

Client Self-Determination in the Collaborative Process

by Kimberly P. Fauss

What is the lawyer's responsibility to the client who has problems more complex than ethical standards address? Lawyers are trained to move beyond simple fixes to the deeper roots of a dispute. The ethics of legal practice prompts us to reflect on how our choices protect the client's interests as well as promote client self-determination. Lawyers develop an understanding of conflict and negotiation skills to meet our clients' needs and help them make informed choices.

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There is no practice more focused on the tension of this balancing act than that of family law. Clients are often in distress when they come to us, and their goals may seem elusive. The lawyer is a pivotal advisor during the emotional drama by providing sound information and support. Clients now have more choices than ever when they seek counsel during separation and divorce.

Traditional litigation practice relies upon a formal and predictable structure to protect the client's legal interests. Collaborative practice provides a structure within which clients can take on more responsibility for their most intimate family interests, which may have broader implications than what the law allows.

A lawyer assists the client when he or she listens deeply for these competing questions: "What are my basic legal rights? How do I address the unique situation of my family?" In litigation, clients are bound by a rights-based approach of generic solutions that have been applied in the past within the limits of what a court can order. In collaborative practice, "the law" provides information a client can draw upon to craft a personalized solution, while working together with the spouse and professionals who advise on that family's particular situation. An article in the

February 2007 issue of *Virginia Lawyer* described the collaborative process.¹ This article focuses on the collaborative client's responsibilities in an attempt to define how much self-determination lawyers can support under the Virginia Rules of Professional Conduct.²

Who is the Collaborative Client?

In the collaborative process, clients enter into a participation agreement that is their contractual obligation. Clients agree to be transparent and provide full information to each other on relevant issues. With the assistance of their separate professional advisors, clients formulate their short- and long-term goals for the family and for themselves. Clients, with the assistance of the professionals, determine which documents are needed, and clients are assigned responsibility for gathering them. Clients brainstorm with the other members of the team to create options to resolve each identified issue. Professionals help evaluate which solution is acceptable. Once the clients have the information they need and all their questions are answered, they agree on settlement terms. In order to do this work, the clients have engaged professionals to provide a limited scope of representation and agreed to modify traditional lawyer-client confidentiality and rules of discovery.³ Often there is a pattern of continuing conflict between the clients. Consequently, a lawyer's concern is that the client can manage roles that may have been assumed by the lawyer and legal staff in traditional litigation

In the past fifty years, society has evolved from cohesive communities to mobile nuclear units of many varieties.⁴ At the same time globalization has broadened perspectives on justice and one-size-fits-all laws.⁵ In the United States, differing cultural value systems must be respected, yet unified under one legal system. The focus on individual rights has been fueled by the individual's access to information on every topic through widely available technology and the Internet.⁶ Other professional disciplines, such as neuroscience, provide integrative and multifaceted lenses to look at events and facts that help

clients discern the broader implications of their decision making.⁷ Professionals assist clients in screening the plethora of information for accuracy, completeness, and relevance. Good and full information gives a client the power to assume personal responsibility and avoid victimization caused by ignorance, limited information, and misinformation.

Clients come to family lawyers with preconceptions about divorce and with a need for guidance in making unfamiliar and emotional choices. Their views are shaped by movies, chat rooms, and memories of past family divorces. Clients are assessed by the professional at intake for their capacity to do the required work. Not every client is capable nor is every case resolvable by cooperative approaches such as mediation and collaboration. Foremost, clients must be able to make decisions and follow through with their commitments. Indications of domestic violence, serious power imbalances between the clients, special needs of the children, or addiction must be evaluated. Some cases may be manageable in collaboration with mental health coaching and supervision. Legal professionals must have the confidence and experience to negotiate complex cases. Indeed, this personal awareness by the lawyer of his own competency is the cornerstone of the Rules of Professional Conduct (Rules).⁸

Is the Legal System Adapting to Collaboration?

