves on functioning more as a friend and healer than as an attorney. *Id.*

48. *See* MACFARLANE, *supra* note 1, at 11. This view can be illustrated in the words of one lawyer who was interviewed by Dr. Macfarlane, who said "I don't really care about whether the outcome is

D. Applying the Model Rules: Competent Representation, Informed Consent, and Agreements Limiting the Scope of Representation

The conflicts of interest in Rule 1.7 that could occur in some collaborative law arrangements can be obviated if the conditions in Rule 1.7(b) are met.[49] If the lawyer holds a reasonable belief that he or she can provide competent and diligent representation to the client(s), and if the client(s) give informed consent, then even arrangements in which the lawyer represents both spouses or has a personal interest that limits full representation of the client may be permissible.[50] Meeting the objective standard of competence and diligence necessarily depends on what the parameters of the representation are.[51] For example, a lawyer whose representation is undertaken for the purpose of conducting a complex anti-trust action will have a different standard than a lawyer who is retained for the purpose of rendering an opinion on a simple contract.[52] In the collaborative law context, competence and diligence will be determined at least in part by what the scope of representation is. The Model Rules provide the lawyer with the ability to limit the scope of the representation;[53] however, the restriction must be reasonable and may be put in place only with the client's informed consent.[54] Further, the comments to Rule 1.7 imply that the scope of the representation agreement cannot obviate the lawyer's duty to provide competent representation.[55] Therefore, although competency depends somewhat on the scope and complexity of the representation, limiting the representation does not remove the requirement of competent representation.

The Model Rules provide a definition of informed consent: an "agreement by a person[56] 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."[57] Further, the consent must be obtained before representation is accepted.[58] Precisely what must be communicated to the client will generally vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent.[59] In any event, reasonable efforts must be made by the lawyer to ensure that the client possesses information reasonably adequate to make an informed decision.[60] This will ordinarily include a disclosure stating the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other

optimal in terms of dollars and cents, but that [my client] and I live up to our collaborative principles." *Id.*

49. *See supra* note 33.

50. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2004).

51. *See* R. 1.1, 1.3.

52. *See* R. 1.1 cmt. [1].

53. R. 1.2(c).

54. *Id.*

55. R. 1.2 cmt. [6], [7]; *see also* Pa. Eth. Op., *supra* note 18, at 6.

56. The requirement that a "person" agree to the course of conduct illustrates another problem with categorizing the family as a represented client; because a "family" as a concept is not in and of itself a person, informed consent could, by definition, never be obtained. *See supra* note 38.

57. R. 1.0(e).

58. R. 1.0 cmt. [6].

59. *Id.*

60. *Id.*

person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's options and alternatives.[61] In a written[62] collaborative law agreement delineating the scope of representation and the information and explanation necessary to obtained informed consent, consideration should be given to the relative sophistication of the client.[63] The comments to the rule suggest that a client's retaining independent counsel may also be a pertinent factor weighing in favor of informed consent.[64]

Informed consent has been labeled by some as a central ethical issue with respect to the structure and ultimate goals of collaborative law arrangements.[65] State bar ethics opinions seem to take divergent views on the subject.[66] Pennsylvania views the methods used by some collaborative practitioners to obtain informed consent as problematic, in that it noted instances where clients and lawyers did not appear to fully understand all of the implications of resolving the dispute through collaborative law despite the fact that the attorney had received client consent.[67] Kentucky takes a cautiously optimistic approach, indicating that as long as clients fully appreciate the implications that collaborative law agreements involve, such as the typical requirement of full and voluntary disclosure for both parties, there is nothing to prevent them from agreeing to important distinguishing features of the collaborative process.[68] North Carolina, though it acknowledges consent must be obtained, does not seem to anticipate that informed consent will become a major ethical issue in collaborative law.[69]

There is data that indicates that, in practice, collaborative lawyers do tend to inform their clients of the central features of collaborative law, such as the disqualification clause in the event the client decides to litigate, commitment to full and voluntary disclosure, and commitment to the team approach of collaborative law.[70]

