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# A Proposed Model Rule for Collaborative Law

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# A Proposed Model Rule for Collaborative Law

CHRISTOPHER M. FAIRMAN\*

## I. INTRODUCTION

No subject is more suited for a symposium entitled, *The Collision of Two Ideals: Legal Ethics and the World of Alternative Dispute Resolution*, than the alternative dispute resolution (“ADR”) newcomer collaborative law. With its meteoric ascension, in just fifteen years collaborative law has gone from an idea in the mind of a family law practitioner, burned out by the bitterness of his practice, to a virtual ADR movement with thousands of practitioners stretching across North America.<sup>1</sup> Like many of its ADR predecessors, collaborative law involves a nonadversarial participatory process of informal conferences by the parties and their lawyers to achieve settlement.<sup>2</sup> Given that this type of interest-based bargaining and creative problem solving is not new,<sup>3</sup> what is the collaborative law buzz all about?

Collaborative law’s unique twist is that everyone agrees in advance that the lawyers participate solely for settlement purposes and cannot represent either party in litigation.<sup>4</sup> By placing the clients in this “container” where they are free from the threat of litigation, collaborative lawyers claim they can resolve disputes cheaper, faster, and fairer than the litigation alternative—at least for family law disputes.<sup>5</sup> While touted as the tool of the future for all civil disputes, collaborative law remains largely relegated to the family law world.<sup>6</sup>

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<sup>1</sup> 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, 1325–28 (2003) (chronicling the remarkable speed at which collaborative law has spread).

<sup>2</sup> See *id.* at 1317–19 (describing collaborative law).

<sup>3</sup> See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) (developing interest-based, problem solving negotiation strategies).

<sup>4</sup> Typically, this is achieved through the use of a written participation agreement that includes a disqualification provision. See *infra* notes 46–49 and accompanying text.

<sup>5</sup> See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 60-61, 233–34 (2001) (describing the “container” concept and claiming collaborative law is more efficient and economical than mediation or litigation).

<sup>6</sup> See William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 354 (2004) (noting the vast majority of collaborative law cases are still divorce cases despite interest in expansion).

Collaborative law's glass ceiling is legal ethics. Unlike other forms of alternative dispute resolution, collaborative law's growth is hampered by questions of compatibility with rules of professional ethics.<sup>7</sup> Critics, including some collaborative law practitioners, find it difficult to square the principles and practices of collaborative law with the professional rules of ethics concerning everything from zealous advocacy to confidentiality to terminating representation.<sup>8</sup> Hence, the ideals of legal ethics collide with the ideals of collaborative law. "A Titan against a Titan!"<sup>9</sup>

Before the clash of these legal titans occurs, this Article proposes a solution—a new Model Rule. Rather than continue the current academic exercise of trying to fit collaborative law within a legal ethical framework that was not designed for it, a better approach is to squarely address the compatibility issues with a new rule of professional ethics. As a threshold matter, Part II explores the value of professional ethical rules, especially in the context of collaborative law. Part III then surveys collaborative law practice and evaluates collaborative law success claims. In Part IV, the central ethical concerns about collaborative law practice are examined, as well as current attempts by the collaborative law profession and state legislatures to provide more control over the practice. Concluding that there remains a need for ethical guidance, Part V presents the text and comment for Proposed Model Rule 2.2—The Collaborative Lawyer.

## II. ON THE IMPORTANCE OF NEW RULES

Recently, a number of commentators have questioned the need for new ethical rules. Charles Pou, a seasoned ADR veteran, explains: "All too often when ethical questions arise within the ADR community, the response is 'let's write a rule.' While well intentioned, this answer leaves us with more than enough rules and standards of conduct."<sup>10</sup> This opposition to new ethical rules is grounded on the belief that alternative methods exist to train

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<sup>7</sup> See Lande, *supra* note 1, at 1329 ("[T]he disqualification agreement is a major barrier to acceptance by major businesses and law firms.").

<sup>8</sup> See *infra* Part IV.A.1–4 (developing areas of ethical concern).

<sup>9</sup> CLASH OF THE TITANS (MGM 1981). The advice from one of three blind old witches to Perseus to save his fiancé Andromeda from being sacrificed to the titan Kraken was to turn the Kraken into stone with the head of Medusa, also a titan. Hence the classic line: "A Titan against a Titan!" Ironically, the Kraken was not a titan at all, but a Scandinavian sea monster.

<sup>10</sup> Charles Pou, Jr., *Enough Rules Already*, DISP. RESOL. MAG., Winter 2004, at 19. Pou colorfully adds: "While added rules may on rare occasion be needed, any major focus on 'top down' rule rewriting risks being non-inclusive, as well as inactive navel-gazing." *Id.* at 20.

## COLLABORATIVE LAW

ADR professionals on ethical issues.<sup>11</sup> While ethics hotlines and case studies may be effective techniques to explore ADR ethics, there is still immense value in well-drafted rules of ethics.

Law remains a largely self-regulating profession.<sup>12</sup> While each jurisdiction embraces a code of ethics, for the most part these rules are not enforced. Out of necessity, state regulators focus on only a subset of ethical issues to protect the public. It is not surprising that disciplinary actions occur in only a small fraction of complaints.<sup>13</sup> This does not, however, render ethical rules moribund.

Rules of ethics serve a vital educational function. Those who are new to the practice of law need guidance on their role and responsibilities.<sup>14</sup> Similarly, lawyers who are new to a particular practice area benefit from clear rule-based guidance. This is particularly true in the field of alternative dispute resolution. While lawyers embrace new representational models, scant attention is given to developing a coherent ethical foundation for these new representational roles. As Professor Kimberlee Kovach succinctly puts it: “New approaches to representation need fresh and different ethical guidelines and rules.”<sup>15</sup> Even in the absence of specific enforcement efforts, new rules serve a vital educational purpose in certain contexts.<sup>16</sup>

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<sup>11</sup> See Charles Pou, Jr., “*Embracing Limbo*”: *Thinking About Rethinking Dispute Resolution Ethics*, 108 PENN ST. L. REV. 199, 211–13 (2003) (describing use of hotlines, ethics websites, and case studies to improve ethics training); Joseph R. Herkert, *Biting the Apple (But Not Inhaling): Lessons from Engineering Ethics for Alternative Dispute Resolution Ethics*, 108 PENN ST. L. REV. 119, 132–35 (2003) (describing use of the case study method).

<sup>12</sup> See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 1.02 (3d ed. 2004) (explaining lawyer self-governance).

<sup>13</sup> According to the ABA Center for Professional Responsibility, in 2003 a national total of 119,863 complaints were received by attorney disciplinary agencies. This resulted in a national total of 2,912 formal disciplinary actions being filed. The median per jurisdiction was 1,507 complaints yielding 40 formal actions filed. There were 1,280,737 lawyers in 2003. See ABA Center for Professional Responsibility, Survey on Lawyer Discipline Systems, Chart 1: Lawyer Population and Agency Caseload (2003), <http://www.abanet.org/cpr/discipline/sold/03-ch1.xls>.

<sup>14</sup> It has been my personal experience as a teacher of professional ethics that future lawyers do not intuit the answer to legal ethical questions and that rules provide a vital roadmap to law students as they struggle with these issues.

<sup>15</sup> Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 416 (2003).

<sup>16</sup> *Id.* at 417 (identifying codes of ethics as the primary tool to educate lawyers about their professional responsibilities).

Is collaborative law one of these contexts? Dean Nancy Rapoport has developed a helpful test for determining if new and distinct ethical rules are warranted in a specific area of legal practice.<sup>17</sup> First, the test for new separate rules includes a baseline assessment of whether there is a poor fit with the practice area and the generalist models of ethics rules.<sup>18</sup> This assessment is followed by “second order” questions. These include: (1) the degree to which repeat players interact with novices, (2) the existence of different jurisdictional layers, (3) ease of enactment of a uniform code, and (4) benefits of a single code for the practice area balanced by disadvantages of abandoning uniform state regulation.<sup>19</sup> Applying the Rapoport test to mediation, Professor Kovach concludes that new and distinct rules are necessary because of the influx of new, inexperienced lawyers into the field.<sup>20</sup>

Like mediation, collaborative law is another good candidate for its own, new ethical rules. With predictions of collaborative law jettisoning to the forefront of dispute resolution techniques,<sup>21</sup> many lawyers new to the concept are confronting it. They will need education on the underlying ethical principles of the collaborative process. Indeed, the fundamental paradigm shift from adversarial to collaborative makes this field one of the most appropriate for new ethical guidelines.<sup>22</sup> Purely from an educational perspective, new rules for collaborative law seem warranted.

Applying the Rapoport test to collaborative law leads to the same conclusion. There is an obvious problem of “fit” between the current codes of ethics and collaborative law.<sup>23</sup> Practitioners and academics point to the disconnect between the fundamental premise of adversarial representation

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<sup>17</sup> See Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998). Rapoport concludes that new ethics rules are necessary for bankruptcy practice. *Id.* at 101.

<sup>18</sup> *Id.* at 65.

<sup>19</sup> *Id.* at 70–77.

<sup>20</sup> See Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 957–58 (2001).

<sup>21</sup> Collaborative law is predicted to “become mainstream in a significantly shorter period of time than it has taken for mediation.” Chip Rose, *Collaborative Concepts*, Mar. 2002, <http://www.mediate.com/articles/editrose2.cfm>.

<sup>22</sup> See Kovach, *supra* note 15, at 416 (identifying the transition from competition to collaboration as an area for new ethical rules); Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 209 (2004) (noting inexperienced collaborative lawyers cannot fully anticipate future ethical issues).

<sup>23</sup> See *infra* Part IV.A.1–2.

## COLLABORATIVE LAW

embodied in the model codes and rules and the cooperative approach of collaborative law.<sup>24</sup> Just as Dean Rapoport concluded in the bankruptcy context, the adversarial model “completely misses the boat.”<sup>25</sup>

Rapoport’s second order questions also support a move to separate new rules for collaborative law. Lawyers new to the practice of collaborative law routinely mix with those more seasoned in the process. While there may not be compelling jurisdictional complexity, there is a growing multiplicity of ad hoc ethical rules being promulgated by collaborative law groups.<sup>26</sup> These differing sets of guidelines increase the need for a uniform ethical code. As proposed in this article, special ethical rules for collaborative lawyers could be adopted on a jurisdiction-by-jurisdiction basis based on a model rule. Thus, state experimentation can be accommodated while preserving the benefits that come from specific guidance for the collaborative lawyer.

One final point informs the need for new rules for collaborative law. Collaborative lawyers themselves give little attention to ethical issues. One recent study dramatically concludes that “[o]utside a small group of experienced practitioners, the study has found little explicit acknowledgment and recognition of ethical issues among CL lawyers.”<sup>27</sup> As a result, “CL lawyers manage the day-to-day and meeting-by-meeting dynamics of their cases within a context of almost unconstrained professional discretion.”<sup>28</sup> Such a practice environment literally screams out for new ethical rules.<sup>29</sup>

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<sup>24</sup> See, e.g., James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 442 (2002); Kovach, *supra* note 15, at 415. *But see* Lande, *supra* note 1, at 1343 (concluding that “CL is a distinctive form of representation that theoretically can fit within established concepts of legal practice.”). For a more complete discussion of these tensions, see *infra* Part IV.A.

<sup>25</sup> Rapoport, *supra* note 17, at 66.

<sup>26</sup> See *infra* Part IV.B.

<sup>27</sup> Macfarlane, *supra* note 22, at 208.

<sup>28</sup> *Id.* at 211.

<sup>29</sup> Given the general absence of awareness of ethical issues among collaborative law practitioners themselves, self-governance is unlikely to be an effective alternative. Thus, assertions that collaborative law’s “collegial and personal nature . . . effectively minimizes unethical conduct” are questionable. See Joshua Isaacs, *Current Development, A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 841 (2005) (making the self-governance claim).

## III. COLLABORATIVE LAW

A. *Crucible and Characteristics*

The origins of collaborative law are well chronicled. The hyper-adversarial world of family law served as the crucible. In 1990, Stuart Webb, a Minnesota family law practitioner, was searching for a better way to resolve divorce disputes—better for both the family members and for his own mental health and well-being.<sup>30</sup> Rejecting the adversarial nature common to his practice area, Webb began experimenting with other trusted lawyers to settle family law cases through a process of nonadversarial collaboration with the parties. He resolved to stop going to court and only represent clients who chose to actively participate in negotiations to achieve settlement. In the rare cases where the negotiation process broke down, Webb withdrew and the client was compelled to find new litigation counsel.<sup>31</sup>

Webb's experiment turned into a grass roots movement. He formed the Collaborative Law Institute, a nonprofit organization to help spread the collaborative law doctrine.<sup>32</sup> By the early 1990s, collaborative law reached the West Coast and the hands of another pioneer in the field, Pauline Tesler.<sup>33</sup> In the next decade, collaborative law groups proliferated following a predictable path. Typically, they sprang up around one or two key individuals who received exposure to the collaborative law practice elsewhere. These key figures returned home—energized and motivated to proselytize the collaborative law approach.<sup>34</sup> Indeed, the intensity of the support for collaborative law is amazing. Some proponents of the new

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<sup>30</sup> Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, BOSTON B.J., Nov./Dec. 2001, at 12, 27; Stuart Webb, *An Idea Whose Time Has Come: Collaborative Law: An Alternative for Attorneys Suffering from "Family Law Burnout,"* MATRIMONIAL STRATEGIST, July 2000, at 7.

<sup>31</sup> See Schwab, *supra* note 6, at 354–55 (describing Webb's development of collaborative law).

<sup>32</sup> See Collaborative Law Institute of Minnesota, <http://www.collaborativelaw.org> (last visited Oct. 21, 2005).

<sup>33</sup> Schwab, *supra* note 6, at 355. Pauline Tesler is recognized as one of the pioneers of collaborative law. Along with Stuart Webb, Tesler was the recipient of the ABA Dispute Resolution Section's first "Lawyer as Problem Solver" Award in 2002. Lande, *supra* note 1, at 1327. Tesler has literally written the book on collaborative law. See TESLER, *supra* note 5.

<sup>34</sup> See Macfarlane, *supra* note 22, at 190.