These historical changes are paralleled within our practice of social justice. The legal system inherited by the United States emphasized property allocation and distribution, when wives and children were property.⁹ While U.S. laws have evolved, property distribution remains a primary function of courts. Until the advent of no-fault divorce statutes in the 1970s, divorce was a battle to determine fault, and it focused on adversarial representation to protect the wronged spouse through property redistribution. As the stigmas of divorce and illegitimacy gradually lifted and an individual's choice to end marriage without fault became normal, family law specialty practices developed. These practices create predictability and place appropriate responsibility for maintaining the children and family systems.¹⁰

Family law is a relatively new specialty. It has remained primarily a litigation practice. Application of statutory standards and case law provide the framework for dissolving a marriage. A provocative book, *The New Lawyer*, by Julie MacFarlane, describes the greater context of the social shift toward settlement and ethical implica-

tions for the litigation model.¹¹ As the backbone of legal representation, the Rules embrace the roles of lawyer as negotiator and litigator.

Professional ethical rules are intended to maintain a cohesive profession, as well as protect clients against fraudulent or substandard professional competency. The client protection function can be accomplished by providing information: clients can self-determine on any choice so long as they have sufficient information to understand the consequences. Informed consent to make decisions is measured by reasonableness under the circumstances.¹²

The Virginia Rules evolved over the last century from the Canons of Professional Ethics (1908) to the Code of Professional Responsibility (1969) to the last major overhaul in the late 1990s that resulted in the Rules of Professional Conduct (2002).¹³ The Rules do not specifically address collaborative practice, since the design is general application, not details. Nonetheless, there are critical generalities that are relevant for family lawyers.

For example, Canon 7 of the 1969 code compelled a lawyer “to represent a client zealously within the bounds of the law.”¹⁴ The current Rules focus instead on the standard of diligence that allows the lawyer to represent the client effectively with a collaborative, problem-solving approach.¹⁵ Even with this significant change, some lawyers continue to apply the litigation ethics embedded in the earlier version.¹⁶

The lawyer serves as a professional advisor when assessing specific facts, values, and competencies brought by the client, so that the client's decision on how to accomplish their goals can be honored as well. MacFarlane's rule 2.1 on the advisor's role allows consideration of moral, social, and economic factors. Comment 2 addresses consideration of emotional and relational factors. MacFarlane defines this kind of advocacy as “advancing one's client's best and most important interests,” in whichever process is chosen.¹⁷ Flexibility, continuing skills development, and evaluative insight are now required.

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How Can Family Lawyers Adapt to These Changes?

In providing information to clients to help them choose the process for resolving their cases, the family lawyer must understand the skills he will need to succeed. The Virginia Rules require lawyers to present the various dispute resolution options available to clients.¹⁸ This is most challenging for lawyers who have not been trained to perform within the process favored by the client. Sometimes the distinctions in processes are not fully understood by the lawyer. Collaboration within the collaborative process is not equivalent to a collaborative attitude within a traditional litigated case characterized by a rights-based approach to settlement.¹⁹ The contrast is sharp between the lawyer's roles:

The adversarial lawyer supports the client's negative beliefs about others and accepts the client's view of the facts and the client's self-concept as victim; the collaborative lawyer urges respect for all participants, understands that clients "color the facts," and questions assumptions that relieve clients of personal responsibility.²⁰

Family lawyers must grasp these distinctions. Just as litigation has its rules of evidence and court procedures, collaboration and mediation have a tool box specially designed for settlement and client self-determination.

The interest-based negotiation techniques of collaborative practice actually may be more akin to traditional corporate and transactional practice, rather than litigation. Winning is discarded in a zero-sum game along with the underlying assumption of scarcity of resources. Interest-based negotiators seek to create value and expand available resources so that clients can meet actual and anticipated needs. As in negotiating a corporate deal, collaboration begins with identifying the client's specific goals and interests. This requires the lawyer to listen beyond the actual words, and question with curiosity rather than judgment; to balance empathy and assertiveness in interactions with both clients; and to cultivate an awareness of the many barriers to resolution, including values, fears, and responsibilities carried by clients and lawyers. Collaboration grounded in interest-based negotiation techniques actually expands the client's range of options and potential.²¹

These negotiation skills are taught in trainings and experiential workshops rather than in didactic continuing education presentations.

Family lawyers who are competent in all dispute resolution processes have many skills. Comment [6] to Rule 1.1 obligates lawyers to continue their study and education to maintain competency.