There are several main problem areas with informed consent. For one, the terminology may be too abstract in the minds of clients, and sometimes inexperienced practitioners do not anticipate and inform clients about all issues that may arise during the process.[71] This, in turn, sometimes results in disappointment and resentment on the part of the client.[72] Client dissatisfaction aside, the disconnect between expectations and results sometimes arising between the lawyer and client may be indicative of inadequate explanation provided by the lawyer. One possible approach proposed by several commentators and cited with approval by the

61. *Id.*

62. Agreements limiting the scope of representation should preferably be in writing. R. 1.5(b). Pennsylvania's rules of professional conduct do not have a provision stating that agreements of this kind should be in writing, however the ethics opinion states that a written agreement is still preferable. PA. RULES OF PROF'L CONDUCT R. 1.5(b) (2000); *see* Pa. Eth. Op., *supra* note 18, at 8.

63. *See* R. 1.0 cmt. [6].

64. *Id.*

65. MACFARLANE, *supra* note 1, at 64.

66. *Compare* Pa. Bar Eth. Op., *supra* note 8, at 7, *with* Ky. Bar. Eth. Op., *supra* note 24, at 4, *and* N.C. Bar. Eth. Op., *supra* note 23, at 2.

67. *See* Pa. Eth. Op., *supra* note 18, at 7.

68. *See* Ky. Bar Eth. Op., *supra* note 24, at 4.

69. *See* N.C. Bar Eth. Op., *supra* note 23, at 2.

70. MACFARLANE, *supra* note 1, at 64.

71. *Id.*

72. *Id.*

Pennsylvania state bar ethics opinion is "that lawyers take into account the individual parties' capabilities, attitudes about professional services, and preferences about risk when recommending a process to clients."[73] Essentially, the Pennsylvania approach would be to promote a case-specific, "facts and circumstances" method, both in terms of obtaining informed consent and in how those facts relate to competent representation and agreements limiting the scope of representation.[74] Such an approach may not only be more consistent with the ethical rules, but may also help collaborative law continue its development as an increasingly viable mechanism for resolving disputes, as overall client satisfaction arguably would improve as a result of better communication between the lawyer and the client at the beginning of the collaborative process.

E. The Disqualification Agreement

The disqualification agreement has been called the "irreducible minimum condition" of collaborative law, as it provides a distinguishing characteristic from other forms of alternative dispute resolution.[75] As indicated above, the disqualification agreement essentially is the subset of the collaborative law agreement that disqualifies the lawyer from any further representation of the client if one or both of the clients choose to withdraw and litigate the dispute. Because there are ethical rules restricting lawyers' ability to withdraw and the usage of retainer agreements authorizing withdrawal,[76] disqualification agreements must be in compliance with the Model Rules.

Rule 1.16 stipulates conditions for both mandatory and permissive withdrawal.[77] Mandatory withdrawal must occur if representing the client would result in some violation of the Model Rules or other law.[78] Permissive withdrawal may occur if the lawyer can withdraw without having an adverse effect on the client's interests, if the client has or is engaging in criminal or fraudulent behavior involving the lawyer's services, if the lawyer has a fundamental disagreement with the client's decision on a course of action, if continued representation would result in unreasonable financial hardship on the attorney, or if other good cause exists.[79] The lawyer must also take steps to reasonably protect the client's interests upon termination, and must comply with applicable rules of tribunals governing withdrawal.[80]

Kentucky maintains the view that the ethical rules have been complied with if the client has consented to an agreement limiting the objectives of representation.[81] Since the terms of the lawyer's engagement are limited by the collaborative law agreement, the lawyer is retained to assist the client with a particular,

73. Pa. Bar Eth. Op., *supra* note 18, at 7; *see* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss, Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 284-85 (2004).

74. *See* Pa. Bar Eth. Op., *supra* note 18, at 7.

75. *See* Lande & Herman, *supra* note 73, at 283.

76. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2004); Lande, *supra* note 3, at 1344.

77. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2004).

