

Collaborative Lawyers' Duties to Screen Cases for Appropriateness and Obtain Clients' Informed Consent

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Collaborative Law (CL) is an impressive dispute resolution process that offers significant benefits in appropriate cases. In the pure model of CL, the lawyers and clients sign a "participation agreement" promising to use an interest-based approach to negotiation and fully disclose all relevant information. A key element is a "disqualification agreement" which provides that both CL lawyers would be disqualified from representing the clients if the case is litigated. It is intended to motivate parties and lawyers to focus exclusively on respectful, interest-based negotiation and voluntary disclosure of information because termination of a CL process would require both parties to hire new lawyers if they want legal representation. Professor Julie Macfarlane's study found that CL negotiators generally did not engage in adversarial negotiation and both clients and their attorneys were satisfied with the process.

While CL often provides real benefits, it can also pose significant, non-obvious risks in some cases. Once parties get into a CL process, it is purposely designed to keep them in the process. If they do not produce a timely and satisfying agreement, however, they may exhaust resources that they might need to resolve the matter through litigation. Although the exit barrier of the disqualification agreement is not insurmountable (as some cases do terminate without agreement), it can have a major impact on the process. A recent study by Michela Keet and her colleagues described one party in CL who "went home and lost sleep over the fear of losing her lawyer" and said that it "felt like another victimization thing" when her husband "threatened not to show up." Two other parties initially felt hopeful about the process and both "made superficial gains" but as they "came closer to reaching agreement," their spouses "used the power to withdraw at the very end, leaving both feeling violated."

We reviewed eight books by CL experts and the Web sites of 126 CL practice groups in the US to identify factors relevant to the appropriateness of CL. These factors include: (a) the motivation and suitability of the parties to participate effectively in a collaborative process, (b) the trustworthiness of the parties, (c) whether a party is intimidated from participating effectively in the collaborative process, (d) whether there has been a history of domestic violence between the parties, (e) whether a party has a mental illness, (f) whether a party is abusing alcohol or other drugs, (g) whether the lawyers are suitable for handling the case collaboratively, (h) whether the parties would use professionals in addition to collaborative lawyers, (i) the parties' ability to afford new lawyers if the

collaborative process terminates without agreement, and (j) the parties' views about the risks of disqualification of lawyers.

Rules of legal ethics require CL lawyers to screen cases for appropriateness and obtain informed consent of prospective CL clients. Rule 1.2 of the Model Rules of Professional Conduct permits "reasonable" limitations of scope of employment and thus requires lawyers to consider whether CL would be reasonable under the circumstances. Similarly, Rule 1.7 requires lawyers to screen potential CL cases to determine whether there is a significant risk that a conflict of interest would materially limit the lawyers' representation and whether the lawyers reasonably believe that they can provide competent and diligent representation. Both rules require CL lawyers to use a thorough and balanced process in obtaining clients' informed consent. These ethical rules can be used to determine the standard of care should there be malpractice lawsuits or disciplinary complaints by clients against CL lawyers.

The draft Uniform Collaborative Law Act states that "before a prospective party executes a collaborative law participation agreement, a prospective collaborative lawyer shall . . . inquire about and discuss with the prospective party factors relevant to whether collaborative law is appropriate for the prospective party's matter." It also requires CL lawyers to make a reasonable inquiry about whether there has been a history of domestic violence between the parties. It creates a presumption against use of CL if the lawyer reasonably believes that there has been a history of domestic violence unless: (1) the CL process is requested by the parties, (2) the lawyers reasonably believe that the parties' safety can be adequately protected, and (3) the lawyers are familiar with nationally-accepted standards of practice for representing victims of coercion, manipulation and violence. The Act requires lawyers to obtain the client's informed consent in every CL case.

The Macfarlane and Keet studies found that although some CL lawyers are very conscientious about screening cases and obtaining informed consent, others are not. This is particularly important considering efforts to promote CL. Our review of local CL practice group Web sites shows that they generally provide glowing portrayals of CL, often with little or no indication of any risk.

Obviously, no one can know in advance how any process will work or what the most appropriate process (or processes) would be in a given case. There is no uniquely "right" answer about which process is best in each case. Ultimately, the parties must choose for themselves. These choices should be made based on a consideration of the

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parties' capabilities and interests, potential risks in a case, the parties' preferences for different types of professional services, and their preferences for certain risks over others. Thus, even if a case involves some risks, CL lawyers may undertake a CL representation if they comply with the ethical rules. CL leaders and trainers can advance the interests of CL clients and the acceptance and growth of the CL field by encouraging CL lawyers to comply with their professional obligations to screen cases and obtain informed consent.

This is adapted from John Lande and Forrest S. Mosten, Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law, 25 Ohio State Journal on Dispute Resolution (forthcoming 2010). It is available at <http://www.law.missouri.edu/lande/publications.htm#ccl> and <http://www.mostenmediation.com>.