## COLLABORATIVE LAW

practice speak of it with almost cult-like fanaticism noting their “conversion” or collaborative law as “saving one’s soul.”<sup>35</sup>

Regardless of the level of fervor with which it is embraced, collaborative law is a distinct dispute resolution device defined by certain characteristics. The cornerstone of the collaborative law approach is the commitment by both counsel and clients to resolve the dispute through a cooperative participatory process leading to settlement and to avoid litigation.<sup>36</sup> This is often referred to as a paradigm shift away from a traditional adversarial model to a problem-solving model.<sup>37</sup> Thus, the win-lose dynamic typical of litigation is replaced with essentially a team approach.<sup>38</sup>

The team approach is best illustrated by a collaborative technique known as the “four-way conference.” This is where the real work of the collaborative law process is done. Both parties and their counsel participate in group meetings to resolve the dispute and ensure the transparency of the process.<sup>39</sup> To facilitate the four-way conferences, parties and counsel commit themselves to good faith negotiation.<sup>40</sup> Similarly, full, open, and honest disclosure of all relevant information by the parties without request is expected.<sup>41</sup> In this manner, costly and contentious discovery disputes are avoided. These structural process changes are designed to encourage attorneys to work cooperatively and creatively while empowering clients to play an active role in resolving their own disputes.<sup>42</sup> While not the norm, some collaborative counsel take the four-way concept to the extreme: they

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<sup>35</sup> See *id.* at 192; Lande, *supra* note 1, at 1317–18 n.3 (noting parallels to religious conversion, a calling, and ministry); Kevin Mayhood, *Different Style of Divorce Lets Couples Work Things Out*, THE COLUMBUS DISPATCH, June 13, 2005, at 7C (describing cult like fanaticism of some collaborative lawyers).

<sup>36</sup> Lande, *supra* note 1, at 1317–19.

<sup>37</sup> TESLER, *supra* note 5, at 78; Reynolds & Tennant, *supra* note 30, at 12.

<sup>38</sup> See Kovach, *supra* note 20, at 975 (describing the team approach of problem solving with collaborative law); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 479, 480–81 (2000) (describing winner and loser characteristics of adversarial litigation).

<sup>39</sup> Lande, *supra* note 1, at 1320–21.

<sup>40</sup> TESLER, *supra* note 5, at 143–45.

<sup>41</sup> Lande, *supra* note 1, at 1321.

<sup>42</sup> Lawrence, *supra* note 24, at 433–34 (explaining how collaborative law encourages attorney and client cooperation and legitimization of interests); Chip Rose, *Introduction to Collaborative Negotiating*, <http://www.mediate.com/articles/rose3.cfm> (last visited Oct. 21, 2005) (describing collaborative law’s attention to the process and outcome needs of clients).



will only meet with their clients to discuss substantive issues in the context of a four-way conference.<sup>43</sup>

To ensure that clients and counsel fully understand and accept the obligations of collaborative law, a participation agreement is used. This is a written contractual commitment between counsel and parties outlining the collaborative law requirements. Participation agreements typically include provisions on working cooperatively, avoiding litigation, engaging in good faith questions and answers, and participation in four-way conferences.<sup>44</sup> Consistent with the cooperative approach, provisions relating to the use of joint experts are also prevalent.<sup>45</sup>

One provision of the participation agreement merits particular attention—the disqualification provision. Also known as a withdrawal or termination requirement, the disqualification provision provides the real force behind collaborative law. If the collaborative process disintegrates and either party decides to litigate, representation by all collaborative counsel terminates requiring all parties to get new litigation counsel.<sup>46</sup> This agreement in advance to withdraw from representation has been a lightning rod for ethical controversy.<sup>47</sup> While withdrawing collaborative lawyers still facilitate the transfer of representation to new counsel, clients must bear the increased costs—both financial and emotional—of bringing in new lawyers.<sup>48</sup> Nonetheless, collaborative lawyers contend the disqualification provision is essential to the effectiveness of collaborative law because it tests at the outset of representation the true level of commitment to the process. For example, Pauline Tesler adamantly states, “There is really only one irreducible minimum condition for calling what you do ‘collaborative law’:

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<sup>43</sup> See Lande, *supra* note 1, at 1320–21 & n.11 (describing “extreme approach” of declining to have substantive client discussions outside of the four-way conferences).

<sup>44</sup> See TESLER, *supra* note 5, at 143–45 (noting components of agreement); Lawrence, *supra* note 24, at 433–36 (outlining components); Tom Arnold, *Collaborative Dispute Resolution—An Idea Whose Time Has Come?*, in ALI-ABA Course of Study Materials: ALTERNATIVE DISPUTE RESOLUTION: HOW TO USE IT TO YOUR ADVANTAGE! 379, 383–89 (Oct. 2000) (describing elements of participation agreement).

<sup>45</sup> TESLER, *supra* note 5, at 56 n.1. Collaborative law clients also may waive the right to retain separate experts. *Id.* at 138.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> See, e.g., Lande, *supra* note 1, at 1328–29 (explaining article’s focus on the disqualification agreement).

<sup>48</sup> 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, 283–84 (2004) (describing costs of bringing in new lawyers); Isaacs, *supra* note 29, at 836 (describing emotional cost); Susan B. Apel, *Collaborative Law: A Skeptic’s View*, VT. B.J., Spring 2004, at 41, 41 (describing profound hardship on client, including costs and psychological strain).

## COLLABORATIVE LAW

you and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other.”<sup>49</sup>

### B. *Evaluating Collaborative Law*

Collaborative law proponents tout the success of this new form of ADR. They claim that collaborative law is cheaper, settles more cases, and does so in a way that leaves everyone feeling better about the process.<sup>50</sup> Hence, lawyers across the country are recognizing the advantages of this new dispute resolution technique and embracing it with aplomb. Until recently, indicia of success for collaborative law were gleaned from the anecdotes of collaborative lawyers themselves.<sup>51</sup> We now benefit from the research results of two systematic studies on collaborative law to test the common claims made about it. Is collaborative law really the effective, cheap, and quick dispute resolution device as proponents claim?

Professor Julie Macfarlane recently published the preliminary results of a multi-year examination based upon case studies where collaborative law was used.<sup>52</sup> Her initial inquiry was to determine whether the collaborative model was any different from traditional negotiation.<sup>53</sup> After gathering data from over 150 separate interviews from 2001-04, Macfarlane concludes that collaborative law is a separate and distinct ADR process—one that “fosters a spirit of openness, cooperation, and commitment to finding a solution that is

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<sup>49</sup> TESLER, *supra* note 5, at 6. Recently, some collaborative law practitioners have spun-off “cooperative” law (collaborative law minus the disqualification provision) as an alternative. Proponents of this variant believe it is just as effective as its collaborative sibling, less risky to the client, and is more likely to be accepted outside of the family law context. See Lande & Herman, *supra* note 48, at 284 (describing cooperative law); see also *infra* notes 132–135 and accompanying text.

<sup>50</sup> See, e.g., 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, 488 (2005) (“Collaborative law practice is touted as more cost-effective, more creative, and less damaging to the clients’ relationship than traditional adversarial litigation.”); William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 401 (1999) (detailing the collaborative law process and noting that it “has been found to reduce both contentiousness and cost”).

<sup>51</sup> See Schwab, *supra* note 6, at 367 (describing the lack of research to assess collaborative law).

<sup>52</sup> See Macfarlane, *supra* note 22, at 187–89 (describing methodology).

<sup>53</sup> *Id.* at 189.

qualitatively different, at least in many cases, from conventional lawyer-to-lawyer negotiations.”<sup>54</sup>

Macfarlane’s conclusion on the qualitative effectiveness of collaborative law is complemented by the survey results recently completed by practitioner William Schwab. In March 2003, Schwab surveyed 361 collaborative lawyers.<sup>55</sup> The results of this survey confirm many of the settlement rate claims made by collaborative lawyers. Schwab found an overall settlement rate of 87.4% with recent cases settling at a rate of 92.1%.<sup>56</sup> The survey results also point toward some significant regional differences. Texas had the highest settlement success rate at 94.1%. Ohio fell in the middle with an 88.3% rate. The lowest settlement rate was California at 78.7%.<sup>57</sup> These settlement rates, while lower than some collaborative lawyers’ claims, “compare[] favorably with previously reported divorce mediation settlement rates.”<sup>58</sup>

Schwab also gathered data on the claim by collaborative lawyers that the process is faster. Proponents claim that a collaborative case lasts from one to seven months.<sup>59</sup> Schwab’s survey results yielded a range from one and one-half to sixteen months.<sup>60</sup> The average length of a collaborative case, however, was 6.3 months—within the high range of collaborative lawyers’ claims.<sup>61</sup>

According to proponents, significant cost savings can also be achieved with collaborative law. For example, Pauline Tesler claims that collaborative law cases are 1/10 to 1/5 the cost of similar cases if litigated.<sup>62</sup> Schwab tends

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<sup>54</sup> *Id.* at 200.

<sup>55</sup> Seventy-one responded yielding a response rate of 19.8%. Schwab, *supra* note 6, at 367–70 (describing methodology).

<sup>56</sup> *Id.* at 375.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* Claims of settlement rates well above 90% exist. See Robert W. Lueck, *The Collaborative Law (R)evolution: An Idea Whose Time has Come in Nevada*, NEV. LAWYER, Apr. 2004, at 18, 20.

<sup>59</sup> Schwab, *supra* note 6, at 376.

<sup>60</sup> *Id.* at 377.

<sup>61</sup> *Id.*

<sup>62</sup> Diane Curtis, *Collaborative Law—Solving Disputes the Friendly Way*, CAL. ST. B.J., Jan. 2005, at 1, 7 (quoting Tesler on cost comparison), available at <http://www.calbar.ca.gov>. Other estimates of cost savings by collaborative lawyers are not as high. See Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F1 (recounting a New York City collaborative lawyer’s estimate of \$15,000 compared to \$30,000 with traditional litigation yielding a one-half cost savings), available at <http://www.nytimes.com> (search “Site Search” for “Amicable Unhitching, With a Prod”; then follow “Amicable Unhitching, With a Prod” hyperlink under “Search

## COLLABORATIVE LAW

to confirm these cost savings, finding collaborative cases being resolved at 1/10 to 1/20 of conventional costs.<sup>63</sup> However, Professor Macfarlane questions whether such cost savings claims make the correct comparisons. Rather than compare collaborative law to traditional litigation costs, Macfarlane contends that the better comparison is not to litigation, but collaborative law to negotiation. Consequently, claims that collaborative law is cheaper or quicker are “still unproven” according to Macfarlane.<sup>64</sup>

One indication of collaborative law’s success is unquestioned: it is rapidly spreading. There are currently more than 4,500 lawyers trained in collaborative law.<sup>65</sup> Eighty-seven distinct collaborative law practice groups exist.<sup>66</sup> Collaborative law is practiced in at least 35 states.<sup>67</sup> It flourishes in certain jurisdictions including Minnesota, Ohio, Connecticut, Texas, Georgia, and the Canadian provinces.<sup>68</sup> Even cursory internet searches return a bevy of collaborative law websites.<sup>69</sup>

Despite this rapid growth, collaborative law remains a practice almost entirely limited to family law.<sup>70</sup> Whether collaborative law will take hold outside of the family law area remains to be seen. The expansion of collaborative law outside of the family law context faces significant challenges. One possible limitation to the overall expansion and use of collaborative law is the current controversy concerning its compatibility with legal ethics.<sup>71</sup>

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Results”).

<sup>63</sup> See Schwab, *supra* note 6, at 355–56 (noting 1/10 to 1/20 of conventional costs).

<sup>64</sup> See Macfarlane, *supra* note 22, at 211 (explaining that “[w]hether CL proves to be cheaper and faster in such cases is still unproven” because the better cost comparison is to lawyer-to-lawyer negotiation, not litigation).

<sup>65</sup> Gross, *supra* note 62, at F11.

<sup>66</sup> See Macfarlane, *supra* note 22, at 186, 190.

<sup>67</sup> Gross, *supra* note 62, at F11.

<sup>68</sup> See Macfarlane, *supra* note 22, at 186.

<sup>69</sup> See Lueck, *supra* note 58, at 20 (noting at least 68 websites).

<sup>70</sup> See Schwab, *supra* note 6, at 354; Macfarlane, *supra* note 22, at 186.

<sup>71</sup> See, e.g., Lande, *supra* note 1, at 1329 (“[T]he disqualification agreement is a major barrier to acceptance by major businesses and law firms.”). Professor Peppet disagrees. He identifies a lack of reputational information, fee structure, and fear of client loss as the true impediments to expansion of collaborative law outside of the family law context. See Peppet, *supra* note 50, at 490–92.

## IV. COLLABORATIVE LAW AND LEGAL ETHICS

A. *Issues of Compatibility*

Despite collaborative law's fervent advocates, questions about its compatibility with current codes of legal ethics continue to dominate the conversation about this new form of ADR.<sup>72</sup> Four specific ethical issues garner attention. First, concerns exist about whether collaborative law is consistent with the duty of loyalty—often labeled as “zealous advocacy.” Second, as with mediation, concerns about the duty of candor and truthfulness to others are present with collaborative law. Third, questions about the compatibility of the disqualification provision with the rules governing termination of representation continue. Finally, fears over potential breaches of the duty of confidentiality also remain. Collaborative law faces challenges with each of these ethical hurdles for a common reason. General rules of ethics governing traditional practice were drafted without collaborative law in mind and are ill-suited to the new collaborative process.

1. *Zealous Advocacy or Zealotry*

Zealous advocacy is the centerpiece of much of the concern about the ability of collaborative law to fit neatly with current ethical codes. The debate, however, operates at several distinct levels. Initially, there is disagreement among collaborative lawyers as to their proper role in relation to the nonclient and opposing counsel. In essence, does the collaborative lawyer owe any duty to others in the collaborative process? If so, can this duty be fulfilled consistent with current ethical rules? A necessary subset of this analysis is whether a duty of zealous advocacy exists at all, and if so, what the parameters are. This provides a logical starting point.

A duty of zealous advocacy is embodied in the canons of the ABA's Model Code of Professional Responsibility. Canon 7 is succinct: “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.”<sup>73</sup> Canon 7, which looms commandment-like over the ethical landscape,

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<sup>72</sup> For the colloquy that framed the current debate see Lawrence, *supra* note 24; Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 OHIO ST. J. ON DISP. RESOL. 497 (2003); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003). Other commentators on collaborative law keep the focus clearly on ethical considerations. See generally Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 158–72 (2004); Lande, *supra* note 1.

<sup>73</sup> MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969).

## COLLABORATIVE LAW

undoubtedly sprang from the ABA's turn-of-the-century Canons of Professional Ethics. Canon 15 described the lawyer's duty as one of "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability."<sup>74</sup> Thus, the Model Code's duty of zealous advocacy is best understood as a duty of diligence—an obligation to vigorously pursue a client's legitimate objectives.<sup>75</sup>

At some point, zealous representation took a turn for the worse. Some attorneys began to confuse (or rationalize) zealousness with an obligation to be aggressive with opposing clients and counsel. Consequently, some viewed zealous advocacy as a command to take every action not prohibited by law, no matter how repugnant. Attorneys choosing this path earned unflattering labels such as "Rambo" or "pitbull litigator."<sup>76</sup>

In 1981, the ABA adopted its first incarnation of the Model Rules of Professional Conduct. With this shift, zealous advocacy went from looming to Lilliputian. What once existed at the canon-level, zeal was demoted to the commentary on the duty of diligence contained in Model Rule 1.3: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>77</sup> Even this reference to zeal was placed in proper perspective by the subsequent comment that a lawyer is not bound "to press for every advantage that might be realized for a client."<sup>78</sup> The rulemakers further tried to deflate the "hired gun" image in 2002 with an addition to the commentary making explicit that a lawyer's duty does not include use of offensive tactics.<sup>79</sup> Nonetheless, the idea that

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<sup>74</sup> American Bar Association Canons of Professional Ethics Canon 15, reprinted in PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 2004-2005 ABRIDGED EDITION 581, 585 (John S. Dzienkowski ed., 2004). Professor Dzienkowski notes that the first thirty-two canons were adopted on August 27, 1908. *Id.* at 581.

