

The Top Ten Reasons Collaborative Practitioners Give for Not Acknowledging Risks of Collaborative Practice (Particularly the Disqualification Agreement)

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When I started studying Collaborative Practice (CP) in 2002, I wondered whether CP would be inconsistent with a (supposed) duty of zealous advocacy. I didn't think a lot about the disqualification agreement (which precludes Collaborative lawyers from representing clients in contested litigation). After a short time, I realized that "zealous advocacy" generally isn't a real ethical problem for CP, but that there are real risks related to the disqualification agreement.

The risks related to the disqualification agreement do not make CP illegitimate. CP is a legitimate practice if Collaborative lawyers obtain clients' informed consent as required by legal and ethical authorities as well as CP theory. Informed consent includes a candid explanation of the benefits and risks of CP and reasonable alternatives. If parties give informed consent, they accept responsibility for taking these risks in exchange for the benefits of CP.

In a recent article, Forrest Mosten and I analyzed the discussion of appropriateness of CP in eight CP books. All acknowledged that CP is not appropriate in some cases and recommended that Collaborative practitioners analyze the appropriateness of CP in each case.² The books generally listed similar factors that they identified as relevant to appropriateness, with some variations. All eight books identified personal motivation and suitability, trustworthiness, and domestic violence as relevant. More than half identified mental illness, substance abuse, and the suitability of lawyers as relevant factors. Three books mentioned fear or intimidation and two books listed risks of disqualification. Mosten and I also analyzed how CP practice group websites addressed these issues, some of which included links to articles about CP.

Risks of Disqualification

Although the books, websites, and articles we analyzed did not address risks of disqualification very much, they did include some discussion. For example, Richard Shields and his colleagues wrote, "A collaborative client may experience a profound sense of failure if the CFL [Collaborative Family Law] process does not result in an

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²John 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 2009), available at <http://www.law.missouri.edu/lande/publications.htm>.

agreement. He is then put to the delay and additional cost of retaining another lawyer to act in the adversarial arena.”³ Douglas Reynolds and Doris Tennant wrote:

The collaborative attorney, both orally and in the engagement letter to the client, must clarify the principles further espoused in the Participation Agreement, including that the lawyers must withdraw if the case heads to court. Clients are advised that a dishonest party could take advantage of the collaborative process to delay settlement or obtain an advantage in subsequent litigation.⁴

An article by David Hoffman and Rita Pollak made the same point. They stated:

Perhaps the most serious problem for the clients is the additional costs if collaborative negotiations break down and the original attorneys must withdraw. Collaborative law can also be abused: for example, parties with greater financial resources could feign an interest in the collaborative process in order to take advantage of its cooperative discovery practices, and then, because they can better afford to change counsel, resist settlement.⁵

In an interview, CP founder Stuart Webb made a similar point. Asked who may not be suited to CP, Webb responded, “If you get a CEO-Type-A person, they might get about a quarter into the process and say, ‘This is ridiculous. I’ll make her an offer sometime, and she’ll accept it or not—I’m out.’ You can’t do anything about that.”⁶

The ethical rules and opinions require Collaborative lawyers to inform clients about risks of disqualification. For example, a Kentucky ethics opinion identifies a list of risks that Collaborative lawyers must advise clients about:

The client must consent to the limited representation, which means he or she must be advised of the limited nature of the relationship and the implications of the arrangement. For example, obtaining new counsel will entail additional time and cost; the client may feel pressured to settle in order to avoid having to obtain new counsel; and the failure to reach a

³Richard W. Shields et al., *Collaborative Family Law: Another Way to Resolve Family Disputes* 55 (2003).

⁴Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, Boston Bar Journal, Nov. 2001, at 1, 4.

⁵David A. Hoffman & Rita S. Pollak, *Collaborative Law Looks to Avoid Litigation*, Massachusetts Lawyers Weekly, May 8, 2000.

⁶Liz Halloran, *The New Way to Divorce: Splitting up Without a Judge*, U.S. News & World Reports, Sept. 28, 2006.

settlement, necessitating new counsel, is not within the exclusive control of the client—the opponent can effectively disqualify both counsel.⁷

A New Jersey opinion states that “the lawyer’s requirement of disclosure of the potential risks and consequences of failure is concomitantly heightened, because of the consequences of a failed process to the client, or, alternatively, the possibility that the parties could become ‘captives’ to a process that does not suit their needs.”⁸

Studies by Julie Macfarlane and Michela Keet and her colleagues found that although some Collaborative lawyers are very conscientious about obtaining informed consent, others are not. Moreover, some CP parties felt that they were seriously hurt by the disqualification agreement. Macfarlane wrote that some parties found that “the pressure to stay in the process may become extreme and inappropriate” because of the disqualification agreement. She wrote that “one of the clients clearly experienced a form of entrapment: ‘Now that we’re this far, it’s hard to leave. I have already spent around [\$X] and all of this time—what do I have to show?’”⁹ The Keet study described one party in a Collaborative case 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 husbands “used the power to withdraw at the very end, leaving both feeling violated.”¹⁰