78. R. 1.16(a)(1)

79. R. 1.16(b)

80. R. 1.16(d)

81. *See* Ky. Bar Eth. Op., *supra* note 24, at 7.

specific objective: negotiating a settlement.[82] If a settlement cannot be reached in the collaborative process, then the representation ends.[83] As long as the client has been fully apprised of all the risks and rewards of the collaborative law process, the Kentucky bar ethics committee sees nothing troubling about the disqualification agreement.[84] North Carolina implicitly agrees with this view, finding that as long as informed consent exists, the disqualification agreement is permissible.[85] Pennsylvania considers this to be a much more difficult issue to resolve.[86] Its ethics committee acknowledges that there is some validity to the view that if a collaborative law case has gone beyond the written scope of representation, the matter for which the lawyer was hired has naturally concluded and the lawyer does not need to withdraw pursuant to Rule 1.16.[87] On the other hand, the underlying divorce is not final, and because the lawyer has represented the client in attempting to resolve the dispute but now intends through the withdrawal provision to stop representing that client, Pennsylvania finds merit in the argument that the lawyer should comply with Rule 1.16.[88] Since it finds the matter unresolved, it advises that the more prudent approach is to follow Rule 1.16.[89]

Pennsylvania identifies Rule 1.16(c) and (d) at the outset, which must be complied with if the lawyer withdraws from representation for any reason.[90] Rule 1.16(c) requires judicial permission to withdraw if the collaborative lawyer has filed an appearance for the client in court.[91] Rule 1.16(d) requires the lawyer to take reasonably practicable steps to protect the client's interest, including giving reasonable notice, allowing sufficient time for other counsel to be employed, and returning papers and property to which the client is entitled.[92] Additionally, although it appears that the mandatory withdrawal provisions in Rule 1.16 would not be triggered in the collaborative law context,[93] the permissive withdrawal provisions found in Rule 1.16(b) could be applied in specific collaborative law scenarios.[94] Since Rule 1.16(b)(1) allows for lawyer withdrawal if it can be done without material adverse effect on the interests of the client, withdrawal might be allowed if done early in the representation, before too much time, money and emotions are invested in the process.[95] If there is a material adverse effect on the interests of the client that will result from withdrawal, the lawyer may still withdraw if: (1) the client insisted upon taking action the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (2) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obli-

82. *Id.*
83. *Id.*
84. *Id.* at 7-8.
85. *See* N.C. Bar Eth. Op., *supra* note 23, at 1.
86. *See* Pa. Bar Eth. Op., *supra* note 18, at 11.
87. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 1.16 (2004).
88. Pa. Bar Eth. Op., *supra* note 18, at 11.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 11-12.
95. *See id.* at 12.

gation is fulfilled; or (3) other good cause exists.[96] In all three situations as applied to collaborative law, Pennsylvania found some support for lawyers withdrawing in certain contexts.[97] For example, permitting lawyer withdrawal if the client has failed to substantially fulfill an obligation to the lawyer would be acceptable assuming the client had violated a term of the collaborative law agreement, but would not apply to situations where the other party failed to comply with the agreement.[98] Pennsylvania also notes that there is significant disagreement and ambiguity amongst commentators and courts as to whether "good cause" or client insistence on acting in a manner with which the lawyer has a fundamental disagreement would include the rationale for the collaborative law withdrawal provision, which is to provide the impetus for more meaningful negotiation.[99] It does seem clear, however, that a client's failure to comply with the terms of the collaborative law agreement is a radically different situation than the other party's failure to comply. Withdrawal for good cause might, in this scenario, be the only justifiable way for the attorney to withdraw in circumstances where withdrawal would cause material adverse effect on the lawyer's client.

III. CONCLUSION

Violation the Model Rules of Professional Conduct is certainly something all practitioners are wary of, even in the traditional adversarial context where norms of compliance with the Model Rules are clearly established. Collaborative law practitioners should take extra caution, given the still-emerging norms of this specialty practice and the fact that many clients and practitioners are inexperienced in anticipating all the consequences of where the collaborative law process will lead. Outside of the state ethics opinions discussed in this comment, there is sparse guidance from local authorities on how collaborative law is viewed within the jurisdictions. Given the divergence in the few opinions that have been published, it is conceivable that this divergence will continue to manifest itself until more data about collaborative law becomes available and/or the American Bar Association specifically addresses collaborative law within the Model Rules.

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96. *Id.* There are additional scenarios for permissive withdrawal in Rule 1.16(b) that the Pennsylvania opinion did not consider relevant for the collaborative law context. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*; *see* Lawrence, *supra* note 13.