<sup>75</sup> See D. Todd Sholar, Note, *Collaborative Law—A Method for the Madness*, 23 MEM. ST. U. L. REV. 667, 678 (1993) (equating zeal with a general obligation of diligence).

<sup>76</sup> See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 304 (1995) (describing the hired gun and Rambo analogies); Kovach, *supra* note 15, at 407 (noting Rambo approach); Macfarlane, *supra* note 22, at 201 (including pitbull and other references).

<sup>77</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1981). The Model Rules also include a reference to zealous advocacy in the preamble stating that as an "advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.* pmbl. ¶ 2.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").

attorneys have an ethical obligation to take every action to benefit their clients persists.<sup>80</sup>

Can collaborative law, with its paradigm shift to problem solving, coexist with an inherently adversarial duty of zealous advocacy—even one narrowly conceived under the current Model Rules? Some think so. Combining Model Rule 1.2 concerning the scope of representation<sup>81</sup> with Rule 1.3's zealous advocacy, one commentator concludes that “the Rules at least suggest that it is permissible for lawyers to fulfill their professional duty of zealous representation while limiting the scope of the representation to the terms of the [collaborative law] agreement.”<sup>82</sup> There are certainly collaborative law practitioners that concur.<sup>83</sup> Add to this scenario the reality that those lawyers gravitating toward collaborative law presumably reject hardball litigation tactics in the first place. Consequently, in the main, collaborative lawyers can go about their practice with little fear of violation of this ethical duty.<sup>84</sup>

However, some collaborative lawyers conceive of their roles differently. For example, James Lawrence believes the collaborative lawyer's “responsibilities shift away from those associated with ‘pure’ advocacy and toward the creative, flexible representation that characterizes neutrality.”<sup>85</sup> Consequently, Lawrence contends that the collaborative lawyer falls in a “unique ethical position” somewhere between the ethical posture of a traditional advocate and a neutral.<sup>86</sup> Other collaborative lawyers think in terms of an obligation to the entire family, not merely their own client.<sup>87</sup> This belief in a duty to nonclients, however, appears to be a minority view among collaborative lawyers.<sup>88</sup> Nonetheless, these divergent characterizations

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<sup>80</sup> See Kay Elkins-Elliott & Frank W. Elliott, *Settlement Advocacy*, 11 TEX. WESLEYAN L. REV. 7, 9 (2004) (describing the persistence of the “fearsome ogre of zealous advocacy”).

<sup>81</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2004) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”).

<sup>82</sup> Schwab, *supra* note 6, at 363–64.

<sup>83</sup> See Susan M. Buckholz, *Two Views on Collaborative Law*, VT. B.J., Spring 2004, at 37, 39 (describing compatibility with Rule 1.2).

<sup>84</sup> See Lande & Herman, *supra* note 48, at 282 (suggesting the collaborative lawyers have the best of both worlds with strong advocacy and negotiation).

<sup>85</sup> Lawrence, *supra* note 24, at 442.

<sup>86</sup> *Id.* at 439.

<sup>87</sup> See Lande, *supra* note 1, at 1336 (“For example, some CL practitioners describe lawyers' roles as serving the interests of the whole family as all or part of their professional duty.”).

<sup>88</sup> See Schwab, *supra* note 6, at 380 (finding that the statement “Collaborative

## COLLABORATIVE LAW

persist bolstering Professor Lande's conclusion that the basic collaborative law model "can be consistent with norms of zealous advocacy though, in practice, some variations . . . do not comply with those professional norms."<sup>89</sup> The ultimate compatibility of collaborative law with the Model Rules may hinge on which conceptualization is considered.<sup>90</sup>

### 2. Candor

Related to the ethical issue of zealous advocacy, the duty of candor is also implicated by the use of collaborative law.<sup>91</sup> Concern about the appropriate level of candor is the same issue currently debated in the context of mediation and negotiation.<sup>92</sup> Traditionally, Model Rule 4.1, "Truthfulness in Statements to Others," would control. Rule 4.1 requires that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."<sup>93</sup> While the rule itself seems straightforward, the comment that follows significantly alters the burden for a lawyer in the context of negotiation:

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.<sup>94</sup>

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lawyers are more like neutrals than like counsel for individual clients" was widely rejected). 84.1% of collaborative lawyers surveyed disagreed with the statement. *Id.* This conclusion may be limited by Schwab's methodology of only surveying collaborative lawyers engaging in family law practice.

<sup>89</sup> Lande, *supra* note 1, at 1338.

<sup>90</sup> See Schwab, *supra* note 6, at 366–67; see also Apel, *supra* note 48, at 42 (describing role confusion of collaborative lawyer which will invoke inherent conflicts).

<sup>91</sup> Beckwith & Slovin, *supra* note 72, at 501–02.

<sup>92</sup> See, e.g., Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181 (2004); Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1 (2004); ABA Section of Dispute Resolution, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs* (Aug. 7, 2004), <http://www.abanet.org/dispute.html>.

<sup>93</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2004).

<sup>94</sup> *Id.* R. 4.1 cmt. 2.



Thus, in the context of negotiation, this comment supports an exception for “puffery”—a euphemism for lying.<sup>95</sup>

Is there really a legitimate concern that lawyers would lie? Yes.<sup>96</sup> Lying has been characterized as “a permanent feature of advocacy”<sup>97</sup> and “central to one’s effectiveness in negotiations”<sup>98</sup> due to the common perception that lying works.<sup>99</sup> Indeed, some believe that “zealous advocacy” means “a lawyer is required to be disingenuous.”<sup>100</sup> As a result, Model Rule 4.1 not only fails to constrain this behavior, but actually legitimizes it—at least in the context of negotiation.

Recent attempts to modify Rule 4.1 have been unsuccessful. A proposal to include a duty of candor to mediators was rejected during the Ethics 2000 reforms of the Model Rules in 2002.<sup>101</sup> While a duty of candor was extended

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<sup>95</sup> James Alfini, *E2K Leaves Mediation in an Ethics “Black Hole,”* DISP. RESOL. MAG., Spring 2001, at 3 (“It thus opens the door for what some refer to as ‘puffery,’ and others as lying, in negotiations.”); John W. Cooley, *Mediator & Advocate Ethics*, DISP. RESOL. J., Feb. 2000, at 73, 75 (noting comments suggest puffing is permissible and noting the absence of a bright line distinguishing lying); Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 51 (1994) (“The codes are far less clear regarding the status of false statements made to opponents in negotiation including whether such statements count as lies at all.”).

<sup>96</sup> As I have plainly stated before: “Lawyers lie.” Fairman, *supra* note 72, at 525. Others concur. *See generally* Pounds, *supra* note 92, at 186 (citing ABA study finding 61% of lawyers found it ethically permissible to engage in settlement puffery involving misrepresentation and that 73% had engaged in puffery); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990) (advancing a comprehensive taxonomy for lawyer lying); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (concluding based upon her study that lawyer deception of clients is pervasive).

<sup>97</sup> Wetlaufer, *supra* note 96, at 1272.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* (contending “well-told lies are highly effective”); Pounds, *supra* note 92, at 184-85 (“The lawyer is oftentimes confronted with circumstances where the use of deception can and does work to permissibly strategic negotiation advantage.”); *cf.* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002) (arguing that the effective hard-bargainer is a myth and reporting conclusions from her new empirical study showing that effectiveness ratings drop for unethical adversarial bargainers).

<sup>100</sup> *See* Wetlaufer, *supra* note 96, at 1255-57 (describing the argument that zealous representation permits lying).

<sup>101</sup> *See* Bruce E. Meyerson, *Telling the Truth in Mediation: Mediator Owed Duty of Candor*, DISP. RESOL. MAG., Winter 1997, at 17 (advocating a duty of candor to mediators); James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 269-72 (1999) (proposing revision to Rule 4.1).

## COLLABORATIVE LAW

to arbitration in revised Rule 3.3,<sup>102</sup> mediation ended up with only a single word—“ordinarily”—to qualify the puffery comment in Rule 4.1.<sup>103</sup> Dean James Alfini’s characterization of this as an ethical “black hole” is appropriate.<sup>104</sup> Yet this is precisely the place collaborative lawyers must turn to for guidance.<sup>105</sup>

Recently, the Litigation Section of the American Bar Association began a formal attempt to recognize a distinction between the ethical duties of a lawyer in the courtroom versus settlement negotiations. In August 2002, the Litigation Section issued Ethical Guidelines for Settlement Negotiations.<sup>106</sup> These Ethical Guidelines include a duty of fair-dealing.<sup>107</sup> As to false statements of material fact, the Ethical Guidelines include section 4.1.1 that states: “In the course of negotiating or concluding a settlement, a lawyer must not knowingly make a false statement of material fact (or law) to a third

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<sup>102</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2002) (defining tribunal to include an arbitrator); *id.* R. 3.3 cmt. 1 (noting duty is owed to a tribunal); see also Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 215–16 (2001) (describing a proposal to include other ADR processes and noting ultimate rejection of the idea).

<sup>103</sup> MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (2002).

<sup>104</sup> Alfini, *supra* note 95, at 7. However, some argue that even illumination will not help. See Peppet, *supra* note 50, at 510–11 (contending that revisions to Rule 4.1 calling for a uniform aspirational ethics rule forbidding all deception would not stop it and is unwise).

<sup>105</sup> See Beckwith & Slovin, *supra* note 72, at 501–02.

<sup>106</sup> See ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations (2002), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>.

<sup>107</sup> *Id.* § 2.3 (“A lawyer’s conduct in negotiating a settlement should be characterized by honor and fair-dealing.”). Similarly, an “attorney may not employ the settlement process in bad faith.” *Id.* § 4.3.1. Commentary to section 2.3 notes the novelty of this approach:

While there is no *Model Rule* that expressly and specifically controls a lawyer’s general conduct in the context of settlement negotiations, lawyers should aspire to be honorable and fair in their conduct and in their counseling of their clients with respect to settlement. *Model Rule* 2.1 recognizes the propriety of considering moral factors in rendering legal advice and the preamble to the *Model Rules* exhorts lawyers to be guided by “personal conscience and the approbation of professional peers.” *Model Rules*, Preamble, [7]. *Cf. infra* Sections 4.1.1, 4.1.2, and 4.3.1. Whether or not a lawyer may be disciplined, sanctioned, or sued for failure to act with honor and fairness based on specific legal or ethical rules, best practices dictate honor and fair dealing. Settlement negotiations are likely to be more productive and effective and the resulting settlement agreements more sustainable if the conduct of counsel can be so characterized.

*Id.* § 2.3 cmt.

person.”<sup>108</sup> The comments, however, continue to embrace the Model Rules definition of materiality.<sup>109</sup> The refusal to alter the materiality definition—juxtaposed against a new good faith provision—sends a confusing message to those looking for guidance on the duty of candor.<sup>110</sup> Consequently, the effect of the Ethical Guidelines on lawyer ethics remains to be seen.<sup>111</sup>

The responsibility of a lawyer to be truthful in a collaborative law proceeding is a necessity.<sup>112</sup> Yet no ethical infrastructure supports this baseline value. The Model Rules do not provide appropriate guidance for collaborative law on the duty of candor. As to mediation, the rules are silent. As to negotiation, the rules are counterproductive.<sup>113</sup> Alternative attempts, like the ABA Litigation Section’s Ethical Guidelines, do not add sufficient

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<sup>108</sup> *Id.* § 4.1.1.

<sup>109</sup> The comment states:

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances. *Model Rule 4.1*, comment 2. “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category . . . .” *Model Rule 4.1*, comment 2.

*Id.* § 4.1.1 cmt.

<sup>110</sup> See Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218 (2004).

<sup>111</sup> At least one additional limitation is that the Guidelines have not been approved by the full ABA. Currently, the Guidelines carry the following disclaimer:

The Ethical Guidelines for Settlement Negotiations have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association. However, the American Bar Association recommends the Ethical Guidelines for Settlement Negotiations as a resource designed to facilitate and promote ethical conduct in settlement negotiations. These Guidelines are not intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules of Professional Conduct, and should not serve as a basis for liability, sanctions or disciplinary action.

Ethical Guidelines for Settlement Negotiations, *supra* note 106, Preface.

<sup>112</sup> There is anecdotal support of dishonesty in collaborative law. See Chip Rose, *The Creative Solution: Sibling Non-Rivalry*, July 2003, <http://www.mediate.com/articles/rose4.cfm> (adding comment after article dated 2/24/05 relating to dishonesty).

<sup>113</sup> See Pounds, *supra* note 92, at 193 (pointing out how Rule 4.1 complicates a determination of what is proscribed conduct).

clarity to be exported to collaborative law. In the end, the “major ethical issue relating to collaborative lawyering”<sup>114</sup> is ignored by current ethics codes.

### 3. Termination

The ethical rules restricting an attorney’s ability to terminate representation are implicated by collaborative law’s disqualification agreement. The concern is a simple one. A client agrees to resolve a dispute using collaborative law and signs the participation agreement. The four-way conferences fail to lead to an agreeable settlement. The client is now forced to choose between counsel of choice or collaborative law. Either choice burdens the client.<sup>115</sup> To keep the current counsel, the client must continue with the unproductive process.<sup>116</sup> Choosing new counsel costs the client time, money, and energy at an especially bad time.<sup>117</sup> The rules of legal ethics purposefully try to avoid this situation by limiting the ability of the lawyer to terminate representation to certain defined situations. Does collaborative law’s disqualification provision fit within these circumstances?

Two provisions of Model Rule 1.16 are relevant. Under Rule 1.16(b)(4), a lawyer may withdraw if “the client insists upon taking an action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”<sup>118</sup> This provision, however, typically does not apply to situations where a lawyer seeks to terminate representation based upon a disagreement with the client about a settlement.<sup>119</sup> Consequently, it is unlikely to provide a sufficient anchor for the disqualification provision.

Model Rule 1.16(b)(5) is more fruitful. It provides that a lawyer may withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”<sup>120</sup> As applied to

<sup>114</sup> Beckwith & Slovin, *supra* note 72, at 501.

<sup>115</sup> See Spain, *supra* note 72, at 163–64 (noting substantial pressures caused by invocation of disqualification agreement).

<sup>116</sup> See Macfarlane, *supra* note 22, at 200 (describing client fears of having to stick with collaborative law).