A recent court case illustrates a possible failure to properly screen a case for CP. In a divorce case, the wife had a child named Charles resulting from an affair in 2004 and she started another affair in February 2007. In the spring of 2007, she suggested that the couple separate and use a CP process. Around the time of the separation, the husband became “suspicious about Charles’s parentage” because of jokes that “Charles looked nothing like him.” In the affair the wife began in 2007, she spent

large blocks of time away from plaintiff and her children while embarking on numerous trips with [her lover] M., including one in which they traveled to Argentina for 18 days. During the course of these trips, plaintiff was left to care for the children, in at least one instance taking them on vacation by himself, while defendant remained largely incommunicado, refusing to provide contact information to her husband. Plaintiff also avers that

⁷Kentucky Bar Association Ethics Committee, Opinion E-425, 7-8 (2005).

⁸New Jersey Ethics Opinion 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055, 2005 WL 3890576, *5 (2005).

⁹Julie Macfarlane, The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases 39, 69 (2005).

¹⁰Michaela Keet et al., Client Engagement Inside Collaborative Law, 24 Canadian Journal of Family Law. 145, 191, 198-99 (2008).

during one family vacation to San Diego, M. secretly followed the family to the West Coast, where defendant shunned dinner and day trips with her husband and children so that she could spend time with M.¹¹

Clearly, these facts indicate that the wife was not trustworthy and that the husband was foolish to enter a CP process with her. The court found that the wife defrauded the husband, who was entitled to recover the fees he paid in the CP process. The husband was a corporate attorney and thus presumably was more sophisticated than many parties who consider CP. Yet even this presumably sophisticated party and his CP lawyer may have failed to consider serious warning signs that CP would be inappropriate. The facts in the court opinion raise serious questions about whether the parties' CP lawyers complied with the duty to screen the case for appropriateness or obtain informed consent, though the opinion did not address this issue.

Top Ten Reasons

In personal conversations, I have found many CP proponents to be reluctant to acknowledge risks of CP, particularly the disqualification agreement. The following are the top ten reasons I have heard in declining to acknowledge risks of CP. Although there is some truth in the following arguments, they divert attention away from the risks of CP.

10. The CP movement is too fragile to openly acknowledge risks now. It is under attack by lawyers (who don't "get it" and/or who are "out to get it") and the movement needs to get stabilized before it can openly acknowledge problems.
9. Litigation is much riskier than CP. If lawyers don't have to get clients' informed consent to use litigation, why should Collaborative lawyers have to get informed consent to use CP?
8. There is a high settlement rate in CP cases, so parties are satisfied with it. There haven't been any lawsuits against Collaborative lawyers.
7. I haven't seen risks of CP in my cases.
6. I routinely provide thorough explanations of the risks to my clients. And at the first four-way meeting, we go over the participation agreement in great detail. (Unspoken: But I won't acknowledge to you that there are risks caused by the disqualification agreement – and it is not one of the things that I generally tell clients.)
5. If Collaborative lawyers tell clients about the risks and the option of Cooperative Practice, why would they ever use CP? They will just take the "easy way out" by using Cooperative Practice.

¹¹Howard S. v. Lillian S., 876 N.Y.S.2d 351, 357 (2009) (Nardulli, J., dissenting).

4. Julie Macfarlane's study showing risks was done a long time ago and things have changed a lot since then. Her study focused on only a few, unrepresentative locations.
3. Studies showing risks of CP have small samples.
2. I think you're right that there are some problems, but I can't say this publicly because colleagues may not respect me or give me referrals in the future.
1. The dog ate my homework. (Ok, I haven't heard this one, but it reflects similar unwillingness to acknowledge the risks as the preceding arguments.)

The Right Thing to Do

Acknowledging risks of CP does not preclude its use because all processes have risks and parties may legitimately prefer the benefits and risks of CP over other those in other processes. It is understandable that CP practitioners may fear that if they acknowledge the risks of CP, they may lose CP cases and even undermine their professional identity. Nonetheless, full disclosure and informed consent are embodied in the highest ideals of the Collaborative field. Candidly and publicly acknowledging the risks of disqualification should not reduce the number of appropriate cases or undermine CP's legitimacy if done properly. It is also the right thing for the Collaborative field to do.

Postscript

On October 24, 2009, Nancy Cameron and I presented a program entitled, "Assisting Clients with Informed Process Choice: Assessment and Ethical Obligations," at the annual networking and educational forum of the International Academy of Collaborative Professionals. At this session, some Collaborative practitioners were much more candid about acknowledging risks of CP than I had previously heard. Hopefully this reflects increasing self-confidence and openness that will continue to grow in the future.