<sup>117</sup> See Lande, *supra* note 1, at 1344.

<sup>118</sup> MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2004). This provision changed in 2002. It formerly stated “imprudent” instead of the phrase “with which the lawyer has a fundamental disagreement.” See MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(3) (2001).

<sup>119</sup> See Lande, *supra* note 1, at 1345–46.

<sup>120</sup> MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(5) (2004).

the disqualification agreement, the client's decision to discontinue with collaborative law and pursue litigation breaches an obligation of the participation agreement regarding a continuation of the lawyer's services. The agreement itself serves as reasonable warning. A comment to Rule 1.16 seems to support withdrawal under these circumstances: "A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to representation, such as an agreement . . . limiting the objectives of the representation."<sup>121</sup> Some commentators find this a sufficient basis for a collaborative lawyer to withdraw consistent with the Model Rules.<sup>122</sup> To date, however, no court or state ethics committee has examined the disqualification provision under the termination rules.<sup>123</sup>

Even if a court or committee tries to assess the compatibility of the disqualification agreement with the Model Rules, it will be stymied by the imprecise analogies of traditional practice. Recently, Professor John Lande completed the most comprehensive examination of the ethical parameters of the disqualification provision.<sup>124</sup> He identified retainer agreements authorizing attorney withdrawal if the client failed to accept settlement advice from the lawyer as the most analogous situation to traditional practice.<sup>125</sup> Retainer agreements of this type are deemed illegal and void per se in most U.S. jurisdictions because they place excessive settlement pressure on the client.<sup>126</sup> Thus, if collaborative law disqualification agreements are

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<sup>121</sup> *Id.* R. 1.16 cmt. 8.

<sup>122</sup> See Spain, *supra* note 72, at 162–63 (stating Rule 1.16(b)(5) "appears to provide a basis for a collaborative lawyer to withdraw from further representation if an agreement is not reached"). Professor Spain, however, has reservations regarding the permissibility of advance consent to withdraw. *Id.* at 163. Spain also argues that the disqualification agreement could be prohibited by a "strict interpretation of Rule 1.16" because "a client would be better served by full service representation." *Id.* He relies, however, on Rule 1.16(b)(1), which is not a prerequisite to using 1.16(b)(5) for permissive withdrawal. *Id.* Professor Lande also notes that this provision could be used to support the disqualification provision. See Lande, *supra* note 1, at 1351 n.125 ("Although this situation may not follow the exact language of the Model Rule comment, it seems consistent with its intent and thus some courts or ethics committees might approve the disqualification agreement on this basis.").

<sup>123</sup> The North Carolina Bar Association recently issued a formal ethics opinion approving the use of collaborative law under Model Rule 1.2 relating to the scope of representation. It did not, however, address the termination rules. See N.C. St. Bar, Formal Eth. Op. 1 (2002), available at 2002 WL 2029469 [hereinafter N.C. Formal Eth. Op. 1]. Professor Peppet, however, has serious reservations that "mandatory mutual withdrawal provisions can be squared with Rule 1.2." See Peppet, *supra* note 50, at 489.

<sup>124</sup> See Lande, *supra* note 1, at 1344–79.

<sup>125</sup> *Id.* at 1347.

<sup>126</sup> See *id.* at 1347–49 & n.105 (detailing the wealth of authority rejecting the use of

## COLLABORATIVE LAW

treated as withdrawal agreements, the disqualification agreements are doomed as unethical.<sup>127</sup>

Lande notes, however, that there are a number of significant differences between the two provisions which make such ethical predictions difficult.<sup>128</sup> Under a traditional withdrawal agreement, the lawyer invokes the provision for the lawyer's own benefit. In contrast, the disqualification provision under collaborative law is designed with the client's interest in mind and to benefit the client by creating incentives to keep bargaining.<sup>129</sup> This difference in purpose undermines the "lawyer overreaching" rationale used to ban withdrawal agreements. An even starker difference may cut the other way. A collaborative law client can compel the disqualification of the other party's counsel.<sup>130</sup> This situation—unaddressed by state ethics regulators—certainly raises problems beyond those present in traditional withdrawal agreements. With all the nuances of collaborative law and imperfect analogies to traditional practice, Professor Lande ultimately concludes that disqualification agreements should be viewed as compatible with the rules of ethical conduct absent new evidence of serious harm to clients.<sup>131</sup>

Lande also throws his support behind those collaborative law practitioners who are reassessing the need for the disqualification agreement in the first place.<sup>132</sup> Recently, some supporters of the philosophy behind collaborative law have broken rank and offer "cooperative" law as an alternative.<sup>133</sup> Cooperative law is essentially collaborative law minus the disqualification provision.<sup>134</sup> Proponents of this variant contend that it has the benefits of collaborative law without the draconian consequences if, despite everyone's best efforts, settlement is not possible.<sup>135</sup> Further

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withdrawal agreements).

<sup>127</sup> While this is the foregone conclusion in U.S. jurisdictions, Lande points out that Canadian courts might accept withdrawal agreements if they are fair and reasonable. *See id.* at 1357–60.

<sup>128</sup> *See id.* at 1351–57 (developing five distinctions between withdrawal agreements and disqualification provisions).

<sup>129</sup> *See id.* at 1352–53.

<sup>130</sup> *See supra* notes 46–48 and accompanying text; Macfarlane, *supra* note 22, at 200 (describing collaborative law client forced to abandon counsel due to spouse's court action); Apel, *supra* note 48, at 43 (stressing that clients must be advised that they are placing control in the hands of someone whose interests may not be congruent).

<sup>131</sup> Lande, *supra* note 1, at 1372–73.

<sup>132</sup> *See id.* at 1375–79 (challenging collaborative law practitioners and theorists to continue experimentation with cooperative law procedures).

<sup>133</sup> *See* Lande & Herman, *supra* note 48, at 284.

<sup>134</sup> Isaacs, *supra* note 29, at 835–36; Lande, *supra* note 1, at 1375.

<sup>135</sup> *See* Lande & Herman, *supra* note 48, at 288.

experimentation with this process may offer some guidance as to the necessity of the disqualification provision, yet one theme remains clear. Current rules of legal ethics were drafted without any conception of collaborative law or the potential use of a disqualification agreement. Consequently, attempts to force-fit the disqualification agreement into the current ethical regime will continue to be unsatisfying.

#### 4. Confidentiality

No principle of legal ethics is more fundamental than confidentiality. It is the foundation upon which the attorney-client relationship is fostered. Absent applicability of a specifically defined exception, Model Rule 1.6(a) presents the basic command: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."<sup>136</sup> Confidentiality is important for collaborative law in order to facilitate the problem-solving discussions that will lead to dispute resolution.<sup>137</sup> In this sense, collaborative law relies on confidentiality the same way that mediation does.<sup>138</sup>

Collaborative law procedures, however, are riddled with risks to confidentiality. Participation agreements often include a duty to voluntarily disclose relevant information.<sup>139</sup> Collaborative counsel may want to disclose (or may have already disclosed at a four-way conference) confidential information, such as the emotional state of the client, that the client does not want revealed. Another potential pitfall involves the use of information or documents gleaned from the collaborative process outside of the collaborative proceedings.<sup>140</sup> Does voluntary disclosure within the collaborative law setting permit its use outside of it? An even greater problem might occur if the collaborative counsel follows the minority practice of only conferring with the client in the presence of the opposing party and counsel. Such a practice essentially removes all information from under the cloak of attorney-client privilege.<sup>141</sup> At the heart of all these

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<sup>136</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004).

<sup>137</sup> See Spain, *supra* note 72, at 168–78 (stressing the importance of confidentiality to collaborative process).

<sup>138</sup> See Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 79–84 (2001) (describing importance of confidentiality to mediation).

<sup>139</sup> See, e.g., TESLER, *supra* note 5, at 137–42 (depicting a Collaborative Law Retainer Agreement).

<sup>140</sup> See Spain, *supra* note 72, at 169.

<sup>141</sup> See Schwab, *supra* note 6, at 365.

## COLLABORATIVE LAW

concerns is the fear that information, once disclosed, would be used later to the client's detriment, especially in the context of failure to reach a settlement.

Application of Model Rule 1.6 to the typical disclosure issue appears to offer at least a framework for resolution. A client effectively waives confidentiality by giving informed consent under Model Rule 1.6(a) to the lawyer at the start of the representation. Such a wide prospective waiver of confidentiality assumes a tremendously thorough job of obtaining informed consent. Unfortunately, recent research indicates that failure to adequately inform clients of disclosure issues already leads to some client dissatisfaction.<sup>142</sup> It is questionable if informed consent as contemplated by the Model Rules is possible under these circumstances. Notwithstanding any blanket waiver, if a conflict between the client and counsel as to disclosure of a particular issue arises, under Rule 1.6(a) the client wins barring counsel's disclosure.<sup>143</sup> Counsel must then determine if provisions of the participation agreement are invoked requiring termination of representation.<sup>144</sup> If the disqualification provision is invoked, confidentiality issues remain as the departing lawyer must determine what information can be disclosed to the new counsel.<sup>145</sup>

As one commentator notes, there may be a need for a specific privilege for collaborative law along the lines of the mediation privilege.<sup>146</sup> North Carolina already follows this approach: "All communications and work product of any attorney or third-party expert hired for purposes of

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<sup>142</sup> See Macfarlane, *supra* note 22, at 209 (noting client complaints about disclosure requirements).

<sup>143</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004).

<sup>144</sup> See Schwab, *supra* note 6, at 365 (describing application of Rule 1.6).

<sup>145</sup> See Spain, *supra* note 72, at 169 (linking disqualification and confidentiality issues).

<sup>146</sup> See *id.* (suggesting need to explore privilege). A mediation privilege is embodied in the Uniform Mediation Act (UMA). The UMA was adopted by the National Conference of Commissioners on Uniform State Laws in August 2001. The UMA contains significant new provisions regarding confidentiality of mediation communications and privilege against disclosure. See ABA Section of Dispute Resolution, UNIF. MEDIATION ACT § 4 (privilege against disclosure), 8 (confidentiality and privilege), § 5 (waiver and preclusion of privilege), § 7 (exceptions to privilege), § 8 (confidentiality), § 9 (mediator disclosure) (2001), available at <http://www.pon.harvard.edu/guests>. On May 13, 2003, Nebraska became the first state to adopt the Uniform Mediation Act. Illinois followed. On November 22, 2004, New Jersey followed suit. Ohio enacted the UMA in December 2004. On April 5, 2005, the Washington legislature passed the UMA. Other jurisdictions considering bills to enact the UMA include the following: Connecticut, District of Columbia, Indiana, Iowa, Minnesota, and Vermont.



participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties.”<sup>147</sup> Alternatively, rules of procedure or ethics could clarify how certain disclosures, such as documents, are to be treated with respect to confidentiality and privilege. Given the importance of voluntary disclosure to the collaborative process, reliance on informed consent or a prospective waiver of confidentiality—without more—is simply insufficient to address these ethical concerns.

## B. *Ethical Rules Specific to Collaborative Law*

The general rules of ethics governing lawyers fail to take into account the unique collaborative law process. Rather than read the tea leaves of the Model Rules, collaborative lawyers have taken many steps to provide self-governance. Collaborative law principles, guidelines, and standards exist at the practice group level, with statewide groups, and even international associations. Unwilling to rely on voluntary codes, some states codify rules for collaborative law practice. These attempts, whether state-mandated or self-imposed, illustrate a common theme—the need for creating separate ethical rules for collaborative practice.

### 1. *Self-governance*

Attempts at collaborative law self-governance can be found at several levels.<sup>148</sup> The most basic unit is the collaborative law practice group. There are at least 87 such practice groups around the United States and Canada.<sup>149</sup> These pockets of collaborative lawyers are the first line of the defense of ethical practice. They may even serve a gatekeeping function on admission into collaborative law practice in some areas.<sup>150</sup> Presumably, members of a practice group are the first to see ethical problems arising in practice and have an opportunity to respond. However, placing too much reliance on

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<sup>147</sup> See N.C. GEN. STAT. §§ 50–77 (2005). Texas also recently amended its collaborative law provisions to include a confidentiality provision. See *infra* notes 208–213 and accompanying text.

<sup>148</sup> See Lande & Herman, *supra* note 48, at 281 (“In just the past few years, local collaborative law groups have been developing their membership criteria and procedures to increase the quality of collaborative law practice and provide quality assurances to collaborative law consumers.”).

<sup>149</sup> See, e.g., Gross, *supra* note 62 (describing the New York Collaborative Law Group).

<sup>150</sup> See Isaacs, *supra* note 29, at 841 (noting informal policing by collaborative law groups).

## COLLABORATIVE LAW

practice groups policing their own as suggested by some commentators<sup>151</sup> is unwise given the recent research demonstrating both a lack of ethics training and general lack of recognition of ethics issues among collaborative lawyers.<sup>152</sup>

Some practice groups appear to rely on the text of their participation agreement to sketch out the ethical parameters of the practice. For example, the participation agreement of the New York Collaborative Law Group provides some guidance on candor by requiring participants to “deal honestly with each other” and provide financial information “that might be considered important by the other, whether specifically requested or not.”<sup>153</sup> It contains a disqualification provision that allows the process to be “terminated by our counsel in the event we violate the terms or spirit of this agreement.”<sup>154</sup> Further, the agreement requires lawyers and clients to “maintain the confidentiality of all communication exchanged within the collaborative law process.”<sup>155</sup>

While the participation agreement may provide an ethical baseline, there are obvious limitations. By design, the participation agreement is written to inform the client of the obligations of collaborative law, not bind the lawyers to an ethical code.<sup>156</sup> Consequently, the nuanced ethical issues implicated by collaborative law cannot be adequately addressed. Important questions are answered with generalities or omitted altogether. An example of this type of omission in the agreement above exists concerning confidentiality. The agreement calls for the use of joint experts, but is silent as to whether information obtained from them through the collaborative law process is cloaked with confidentiality. Additionally, differences in participation agreements contribute to a lack of consensus on accepted ethical practice. For example, the provision singling out financial information for automatic

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<sup>151</sup> See, e.g., *id.* (arguing self governance through reputation minimizes unethical conduct).

<sup>152</sup> Macfarlane, *supra* note 22, at 208. This finding is not surprising given that much of the ethical message communicated by some practice groups boils down to simplistic slogans. For example, the New York Collaborative Law Group’s participation agreement proclaims: “We pledge: Not Court, but Consensus; Not Combat, but Collaboration; Not Coercion, but Cooperation.” See The New York Collaborative Law Group, Collaborative Law Participation Agreement, [http://www.collaborativelawny.com/participation\\_agreement.php](http://www.collaborativelawny.com/participation_agreement.php) (last visited Oct. 21, 2005). While the alliteration is nice, the message is not a substitute for ethical guidance.

<sup>153</sup> The New York Collaborative Law Group Participation Agreement, *supra* note 152.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See Peppet, *supra* note 50, at 494–95.

disclosure—and presumably shielding all other information—is not present in all participation agreements. Thus, the participation agreement is not a substitute for an ethical code for collaborative lawyers.<sup>157</sup>

The Association of Collaborative Law Attorneys has developed the closest thing to a true set of ethical rules for collaborative lawyers with its “Principles and Guidelines for Collaborative Law.”<sup>158</sup> These are widely reproduced by collaborative law practice groups with some variations.<sup>159</sup> These Principles contain a mixture of procedural rules and aspirational ethical goals limited exclusively to family law matters.<sup>160</sup> They do address some of the core ethical issues presented by collaborative law, although not always with clarity.<sup>161</sup>

Take for example compatibility with zealous advocacy. Principle 3.02 provides that “parties are still expected to protect their respective interests” and “the parties may continue to act in their own best interests, and not in the other party’s interests, in areas which are outside the dispute, such as in changing estate plans and in future financial and other activities.” While the rule is clear on permissible self-interest in areas outside the dispute, by implication, the rule appears to require a party to act in the interests of the other party on the core disputed questions.

The Principles are much clearer on the duty of candor requiring “complete, full, honest and open disclosure of all information having a material bearing on the case, whether requested or not.”<sup>162</sup> All parties and

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<sup>157</sup> See *id.* (describing confusing and overly broad disqualification provisions in participation agreements).

<sup>158</sup> Association of Collaborative Law Attorneys, Principles and Guidelines for Collaborative Law, <http://www.nocourt.org/principles.html> (last visited Oct. 21, 2005) [hereinafter Principles]. The Principles were originally drafted by the Collaborative Law Association in Santa Clara County, California, the predecessor of ACLA.

<sup>159</sup> See Principles and Guidelines for the Practice of Collaborative Law, <http://www.mediate.com/pfriendly.cfm?id=474> (last visited Oct. 8, 2005) (labeling itself an adaptation); San Francisco Collaborative Law Group, Statement of Principles of Collaborative Law, <http://www.collaborativelawsf.com/guidelines.htm> (last visited Oct. 8, 2005); International Academy of Collaborative Professionals, Statement of Principles of Collaborative Law (on file with author) (superseded by new IACP Principles of Collaborative Practice, <http://www.collaborativepractice.com/articles/principles.pdf> (last visited Oct. 8, 2005)).

<sup>160</sup> See Principles, *supra* note 158, at 1.01 (restricting Principles to family law).

<sup>161</sup> *Id.* at 3.01 (“[W]e understand there is no guaranty of success . . . While we all are intent on striving to reach a cooperative and open solution, actual performance may fall short.”); *id.* at 4.01 (“[W]e agree to uphold a high standard of integrity.”); *id.* at 12.01 (“All parties, attorneys, and consulting professionals hereby pledge to comply with and to promote the spirit and written word of this document.”).

<sup>162</sup> *Id.* at 2.01.

## COLLABORATIVE LAW

professionals agree that they “shall not take advantage of inconsistencies, misstatements of fact or law, or others’ miscalculations, but shall disclose them and seek to have them corrected.”<sup>163</sup> The full disclosure requirement is paired with a commitment to “vigorous good faith negotiation.”<sup>164</sup> These provisions have teeth. Counsel “shall immediately withdraw” upon learning that their client has knowingly withheld or misrepresented information having a material bearing on the case.<sup>165</sup> There is also the expected disqualification agreement triggered by the filing of adversary documents with the court.<sup>166</sup>

The ACLA’s Principles attempt to serve as a comprehensive ethical code. On some provisions, such as candor, the Principles speak with clarity, but tend to micro-manage in the details. Other provisions suffer from imprecise language. Because different associations appear to borrow freely and even alter the Principles, there is a lack of uniformity manifesting in significant differences on key issues.<sup>167</sup> The most problematic of these is the level of duty owed to others in the collaborative law process.<sup>168</sup>

Another source of ethical guidance comes from associations of collaborative law professionals. These groups seek to embrace not only lawyers, but also others—such as mental health professionals and financial specialists—involved in a collaborative law case. Associations of collaborative professionals have promulgated several different sets of ethical guidelines with varying degrees of detail and usefulness. Consider first the Ethical Guidelines for Collaborative Family Law recently revised by the

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<sup>163</sup> *Id.* at 4.01 (specifying what the reaction should be if an attorney discovers misstatements by his client, consulting professionals, himself, or opposing counsel).

<sup>164</sup> *Id.* at 6.01.

<sup>165</sup> *Id.* at 7.01 (providing examples such as: secret disposition of property, failure to disclose the existence or true nature of assets, on-going emotional or physical abuse, or planning to flee with children).

<sup>166</sup> *Id.* at 8.02 (disqualifying as witnesses all consultants and barring their work product as inadmissible in court).

<sup>167</sup> For example, the ACLA’s Principles contain the immediate withdrawal provision for knowingly withheld information and a separate provision noting the ultimate sanction against lawyers abusing the collaborative law process is diminution of the attorney’s reputation, whereas other versions do not. *Compare id.* at 7.01–.02, with Principles and Guidelines for the Practice of Collaborative Law, *supra* note 159 (omitting the provisions).

<sup>168</sup> *Compare* Principles, *supra* note 158, at 3.02 (implying duty to act in other party’s interest), with San Francisco Collaborative Law Group, Statement of Principles of Collaborative Law, *supra* note 159, at III (“Although the participants are committed to reaching a shared solution, each party is still expected to identify and assert his or her respective interest and the parties’ respective attorneys will help each of them do so.”).

Colorado Collaborative Law Professionals.<sup>169</sup> Much of the guidance in this laundry list of provisions relates to the prevention of inter-professional ethical concerns such as separation of fees and unauthorized practice outside of one's respective discipline.<sup>170</sup> Unfortunately, many tough ethical issues facing lawyers are avoided. For example, on the question of privilege, the guidelines effectively punt declaring disclosure "shall follow both legal and ethical guidelines by requiring written consent forms for release of privileged information" without identifying what is privileged in the first place.<sup>171</sup> Similarly, the guidelines do nothing to resolve potential conflicts between collaborative law and legal ethics. These guidelines require that "[a]ll Collaborative Family Law team members must also adhere to the Code of Ethics of their respective disciplines."<sup>172</sup>

Another interdisciplinary group, the International Academy of Collaborative Professionals, is extremely active in promulgating standards and principles. By May 2005, the IACP had adopted several separate documents addressing collaborative professionals.<sup>173</sup> All of the standards are aspirational, voluntary guidelines self-described as a "work-in-progress."<sup>174</sup> Adopted on January 24, 2005, the Principles of Collaborative Practice is a narrative explaining the development of collaborative practice, which involves a team of professionals, from collaborative law.<sup>175</sup> Collaborative practice embraces the familiar tenets of settlement without court intervention, withdrawal of professionals if either client goes to court, and open

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<sup>169</sup> See Colorado Collaborative Law Professionals, Ethical Guidelines for Collaborative Family Law (Mar. 2004), <http://cclawp.org/PDF/203%20M%20EthicalGuidelines.pdf>.

<sup>170</sup> For example, the Guidelines state that "[e]ach discipline practices independently from each other and all fees are set independently." *Id.* Also, "[n]o team member shall receive financial remuneration for referring to another team member" and "[n]o team member shall give advice outside of his or her training or expertise." *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Three have direct relevance to lawyers: Principles of Collaborative Practice; Minimum Standards for Collaborative Practitioners; and Ethical Standards for Collaborative Practitioners. A fourth is Principles for Collaborative Trainers. The previously-posted Statement of Principles of Collaborative Law (modeled after the ACLA Principles) is now superseded by the new Principles of Collaborative Practice.

<sup>174</sup> See International Academy of Collaborative Professionals, Standards, Ethics and Principles, Statement by IACP Standards Committee (May 2005), <http://www.collaborativepractice.com> (go to "For Collaborative Professionals" pull-down tab; highlight "About the IACP" link; then click on "Ethics & Standards" tab).

<sup>175</sup> International Academy of Collaborative Professionals, Principles of Collaborative Practice (Jan. 24, 2005), <http://www.collaborativepractice.com/articles/principles.pdf>.

## COLLABORATIVE LAW

communication and information sharing.<sup>176</sup> The IACP Principles, however, are not a surrogate for ethical guidelines.

Similarly, the IACP Minimum Standards for Collaborative Practitioners adopts training standards for collaborative team members.<sup>177</sup> The document includes a section entitled IACP Minimum Standards for Collaborative Lawyer Practitioners. These cryptic standards require a collaborative lawyer to be in good standing in the jurisdiction and to be trained for a certain number of hours in collaborative practice, client-centered facilitative problem solving, and other related skills.<sup>178</sup> While these standards address the important duty of competence, they are limited to this single ethical area. It is also quite telling that while there is the Minimum Standards general requirement that all collaborative practitioners diligently strive to be consistent with the IACP Ethical Standards for Collaborative Practitioners, there is no requirement for any specific training on ethical issues.<sup>179</sup>

The IACP Ethical Standards for Collaborative Practitioners includes provisions relating to lawyer behavior, as well as other collaborative professionals.<sup>180</sup> In the opening statement, the Ethical Standards state: “Collaborative Practice differs greatly from adversarial dispute resolution practice. It challenges practitioners in ways not necessarily addressed by the ethics of individual disciplines. The following provides ethical guidelines to address these challenges.”<sup>181</sup> What follows is twenty-three standards applicable to legal, mental health, and financial professionals, plus four additional standards specific to collaborative practitioners assuming different roles in the process.<sup>182</sup> The very first standard, however, severely limits the usefulness for attorneys: “A Collaborative practitioner shall adhere to the ethics of his or her respective discipline. Nothing in the following guidelines shall be construed to contradict those standards.”<sup>183</sup> Yet it is precisely the compatibility between current legal ethical codes and collaborative law

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<sup>176</sup> *Id.*

<sup>177</sup> International Academy of Collaborative Professionals, Minimum Standards for Collaborative Practitioners (adopted July 13, 2004), [http://www.collaborativepractice.com/articles/IACP\\_Practitioner\\_Standards.pdf](http://www.collaborativepractice.com/articles/IACP_Practitioner_Standards.pdf).

<sup>178</sup> *Id.* at 2.1–4.

<sup>179</sup> *Id.* at 1.3.

<sup>180</sup> International Academy of Collaborative Professionals, Ethical Standards for Collaborative Practitioners (Jan. 24, 2005), <http://www.collaborativepractice.com/articles/EthicsStandardsfinal.pdf>.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* Ethical Standards 24–27.

<sup>183</sup> *Id.* Ethical Standard 1.

mandates that cries out for attention and guidance.<sup>184</sup> Not surprisingly, standards relating to confidentiality require adherence “to the rules of confidentiality as they relate to that practitioner’s discipline” and a duty to fully inform the client about confidentiality in the specific collaborative process chosen.<sup>185</sup> Practitioners shall reveal privileged information only with the client’s permission according to the participation agreement or “as required by law.”<sup>186</sup> This does little to address the sticking points with confidentiality.<sup>187</sup>

In contrast, a complex web of termination and candor rules emerge. The Ethical Standards include a disqualification provision applying to all collaborative professionals triggered by threats of litigation or starting a contested court proceeding.<sup>188</sup> If it is consistent with general ethics codes and confidentiality, clients must agree to not “knowingly withhold or misrepresent information material to the Collaborative process” or act to undermine the process.<sup>189</sup> If a client knowingly withholds material information or undermines the process as determined by a team member, it is considered constructive termination of the process.<sup>190</sup> However, the next standard seems to back away from the automatic termination by requiring a team member who discovers such conduct to first advise and counsel the client that the conduct violates the Ethical Standards.<sup>191</sup> “[P]ersistent violation of such principles will mandate the withdrawal of the Collaborative practitioner” and “in the discretion of the member” termination of the collaborative process.<sup>192</sup> Another subsection reiterates that if a client persists in violation of the “principles of disclosure and/or good faith,” the team member will withdraw and notify the other members of termination of the process.<sup>193</sup> Interestingly, this section is the first mention of a duty of candor and good faith.<sup>194</sup>

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<sup>184</sup> See *supra* Part IV.A.

<sup>185</sup> See Ethical Standards for Collaborative Practitioners, *supra* note 180, Ethical Standards 2–3.

<sup>186</sup> *Id.* Ethical Standard 4.

<sup>187</sup> See *supra* Part IV.A.4 (outlining issues of confidentiality in collaborative law).

<sup>188</sup> Ethical Standards for Collaborative Practitioners, *supra* note 180, Ethical Standard 9.

<sup>189</sup> *Id.* Ethical Standard 10(b).

<sup>190</sup> *Id.* Ethical Standard 10(c)–(d).

<sup>191</sup> *Id.* Ethical Standard 11(a)–(b).

<sup>192</sup> *Id.* Ethical Standard 11(b).

<sup>193</sup> *Id.* Ethical Standard 11.1.1(a)–(b).

<sup>194</sup> *Id.* Ethical Standard 10(a) (requiring the client to adhere to “basic principles and guidelines for Collaborative Practice”). The Principles of Collaborative Practice includes

## COLLABORATIVE LAW

While the IACP has diligently promulgated a variety of voluntary guidelines, even their Ethical Standards is not a model that can be adapted to general use. The Ethical Standards fall short for the same reasons described for the Ethical Guidelines of the Colorado Collaborative Law Professionals. The major focus is on interdisciplinary collaboration, not lawyer ethics. By requiring continued compliance with current codes of ethics in each profession, the Ethical Standards cannot effectively guide collaborative lawyers on the issues in tension with the current Model Rules. Where legal ethics are addressed, content is underdeveloped, excessively detailed, or internally confusing.

### 2. *State Statutes*

Another potential source for ethical guidance comes from the handful of states that have codified collaborative law, often blending both collaborative procedure and ethics. In 2001, Texas became the first state to adopt collaborative law procedures by incorporating them into the Texas Family Code—making it available for marriage dissolution proceedings and suits affecting the parent-child relationship.<sup>195</sup> The statute focuses primarily on procedure and the contents of the participation agreement. Attorney ethics, however, are impacted by these requirements. For example, a collaborative dissolution of marriage must be initiated by a written agreement of the parties and attorneys thus highlighting the importance of informed consent.<sup>196</sup>

Under the statute, collaborative law is defined as a procedure in which the parties and their attorneys agree in writing to “use their best efforts and make a good faith attempt” to resolve their dissolution<sup>197</sup> without resorting to

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a paragraph on the importance of freely disclosing all relevant information and the “commitment to full disclosure.” *Principles of Collaborative Practice*, *supra* note 175.

<sup>195</sup> TEX. FAM. CODE ANN. § 6.603 (marriage dissolution proceedings), § 153.0072 (suits affecting the parent-child relationship) (Vernon 2005) (effective Sept. 1, 2001). Identical provisions for collaborative law were codified in two places—one for dissolution of marriage and the other for suits affecting the parent-child relationship. For convenience a single citation to the dissolution chapter is used. The rise of collaborative family law in Texas is truly meteoric; Stuart Webb and Pauline Tesler first presented the model to Texas practitioners in Dallas in February 2000. *See* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 46–47 (2004) (describing the introduction of collaborative law in Texas).

<sup>196</sup> TEX. FAM. CODE ANN. § 6.603(a).

<sup>197</sup> *Id.* § 153.0072(b) (substituting “a suit affecting the parent-child relationship” for the dissolution language).



judicial intervention.<sup>198</sup> Further, the “‘parties’ counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.”<sup>199</sup> Thus, in the definition alone, the statute has a heightened duty of candor with the best efforts/good faith requirement and it permits the disqualification provision potentially at odds with the rules of termination. Support for these provisions is reiterated in a list of five mandatory provisions in a collaborative law agreement: (1) full and candid exchange of information between the parties and their attorneys; (2) suspension of court intervention while the collaborative process is ongoing; (3) hiring of joint experts; (4) withdrawal of all counsel if the collaborative process does not end in settlement; and (5) other provisions consistent with a good faith effort to settle.<sup>200</sup>

The remainder of the collaborative law statute deals with procedural items such as entitlement to judgment if the settlement agreement prominently displays a boldfaced, capitalized, or underlined statement that the agreement is irrevocable.<sup>201</sup> There are also specific limitations on judicial action if the court is notified in advance that collaborative law is being used.<sup>202</sup> Finally, the statute includes a couple of provisions relating to the procedure for notifying the court of success or failure, as well as status reports.<sup>203</sup>

Texas continues to pursue statutory implementation of collaborative law. Building on the success in settling domestic disputes, collaborative law supporters introduced Texas House Bill No. 205 on January 11, 2005.<sup>204</sup> The bill would amend the Texas Civil Practices and Remedies Code to make collaborative law available for all disputes.<sup>205</sup> The text of the bill is

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<sup>198</sup> *Id.* § 6.603(b). There are exceptions for approving the settlement, making the legal pronouncements, and signing orders to effectuate the agreement. *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* § 6.603(c)(1)–(5).

<sup>201</sup> *Id.* § 6.603(d).

<sup>202</sup> *Id.* § 6.603(e). Until the court is notified that the collaborative process did not end in settlement, it cannot set a hearing or trial date, impose discovery deadlines, require compliance with scheduling orders, or dismiss the case. *Id.*

<sup>203</sup> *Id.* § 6.603(f)–(g).

<sup>204</sup> H.B. 205, 79th Leg., Reg. Sess. (Tex. 2005); see ADRWorld.com, *Texas Bill Reflects Growing Support for Collaborative Law*, Jan. 13, 2005, <http://www.adrworld.com> (search for “Texas Bill Reflects Growing Support for Collaborative Law”; then follow “Texas Bill Reflects Growing Support for Collaborative Law” hyperlink) (describing family law success as motivation for expanding use).

<sup>205</sup> See H.B. 205, 79th Leg., Reg. Sess., Sec. 1 (Tex. 2005) (“On a written agreement of the parties and their attorneys, a dispute may be conducted under collaborative law procedures.”).

## COLLABORATIVE LAW

essentially identical to the current provisions relating to collaborative law's use in dissolution of marriage and suits affecting the parent-child relationship with one substantive ethical change. H.B. 205 includes a final subsection that would make the confidentiality provisions currently in place for other forms of alternative dispute resolution applicable to collaborative law.<sup>206</sup> The bill is currently pending before the House Committee on Civil Practices.<sup>207</sup>

While the fate of H.B. 205 is uncertain, the confidentiality provision is now law. Effective June 18, 2005, Texas amended the Family Code to apply the provisions for confidentiality of alternative dispute resolution as provided in the Civil Practices and Remedies Code to collaborative law proceedings.<sup>208</sup> The general confidentiality provision states:

[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.<sup>209</sup>

Additionally, any record made at an ADR procedure is confidential, and the participants or third party facilitating the procedure may not be required to testify in any proceeding relating to the dispute or be subject to process requiring disclosure of confidential information or data arising out of the matter in dispute.<sup>210</sup> There are exceptions for material discovered independent of the procedure, reportable abuse and neglect, and certain agreements with government entities.<sup>211</sup> There is also a provision for in camera inspection and judicial determination if material is subject to

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<sup>206</sup> See *id.* § 2 (amending § 153.0072 of the Civil Practice and Remedies Code to apply to § 6.603 (dissolution) and § 153.0072 (suits affecting parent-child relationship)).

<sup>207</sup> Supporters of H.B. 205 expected approval during the legislative session due to the support for it among civil lawyers. See *Texas Bill Reflects Growing Support for Collaborative Law*, *supra* note 204. However, with the Texas legislature in the midst of its perennial school funding crisis, it appears likely that the bill will not emerge from committee.

<sup>208</sup> See Act effective June 18, 2005, 79th Leg., Reg. Sess., ch. 916, § 1, 2005 Tex. Sess. Law Serv. 916 (Vernon) (To be codified as an amendment to TEX. FAM. CODE ANN. § 6.603(h)) ("The provisions for confidentiality of alternative dispute resolution procedures as provided in Chapter 154, Civil Practices and Remedies Code, apply equally to collaborative law procedures under this section.").

<sup>209</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon 2005).

<sup>210</sup> *Id.* § 154.073(b).

<sup>211</sup> *Id.* § 154.073(c), (d), (f).

disclosure or protection.<sup>212</sup> The application of these confidentiality provisions to collaborative law is a major attempt to address ethical concerns raised about the use of the process.<sup>213</sup>

North Carolina became the second state to enact provisions allowing for collaborative law proceedings for divorce cases in 2003.<sup>214</sup> This statute follows closely on the heels of the 2002 formal ethics opinion of the North Carolina State Bar approving the use of collaborative law in family law disputes.<sup>215</sup> The North Carolina definition of collaborative law is the same as the Texas statute—an agreement by the parties and their attorneys to use their best efforts and make a good faith attempt to resolve their dispute without resort to judicial intervention.<sup>216</sup> However, when establishing the agreement requirements, North Carolina takes a minimalist approach. A collaborative law agreement must be in writing and signed by the parties and counsel, but the only specific content requirement is that it includes provisions for the withdrawal of all attorneys if the process does not achieve settlement.<sup>217</sup> Notably absent is the requirement of full and candid exchange of information.

The North Carolina statute is also weighted heavily toward procedural requirements, some similar to the Texas statute while others are novel. Like Texas, notice to the court that collaborative law is being used prevents judicial action until the court receives written notice of failure to settle, voluntary dismissal, or a request for the entry of judgment.<sup>218</sup> A party is entitled to entry of judgment to effectuate the settlement terms if the agreement is signed by each party.<sup>219</sup> Of course, the collaborative attorneys are disqualified from representing either party in further civil proceedings.<sup>220</sup>

North Carolina's collaborative law statute breaks from the Texas model by adding a provision for tolling of all limitations periods and deadlines

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<sup>212</sup> *Id.* § 154.073(e).

<sup>213</sup> See *Texas Bill Reflects Growing Support for Collaborative Law*, *supra* note 204 (noting that bill supporters say it will serve as an educational tool, give the process added legitimacy, and show critics that this is good legal practice).

<sup>214</sup> See N.C. GEN. STAT. §§ 50-70 to 50-79 (2005).

<sup>215</sup> See N.C. Formal Eth. Op. 1, *supra* note 123 (finding collaborative law for family law disputes can be consistent with Rules of Professional Conduct).

<sup>216</sup> N.C. GEN. STAT. § 50-71(1) (defining collaborative law).

<sup>217</sup> *Id.* § 50-72 (listing agreement requirements).

<sup>218</sup> *Id.* § 50-74(b). No notice must be given if the collaborative agreement is entered into prior to the filing of a civil action. *Id.* § 50-74(a).

<sup>219</sup> *Id.* § 50-75. North Carolina does not include a requirement of emphasis or magic words as to the irrevocability of the agreement. See TEX. FAM. CODE ANN. § 6.603(d) (Vernon 2005).

<sup>220</sup> See N.C. GEN. STAT. § 50-76(c).

## COLLABORATIVE LAW

while the participation agreement is in effect and a survivorship provision.<sup>221</sup> The statute also explicitly recognizes that the parties can use other forms of alternative dispute resolution, such as mediation or arbitration.<sup>222</sup> The parties can even use their collaborative counsel for other forms of ADR provided for in the participation agreement.<sup>223</sup>

Until Texas's recent application of confidentiality to collaborative law, North Carolina took the vanguard position to ensure confidentiality and privilege. North Carolina imposes a broad cloak: "All statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding."<sup>224</sup> "Work product includes written or verbal communications or analysis of any third-party experts used in the collaborative law process."<sup>225</sup> All communications and work product of any attorney or third-party expert participating in the collaborative process are also privileged and inadmissible in any court proceeding, except by agreement of the parties.<sup>226</sup> While North Carolina no longer stands alone in its treatment of confidentiality, the North Carolina protection is broader than Texas's because North Carolina explicitly extends confidentiality, inadmissibility, and privilege to cover third-party experts.<sup>227</sup>

Given the relevant infancy of collaborative law, the move to statutory permanence by Texas and North Carolina signals both the level of interest in using the collaborative law process and the heightened concern about its compatibility with existing legal ethics rules. Other states, such as New Jersey, may soon follow the Texas and North Carolina models.<sup>228</sup> While the statutory approach can add clarity on some ethical questions, the current focus of statutory collaborative law is on procedure and process. One must turn to the opinions of state ethics committees to find an answer to the question of compatibility of collaborative law with current ethics rules. This shallow pool of advisory opinions, however, merely reflects the need for a more dramatic rule-based solution.

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<sup>221</sup> *Id.* § 50-73 (tolling of time periods); 50-79 (collaborative law procedures surviving death).

<sup>222</sup> *Id.* § 50-78.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* § 50-77(a).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* § 50-77(b).

<sup>227</sup> Compare *id.* § 50-77, with TEX. CIV. PRAC. & REM. CODE ANN. § 154.073.

<sup>228</sup> See Assemb. B. No. 3375, 211th Leg. (N.J. 2004) (proposing to establish collaborative divorce modeled after the Texas and North Carolina statutes).

### 3. State Ethics Opinions

Recently, the ethics committees of three state bar associations—Pennsylvania, North Carolina, and Kentucky—considered collaborative law and its compatibility with the jurisdiction’s ethical rules. Their conclusions reflect a mixed reception on the ethical use of collaborative law under current rules. Moreover, these opinions are inherently advisory in nature and do not purport to be the last word on the subject. Nonetheless, they reflect the ongoing struggle collaborative law faces under the current ethical rules.

Consider first the recent informal opinion of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility on collaborative law authored by Professor Laurel Terry of Penn State-Dickinson School of Law.<sup>229</sup> The Committee was asked the general question of whether the practice of collaborative law in a domestic relations context is ethical provided clients are given full disclosure regarding all methods for resolving their dispute and the rights waived by choosing the collaborative law method.<sup>230</sup> The request had the unusual inclusion of 61 pages of materials, most apparently gleaned from continuing legal education course materials.<sup>231</sup> The request even failed to include a definition of collaborative law.<sup>232</sup> The Committee ultimately interpreted the letter request as posing the following question: “Do the Pennsylvania Rules of Professional Conduct create a per se ban on using a collaborative law process in a domestic relations case?”<sup>233</sup>

The opinion weighed into the compatibility of collaborative law in multiple contexts including the following: client identity, Rule 1.7 and conflicts, Rule 1.1 and competence,<sup>234</sup> Rule 1.2 and scope of representation, Rule 1.5(b) and written agreements about scope of representation,<sup>235</sup> Rule

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<sup>229</sup> See Pa. Bar Ass’n Comm. Leg. Eth. & Prof’l Resp., Informal Op. 2004-24 (2004), available at 2004 WL 2758094 [hereinafter Pa. Informal Op. 2004-24].

<sup>230</sup> *Id.* at \*1.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at \*2. Even as framed above, Professor Terry was handicapped by the lack of specificity of the request. Terry lamented this problem in the opinion itself noting the recent contributions by John Lande and Julie Macfarlane and the different ways to structure a collaborative law agreement that might be dispositive. *See id.*

<sup>234</sup> Terry recommends “that when you have a specific client and a specific situation, you carefully consider the interplay between Rule 1.2(c) and Rule 1.1 and make sure that you are satisfied that you are able to provide competent representation.” *Id.* at \*8.

<sup>235</sup> Even though the Pennsylvania rules do not require a written agreement for limitation on the scope of representation, Terry recommends one as “preferable.” *Id.* at \*8.

## COLLABORATIVE LAW

7.5 and joint advertising,<sup>236</sup> Rule 1.16 and withdrawal, Rule 1.2(a) and client's right to settle,<sup>237</sup> Rule 1.7 and nonconsentable conflicts of interest,<sup>238</sup> and prospective waiver of liability.<sup>239</sup> While "not prepared to say that using some kind of collaborative law process in a domestic relations context is a per se violation of the Pennsylvania Rules of Professional Conduct," Professor Terry urged careful consideration of the Rules before going forward.<sup>240</sup>

Particularly troubling to Terry were the issues of client identity, multiple representations, and Rule 1.7 conflicts; limitations on representation under Rule 1.2; and Rule 1.16 termination. These issues, which go to the core of collaborative law, underscore the tension with current rules models. For example, Terry is troubled by the threshold question of client identity. She rejects the concept of "lawyer for the situation" and notes the imperative of clearly identifying the client represented.<sup>241</sup> To the extent that multiple clients are involved and those are two spouses in a contemplated divorce, Terry finds compatibility with Rule 1.7(b) necessary and problematic.<sup>242</sup> Additionally, relying upon the recent research of John Lande<sup>243</sup> and Julie Macfarlane,<sup>244</sup> Terry believes that the interplay between Rule 1.2(c)

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<sup>236</sup> Terry concludes that it is unclear whether joint advertising might lead a court to impute conflicts within a CL group but that careful consideration of the issue was necessary. *See id.* at \*9–10.

<sup>237</sup> Terry instructs that preparation and enforcement of the retainer agreement must keep Rule 1.2(a) in mind and "ensure that the client understands that it is the client's decision whether to settle." *Id.* at \*13.

<sup>238</sup> Terry recommends keeping "Rule 1.7 in mind and consider whether there are any conflicts between the client's interests and your interest in practicing collaborative law." *Id.* at \*14.

<sup>239</sup> Terry concludes that one portion of the materials included for review contained a misleading statement as to prospective waivers. *Id.* The materials stated that the client has a right to independent counsel. *Id.* Pennsylvania rules require the client to actually have independent counsel when prospectively waiving malpractice claims. *Id.*; *see* PA. RULES OF PROF'L CONDUCT R. 1.8(h)(1).

<sup>240</sup> *See* Pa. Informal Op. 2004-24, *supra* note 229, at \*2.

<sup>241</sup> *Id.* at \*3.

<sup>242</sup> "In my view, it is not at all clear whether the objective element of Rule 1.7(b)(1) could be satisfied if you represented both husband and wife in pre-litigation divorce negotiations . . . . My personal view would be to find this element not satisfied and prohibit dual representation of a divorcing husband and wife. I believe that the risks are too large and the lawyer may not be able to effectively judge when he or she is favoring one spouse." *Id.* at \*4.

<sup>243</sup> *See generally* Lande, *supra* note 1.

<sup>244</sup> *See generally* Macfarlane, *supra* note 22.

(limitations on scope of representation) and Rule 1.1 (duty of competence) requires careful consideration of the specific situations of specific clients.<sup>245</sup>

As for compatibility with the Rule 1.16 (the termination/withdrawal rule), Terry posits multiple difficulties. First, there is an open question as to whether Rule 1.16 even applies.<sup>246</sup> As Terry explains, Rule 1.16 applies if one considers the termination agreement inherent in collaborative law as a withdrawal from representation.<sup>247</sup> In contrast, if the situation is one in which the matter for which the lawyer was retained naturally concludes, Rule 1.16 need not be followed.<sup>248</sup> Because of this fundamental problem, Terry recommends the conservative approach of compliance with Rule 1.16.<sup>249</sup> Compliance, however, may be difficult. Of particular importance is complying with one of the permissive withdrawal provisions of Rule 1.16(b).<sup>250</sup> Without deciding the issue, Terry concludes that compliance with Rule 1.16 (c) (seeking permission from the court if an appearance has been made) and 1.16(d) (taking reasonable steps post-withdrawal to protect client's interests) are essential.<sup>251</sup> Additionally, she recommends that the withdrawing lawyer consider why there are grounds for the withdrawal under either the mandatory or permissive provisions of Rule 1.16.<sup>252</sup>

The limitation on the usefulness of the Pennsylvania Informal Opinion in providing answers to the ethical questions raised by collaborative law is obvious. The opinion does not actually answer most of the key issues presented, but merely flags them for lawyer consideration. Even this type of analysis is not controlling. The caveat at the conclusion of the opinion explicitly recognizes the limitation:

The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any court. It carries only such weight as an appropriate reviewing authority may choose. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.<sup>253</sup>

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<sup>245</sup> See Pa. Informal Op. 2004-24, *supra* note 229, at \*7.

<sup>246</sup> *Id.* at \*10–12.

<sup>247</sup> *Id.* at \*10–11.

<sup>248</sup> *Id.*

<sup>249</sup> See *id.*

<sup>250</sup> *Id.* at \*11–12.

<sup>251</sup> *Id.* at \*12.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at \*15.

## COLLABORATIVE LAW

Professor Terry, however, does recognize a potential solution: Because “collaborative law involves a paradigm shift,” it may be “appropriate to have a separate ethics rule or rules for collaborative law lawyers.”<sup>254</sup>

In 2002, the North Carolina State Bar Association issued a formal ethics opinion concerning lawyer participation “in a non-profit organization that promotes a cooperative method for resolving family law disputes although the client is required to make full disclosure and the lawyer is required to withdraw before court proceedings commence.”<sup>255</sup> Despite the lengthy description, the inquiry was clearly about the use of collaborative law to facilitate resolution of family law disputes. Unlike the informal Pennsylvania opinion, the North Carolina State Bar answered discrete questions. These answers, however, illustrate the complexity of finding ethical guidance in this field.

First, the North Carolina opinion addressed whether a lawyer who is a member of a collaborative family law group could represent a spouse if another member represents the other spouse.<sup>256</sup> With little explanation, the opinion concludes: “Yes, provided both lawyers determine that their professional judgment on behalf of their respective clients will not be impaired by their relationship to the other lawyer through the CFL Organization, and both clients consent to the representation after consultation.”<sup>257</sup> While the Pennsylvania opinion found compliance with Rule 1.7(b) problematic, North Carolina sees no such complexity.

This cryptic approach continues as the North Carolina State Bar considered advance agreements limiting the scope of lawyer services. The opinion matter-of-factly declares: “Rule 1.2(c) permits a lawyer to limit the objectives of a representation if the client consents after consultation.”<sup>258</sup> Similarly as to advertising, the formal opinion concludes that brochures describing the collaborative family law approach are permissible provided they are truthful and not misleading under Rule 7.1.<sup>259</sup> This includes contacting the other spouse, if not represented by counsel, to suggest use of the collaborative law process.<sup>260</sup>

On the core issue of voluntary disclosure and its compatibility with the duty of competence, the North Carolina State Bar opinion offers little concrete analysis. It concludes “the lawyer must use his or her professional

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<sup>254</sup> *Id.* at \*2.

<sup>255</sup> N.C. Formal Eth. Op. 1, *supra* note 123, at \*1.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* (citing N.C. RULES OF PROF'L CONDUCT R. 1.7(b)).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at \*2.

<sup>260</sup> *Id.*



judgment to analyze the benefits and risks for the client in participating in the collaborative family law process, taking the disclosure requirements into consideration, and advise the client accordingly.”<sup>261</sup> When directly asked about a disclosure requirement that permits withholding information about adultery even though the general policy is of full disclosure, the opinion provides another nebulous response:

A lawyer may represent a client in the collaborative family law process if it is in the best interest of the client, the client has made 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.<sup>262</sup>

This includes a risk and benefits analysis by the lawyer and client of making and receiving certain disclosures (or not receiving those disclosures).<sup>263</sup> Interestingly, the North Carolina State Bar opinion does not consider the key termination or withdrawal issue at all.

The Kentucky Bar Association recently issued a more thorough examination of the compatibility of collaborative law with ethical rules in June 2005.<sup>264</sup> At the request of Collaborative Law of Central Kentucky, Inc., a nonprofit organization of lawyers promoting the use of collaborative law, the Kentucky Bar Association explored the intersection of the Kentucky Rules of Professional Conduct and collaborative family law.<sup>265</sup> Similar to the Pennsylvania example, extensive materials about the development of collaborative law were presented to the ethics committee.<sup>266</sup> The Kentucky Bar Association, however, took great care in describing collaborative law to establish a baseline definition of the process.<sup>267</sup>

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Ky. Bar Ass’n Eth. Comm., Op. E-425 (2005), available at [http://www.kybar.org/documents/ethics\\_opinions/kba\\_e-425.pdf](http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf) [hereinafter Ky. Op. E-425]; see *Concept of Collaborative Lawyering Receives Qualified Approval in Kentucky*, 21 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 453 (2005).

<sup>265</sup> Although the opinion notes the use of collaborative law in resolving other disputes, it limited its discussion to family law noting that “[c]ollaborative law is used primarily in family law cases.” Ky. Op. E-425, *supra* note 264, at 2.

<sup>266</sup> *Id.*

<sup>267</sup> The opinion states as follows:

The goal of the collaborative law process is to reach an agreement through a cooperative process. It is based upon a problem-solving model rather than an adversarial model and tends to focus on the future, rather than the past; on

## COLLABORATIVE LAW

Before even addressing the specific inquiries, the ethics committee *sua sponte* offered what it described as “three very important observations.”<sup>268</sup> First, “the collaborative law agreement between a lawyer and the client cannot alter the lawyer’s ethical obligations under the Rules of Professional Conduct.”<sup>269</sup> Second, because the lawyer’s duty of competency, “[a] lawyer cannot advise a client to use the collaborative process without assessing whether it is truly in the client’s best interest.”<sup>270</sup> Third, “because the relationship between the lawyer and the client is different from what would normally be expected, the lawyer has a heightened obligation to communicate with the client regarding the representation and the special implications of collaborative law process.”<sup>271</sup> These heightened obligations were grounded on the premise that the collaborative process is “dramatically different from the adversarial process.”<sup>272</sup>

The first issue addressed by the Kentucky ethics opinion is whether a lawyer could participate in an agreement requiring full disclosure.<sup>273</sup> The opinion rejects any potential violation of the so-called duty of zealous representation because no such duty exists under Kentucky’s Rules of Professional Conduct.<sup>274</sup> Rather, the Rules impose duties of competence and diligence.<sup>275</sup> These requirements do not prohibit nonadversarial forms of representation. Indeed, if the client’s objective is to “obtain a divorce in the most amicable way possible, then it is incumbent upon the lawyer to help the

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relationships rather than facts; and on rebuilding relationships rather than finding fault. As part of the collaborative law process, the lawyers and the parties are normally expected to sign an agreement setting forth the rules of the negotiations and the expectations of the parties. Each party has separate representation. All agree to open, face-to-face negotiations with both lawyers and clients present (four-way negotiations). The formal discovery process is eliminated, but the parties agree to full and timely disclosure of all material information and to act in good faith. If a lawyer learns that his or her client has acted in bad faith or withheld or misrepresented information, the agreement encourages the lawyer to withdraw. If the dispute cannot be resolved through the collaborative process, it is agreed that the lawyers will withdraw and will not participate in subsequent litigation involving the same or substantially related matter.

*Id.*

<sup>268</sup> *Id.* at 3.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 4.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*; see KY. SUP. CT. RULES 3.130, RULES OF PROF’L CONDUCT R. 1.1; 1.3.

client find the means to accomplish that goal.”<sup>276</sup> Thus, the opinion gives a qualified yes to the first issue.

The second issue the opinion examines is withdrawal by the lawyer if the client withholds or misrepresents information.<sup>277</sup> Grounding its analysis in Rule 1.16, the opinion notes that withdrawal would be permitted if the client insists on pursuing an objective the lawyer deems repugnant or imprudent or the client fails substantially to fulfill an obligation to the lawyer after reasonable warning.<sup>278</sup> Consequently, the opinion concludes that “[i]f the client is violating one of the core provisions of the collaborative agreement, which both the lawyer and the client have signed, it would appear that the lawyer has the right to withdraw under one of the above provisions.”<sup>279</sup> The opinion also addresses the fact that the lawyer must withdraw under certain mandatory circumstances as required by the Rules, and it approves of the process of noisy withdrawal under certain circumstances.<sup>280</sup>

The Kentucky Bar Association also explores the compatibility of the disqualification provision with Rule 5.6 and its prohibition on agreements restricting a lawyer’s right to practice as part of an employment agreement or settlement of a controversy between parties.<sup>281</sup> The opinion makes swift work of this issue by concluding that the disqualification agreement “is not the kind of restrictive covenant contemplated by Rule 5.6.”<sup>282</sup> The ethics committee adds that Rule 1.2 on limitation of the objectives of representation also requires that the client be properly informed and consent to the limitation, including explanation of the costs incurred by disqualification.<sup>283</sup>

The final issue the opinion considers relates to the formation of collaborative law groups, solicitation, and advertising.<sup>284</sup> On these issues, the ethics committee provides no guidance except to say that lawyers are free to act consistent with the Rules of Professional Conduct.<sup>285</sup> Refusing to

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<sup>276</sup> Ky. Op. E-425, *supra* note 264, at 5. The opinion quotes at length from Sheila M. Gutterman, a collaborative law practitioner credited with founding collaborative law in Colorado. *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*; see KY. SUP. CT. RULES 3.130, RULES OF PROF’L CONDUCT R. 1.16.

<sup>279</sup> Ky. Op. E-425, *supra* note 264, at 5. Of course, the lawyer must comply with Rule 1.16(c) and (d) requiring court approval if an appearance has been made and taking steps to protect the client’s interest following termination. *Id.* at 5–6.

<sup>280</sup> *Id.* at 6–7.

<sup>281</sup> See KY. SUP. CT. RULES 3.130, RULES OF PROF’L CONDUCT R. 5.6.

<sup>282</sup> Ky. Op. E-425, *supra* note 264, at 7.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 8.

<sup>285</sup> *Id.*

## COLLABORATIVE LAW

speculate, the ethics committee hints that the Kentucky Advertising Commission is better suited to address such questions.<sup>286</sup>

In sum, the Kentucky Bar Association gives tentative approval to the use of collaborative family law and its compatibility with the Kentucky Rules of Professional Conduct. “In the final analysis, there may be situations where the collaborative process will serve the interests of the client and will not create ethical dilemmas for the lawyer.”<sup>287</sup> Despite this approval, the Bar Association maintains a cautionary tone. “Any lawyer who engages in the collaborative process must proceed with the utmost caution in order to avoid all potential ethical pitfalls.”<sup>288</sup> Moreover, this formal opinion, like the others discussed in this section, are only advisory.<sup>289</sup>

While the sample is small, the examination of the compatibility of collaborative law with the rules of ethics undertaken by state ethics committees is instructive. First, the sheer volume of potential ethical rules implicated by collaborative law is striking, as the Pennsylvania and Kentucky opinions amply demonstrate.<sup>290</sup> Second, there is a notable lack of consensus as to which specific rules are implicated. For example, the key termination or withdrawal issue is analyzed by Pennsylvania under Rule 1.16 and Rule 1.2, whereas Kentucky viewed it primarily under Rule 5.6 and Rule 1.2;<sup>291</sup> North Carolina omitted the issue all together.<sup>292</sup> Even when there is agreement on what ethical rule applies, the analysis of the ethics committees often conflicts. Consequently, Pennsylvania finds compliance with Rule 1.7 on conflicts both essential and problematic while North Carolina breezed through the issue in a single sentence.<sup>293</sup> Kentucky does not even address the conflicts issue. Thus, the limited analysis by state ethics committees fails to yield consensus on even what questions to ask, much less the answer. With major ethical questions remaining unanswered, the stage is set for a superior

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 9.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*; see KY. SUP. CT. R. 3.530.

<sup>290</sup> See *supra* notes 234–40 and accompanying text (noting plethora of ethical rules considered by Pennsylvania); Ky. Op. E-425, *supra* note 264, at 1 (noting consideration of Rules 1.1, 1.2, 1.3, 1.4, 1.6, 1.16, 2.1, 2.2, 5.6, and 8.3).

<sup>291</sup> The Kentucky Bar Association opinion considered Rule 1.16 but only on the limited question of termination or withdrawal for failure of the client to disclose information. See Ky. Op. E-425, *supra* note 264, at 5.

<sup>292</sup> Compare Pa. Informal Op. 2004-24, *supra* note 229, at \*10-12, with Ky. Op. E-425, *supra* note 264, at 7-8, with N.C. Formal Eth. Op. 1, *supra* note 123.

<sup>293</sup> See *supra* note 242 and accompanying text (describing Pennsylvania application of Rule 1.7); *supra* notes 256–57 and accompanying text (describing North Carolina application of the same rule).

approach to resolve the ethical issues surrounding collaborative law—an amendment to the Model Rules of Professional Conduct.

## V. A NEW MODEL RULE OF PROFESSIONAL CONDUCT

### A. *Why a Model Rule?*

First adopted in 1983, the American Bar Association's Model Rules of Professional Conduct remain the chief source of ethical rules. Most states have adopted codes based on the Model Rules.<sup>294</sup> As such, it makes sense to integrate a proposed ethical rule concerning collaborative law into the Model Rules if possible.<sup>295</sup> While the precise placement of a new Model Rule is not

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<sup>294</sup> Oregon is the most recent convert, adopting new rules based on the Model Rules effective January 1, 2005. See OREGON RULES OF PROF'L CONDUCT (2005), available at [http://www.osbar.org/\\_docs/rulesregs/ORPC.pdf](http://www.osbar.org/_docs/rulesregs/ORPC.pdf). Forty-five jurisdictions now follow a Model Rules based ethical code. This includes forty-four states and the District of Columbia. For a comprehensive listing and websites addresses for each state code see ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT § 1:3 (2005) (Model Standards/State Ethics Rules). In contrast, the ABA's Model Code of Professional Responsibility is of dwindling relevancy. Only a handful of states retain professional rules based on the older Model Code. The holdouts include: Iowa, Nebraska, New York, and Ohio. See *id.* California and Maine do not follow either the Model Code or Model Rules. *Id.*

At least one of these jurisdictions is on the verge of shifting to the Model Rules format. Ohio adopted the Ohio Code of Professional Responsibility on October 6, 1970, basically enacting the ABA's Model Code. On March 10, 2003, the Chief Justice of the Supreme Court of Ohio announced the creation of a special Task Force on the Rules of Professional Conduct. The eighteen-member Task Force is charged with engaging in comprehensive review of the Ohio Code of Professional Conduct, the Model Rules, and the ABA Ethics 2000 revisions. The Task Force will ultimately file a report with the Supreme Court as to what revisions should be made in Ohio. The Task Force has just completed the public comment stage on the last batch of proposed rules. According to the Task Force, "[b]y adopting the Model Rules, Ohio will become more relevant in national discussions on the subject of legal ethics. See Supreme Court Task Force on Rules of Professional Conduct, *Frequently Asked Questions* (May 2005), available at <http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/faq.doc>. A draft of the proposed rules is available at [http://www.sconet.state.oh.us/Atty\\_Svcs/ProfConduct/proposal/default.asp](http://www.sconet.state.oh.us/Atty_Svcs/ProfConduct/proposal/default.asp).

<sup>295</sup> Professor Peppet discusses the relative merits of context-specific codes compared to Model Rules in his recent article where he ultimately advances his new contract model of legal ethics. See Peppet, *supra* note 50, at 511–14. The solution proposed by this article is a compromise that sacrifices greater detail (that would be available in a stand-alone code of ethics) in favor of maintaining the unifying advantages of placement in the Model Rules. Whether this places me in the "cottage industry" of producers of context-specific codes is uncertain. In other contexts, I have been a staunch advocate for transsubstantive rules. See, e.g., Christopher M. Fairman, *Heightened*

## COLLABORATIVE LAW

a priority issue, there is a convenient home. In 2002, Model Rule 2.2 relating to lawyers as intermediaries was eliminated. This leaves a welcoming spot—and in an appropriate part of the Rules—for this proposal to slip in to. The text of proposed new Rule 2.2 relating to collaborative law follows.

### *B. Proposed Model Rule 2.2 and Comments*

#### Rule 2.2 The Collaborative Lawyer

(a) A lawyer may serve as a collaborative lawyer. Collaborative law is a procedure in which the parties and their lawyers agree to use their best efforts and participate in good faith to resolve a dispute on an agreed basis without resorting to judicial intervention. An agreement to use collaborative law must be the result of informed consent, confirmed in writing, with terms that can be reasonably understood by the parties, and signed by all parties and their lawyers.

(b) A collaborative lawyer shall be competent by training and experience to engage in collaborative representation.

(c) While all collaborative lawyers engaged in resolving a dispute share a common commitment to the collaborative law process, a collaborative lawyer represents the client who has retained the collaborative lawyer's services.

(d) A collaborative lawyer shall facilitate the resolution of all issues in the dispute using cooperative strategies, instead of adversarial techniques. A collaborative lawyer shall not initiate or threaten to initiate any contested court procedure.

(e) A collaborative lawyer shall make a voluntary, full, honest, and open disclosure of all relevant information that a reasonable decision maker would need to make an informed decision about each issue in the dispute.

(f) All information arising from and relating to a collaborative representation is confidential including any written or verbal communications or analysis of any third-party experts used in the collaborative law process.

(g) A collaborative lawyer shall withdraw from representation if:

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*Pleading*, 81 TEX. L. REV. 551, 622–23 (2002) (rejecting heightened pleading in part due to transsubstantivity advantages). I believe that modifying the existing Model Rules to accommodate collaborative law is not wholly inconsistent with this view.

(1) either party chooses to litigate;

(2) the parties do not reach a settlement through the collaborative law process or other forms of alternative dispute resolution mutually agreed upon by the parties; or

(3) either party knowingly withholds or misrepresents information having a material bearing on the case or otherwise acts to undermine the collaborative law process.

Following withdrawal, the collaborative lawyer shall assist the client in selection of new counsel.

### COMMENT

[1] Collaborative lawyering is a distinct representational role. A collaborative lawyer is not a traditional advocate zealously asserting the client's position under the rules of an adversary system. Nor is the collaborative lawyer merely acting as a negotiator seeking an advantageous result for the client. While a collaborative lawyer is helping the parties to resolve a dispute, the lawyer is still engaged in a representational role and is not serving as a third party neutral. A lawyer acts as a collaborative lawyer under this Rule when, in the context of a dispute, the lawyers and their clients mutually agree to use collaborative law procedures to resolve the issues between the clients. Collaborative law is a form of voluntary conflict resolution designed to minimize the negative economic, social, and emotional consequences often associated with the adversarial process. A lawyer who undertakes collaborative representation must be committed to not only avoiding litigation, but in fostering an atmosphere of honesty and cooperation conducive to resolving the issues in dispute justly and equitably.

[2] Collaborative law not only involves an orientation away from adversarial techniques and litigation, but requires a voluntary limitation on the scope of representation between lawyers and clients. Consequently, it is essential that the client's decision to use collaborative law is the result of fully informed written consent, signed by all parties and lawyers. This is typically done through the use of a participation agreement, drafted with terms that can be reasonably understood by all parties, and that specifically delineates the collaborative law process.

[3] Collaborative lawyers have a duty to use their best efforts and participate in good faith to resolve a dispute without resorting to judicial intervention and to ensure their clients do the same. While the collaborative lawyer is committed to settlement through the collaborative process, there is

## COLLABORATIVE LAW

no guarantee of success. Collaborative lawyers and their clients must strive to reach a cooperative solution, but realize that the process may fall short.

[4] A collaborative lawyer's duty to avoid adversarial legal proceedings does not preclude the collaborative lawyer from complying with applicable requirements to provide notice to the court of participation in the collaborative law process, obtain orders to effectuate a collaborative law participation agreement or a settlement agreement, or similar noncontested court procedure.

[5] A collaborative lawyer's duty to provide competent representation is not unique. Rule 1.1 and the factors presented in the comment to determine whether a lawyer has the requisite knowledge and skill necessary for collaborative representation still apply. However, not every lawyer is suited for collaborative law, nor is every client. A lawyer must be extremely vigilant to ensure the lawyer has not only the training and experience, but the mindset to follow the collaborative process. Similarly, one component of competence for a collaborative lawyer is the ability to determine if a client is suitable for participation in collaborative law.

[6] In its infancy, much confusion generated around the compatibility of collaborative law with the Rules due to mischaracterizations that the collaborative lawyer represented both parties, the family, or the process itself. A collaborative lawyer does not represent the other party in the traditional sense. Nor is a collaborative lawyer engaging in multiple representations. Nor is a collaborative lawyer acting as a lawyer for the situation. A collaborative lawyer represents a single client. Each collaborative lawyer has been instructed by the respective client to facilitate resolution of a common dispute using collaborative law techniques. Therefore, collaborative lawyers engaged in fulfilling their separate representational roles for their individual clients stand in the same relationship to the dispute—both have been charged to facilitate resolving it. This does not, however, transform the character of the representation of a single client into a joint representation.

[7] A collaborative lawyer's role is to provide an organized framework that will make it easier for the parties to reach an agreement. A collaborative lawyer should help the parties communicate, identify issues, ask questions, and suggest solutions. Collaborative lawyers and the parties must work together to keep the process honest, respectful, and productive.

[8] Collaborative law is based on the use of informal discussions and conferences, often called four-way conferences, where the parties and collaborative lawyers engage in good faith participation. Collaborative lawyers often use interest-based bargaining and creative problem solving



strategies. Collaborative lawyers should help the parties take a reasoned approach on all issues.

[9] Collaborative lawyers should encourage the use of joint experts and consultants. All joint experts and consultants retained through the collaborative law process will be directed to work in the same collaborative manner to resolve issues without resorting to judicial intervention.

[10] The collaborative process requires voluntary production of all information that a reasonable decision maker would need to decide an issue. If a client discloses to a collaborative lawyer relevant information with the instruction that the lawyer not disclose it, the collaborative lawyer is ethically bound by paragraph (e) to advise the client that refusal to disclose relevant information is contrary to the principles of collaborative law. The collaborative lawyer must refuse to proceed unless the information is disclosed. If, after advice and counsel, the client continues to refuse voluntary disclosure, the collaborative lawyer must withdraw from representation and terminate the collaborative process in accordance with paragraph (g).

[11] The collaborative lawyer should not take advantage of inconsistencies, inadvertent misstatements of fact or law, or miscalculations, but should disclose them and seek to have them be corrected. If a collaborative lawyer discovers inconsistencies, inadvertent misstatements of fact or law, or miscalculations, made by the client, any consulting professional, or the other collaborative lawyer, the lawyer should inform the person of the discovery and request the person to make the required disclosure. The collaborative lawyer must disclose the lawyer's own inconsistencies, misstatements, and miscalculations.

[12] Confidentiality of the collaborative process is essential. A collaborative lawyer shall not disclose information arising from and relating to the collaborative representation whatever the source unless required or permitted to do so under Rules of Professional Conduct or other applicable law. The collaborative lawyer should ensure that the client and consulting professional also adhere to strict confidentiality provisions.

[13] Paragraph (g) specifies the collaborative lawyer's duty to withdraw. A central feature of collaborative law is that neither collaborative lawyer may represent the parties in litigation. If either party undertakes contested judicial action, the collaborative lawyers must withdraw. Two other situations also require termination of representation. If the parties are unable to settle the issues in dispute through the collaborative process, the collaborative lawyers should withdraw. However, nothing in this section precludes the collaborative lawyers from continuing to represent the clients using other alternative dispute resolution processes for all or part of the

## COLLABORATIVE LAW

issues in dispute provided the parties and collaborative lawyers mutually agree. A collaborative lawyer must also withdraw if either party abuses or undermines the collaborative process, such as knowingly withholding or misrepresenting information having a material bearing on the case. If a collaborative lawyer withdraws or is terminated for any other reason, the party may retain a new collaborative lawyer and continue the process.

[14] The collaborative lawyer shall explain to the parties that in the event of termination of representation, the lawyer will assist the client in obtaining new counsel; however, each party will incur additional attorneys' fees to hire new counsel.

[15] A withdrawing collaborative lawyer must comply with applicable law requiring notice to a tribunal when terminating representation.

## VI. CONCLUSION

Proposed Model Rule 2.2 is an attempt to advance the conversation concerning the ethics of collaborative law from its current position. Instead of speculating on the application of Rules that were not drafted with a collaborative model in mind, Proposed Model Rule 2.2 allows energy to be invested in what the ethics of collaborative law practice should be. By creating a stand alone Model Rule, there can be no question that the practice of collaborative law can be consistent with professional ethics. The major ethical questions of compatibility with being a zealous advocate, the appropriate duty of candor, the scope of representation and termination, and confidentiality are all addressed. Proposed Model Rule 2.2 is a start.

There are certainly open questions concerning the ethics of collaborative practice that are not included in Proposed Model Rule 2.2 that warrant continued discussion. For example, questions concerning attorneys' fees may need to be addressed. There are some collaborative law groups that view attorney fee parity as important to the collaborative process and include fee parity in their codes of conduct.<sup>296</sup> Given the absence of the provision from other guidelines, there does not appear to be consensus on fee parity as an essential ethical requirement. Professor Macfarlane's research also indicates that increased transparency may be necessary concerning collaborative law fee structure. In particular she notes that the practice of billing for all

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<sup>296</sup> See TESLER, *supra* note 5, at 144 ("We agree that our lawyers are entitled to be paid for their services, and the first task in a collaborative law matter is to ensure parity of payment to each of them."); San Francisco Collaborative Law Group, Statement of Principles of Collaborative Law, *supra* note 159 ("The Collaborative process requires parity of payment to each attorney.").

discussions made between members of the collaborative team leads to disputes that could be avoided by better informing the client in advance.<sup>297</sup>

By far, the most significant issue omitted from Proposed Model Rule 2.2 is the question of privilege. The concept of a confidential relationship between an attorney and client is supported by three interrelated doctrines: attorney-client privilege, work product, and confidentiality established by professional ethics.<sup>298</sup> The Model Rules control only one of these areas—confidentiality by professional ethics.<sup>299</sup> Consequently, Proposed Model Rule 2.2 does not include provisions for clarifying the applicability of privilege or work product doctrine. This is not to say that explicit extension of an attorney-client privilege or work product should not be addressed.<sup>300</sup> Both North Carolina<sup>301</sup> and Texas<sup>302</sup> present models for experimentation. However, these two elements of the confidential relationship must be governed by state law and evidentiary rules; they are not properly part of the Model Rules.

As collaborative law continues to spread both across North America and outside of family law disputes, other ethical issues will undoubtedly surface. This does not, however, provide a reason to wait. Concerns about the compatibility of collaborative law with the existing legal ethical regimes should not stand as a roadblock. Collaborative law probably can be shoehorned into an ill-fitting pair of existing ethical shoes. But why? The reality is that the drafters of the Model Rules were not considering collaborative law when they were penned, adopted, or amended. At the same time, the thousands of lawyers currently engaged in collaborative law practice are not engaged in unethical conduct merely by following collaborative law procedures. Rather, collaborative law is squarely in the mainstream of nonadversarial alternative dispute resolution techniques and its practice is an ethically appropriate representational role for an attorney. Adoption of Proposed Model Rule 2.2 answers any lingering doubts.

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<sup>297</sup> See Macfarlane, *supra* note 22, at 211 (describing fee transparency issue).

<sup>298</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2004).

<sup>299</sup> *Id.*

<sup>300</sup> See Spain, *supra* note 72, at 169 (suggesting need to explore privilege).

<sup>301</sup> N.C. GEN. STAT. § 50-77 (2005) (“All communications and work product of any attorney or third-party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties.”).

<sup>302</sup> See *supra* notes 208–213 and accompanying text (discussing Texas collaborative law privilege).