The collaborative family lawyer must be able to step back from a perceived win or outcome to support the client in assessing what is acceptable for the family system, if that is the client's goal. MacFarlane summarizes the skills needed by family lawyers to meet changing client needs:

The new lawyer takes on all the traditional professional responsibilities of counsel as well as some additional ones. These include the responsibility to educate the client on a range of alternate process options, to establish a constructive relationship with the other side that does not undermine her loyalty to her client, to commit to the good faith use of appropriate conflict resolution processes and to model good faith bargaining attitudes, to anticipate pressures to settle, and to advocate strongly for a consensus solution that meets, above all, the needs of her client.²²

As advocates in any process, we lawyers begin by evaluating ourselves and whether we can provide not only competent representation, but also the values-based services a client may be seeking.

Are Protections for Clients Integrated into Collaborative Practice?

Specialized bar organizations guide family lawyers beyond the general considerations of the Rules of Professional Conduct.²³ The American Academy of Matrimonial Lawyers conflates the role of advocacy with the role of counseling: "public and professional opinion has been moving away from a model of zealous advocacy in which the lawyer's only job is to win and toward a counseling and problem-solving model referred to as 'constructive advocacy.'²⁴ In collaborative practice, the preeminent specialty organization is the International Academy of Collaborative Professionals (IACP) with a worldwide membership today of more than three thousand members. The IACP has promulgated ethical standards, minimum practice standards, and standards for collaborative trainers and trainings.²⁵ The focus remains on competency in the professional's continuing education and training, as well as the professional's experience with diverse clients and with complexity in physical, psychological, and emotional factors:

It is important for the practitioner to be able to recognize these factors, as they will necessarily influence the collaborative process and the client's decision making. It is even more important for the practitioner to recognize the limits of his or her ability to effectively deal with these factors and with the client's response to them.²⁶

These standards of collaborative practice direct the lawyer to evaluate the client's capacity and unique situation, as well as the lawyer's own capacity to achieve the client's goals.

Collaborative professionals from legal, mental health, and financial backgrounds throughout the commonwealth have established the Virginia Collaborative Professionals (VaCP), a statewide organization committed to the mission and standards of the IACP. The VaCP endorses the IACP practice standards and mandates a significant number of hours in interest-based negotiation training so that members will develop interest-based negotiation competency for use in collaborative practice.

The challenges at this point, however, are: Who will screen professional qualifications and enforce the ethical standards of collaborative practice? How do we as professional providers of services describe that service with one voice to avoid client confusion and substandard practices? How does our self-regulating bar evaluate diligence and competency of the practitioners who facilitate client self-determination in dispute resolution? How do lawyers work as a team with other collaborative professionals who are not bound by our ethical framework to support our clients? These are not new questions for specialized practices that have emerged to meet changing client needs. At the personal level, lawyers must strive to maintain their own ability to bring the highest professional services to clients who entrust their families' well-being with us.

The National Commission of Uniform State Laws has drafted the Uniform Collaborative Law Act, the model form of which is anticipated in July 2009.²⁷ The act undertakes the formalization of collaborative practice, just as the Uniform Mediation Act did in the late 1990s for mediation.²⁸ As our self-regulating bar develops reasonable safeguards with consistent practice standards for collaborative practice, our clients will be better informed and supported in making appropriate choices for their personal circumstances. Collaboration provides a bridge from client protection to the lawyer's effective assistance to the client who strives to self-determine. ■

Endnotes:

- 1 Fauss, K. P., Smith, C. W., & Chiasano, P. V. (February 2007). Collaborative Practice: Solving Family Disputes Outside of Court. *Virginia Lawyer*, 55(7), 36-40. (http://www.vsb.org/docs/valawyer/magazine/vl0207_collaborativ%2316FD3A2.pdf) The central defining feature of collaboration is the contractual disqualification of the lawyers from litigation between the clients. This requirement distinguishes collaborative practice from mediation and other types of settlement negotiations.
- 2 Virginia Rules of Professional Conduct (2006). Extensive changes to the prior format in the "Model Code of Professional

- Responsibility" were made in the American Bar Association Model Rules of Professional Conduct in 2002 and have been widely adopted by state bars.
- 3 These modifications to litigation procedures cause concern for some lawyers, even with the informed consent provided to clients. See Letter of ABA Litigation Section commenting on the Uniform Collaborative Law Act dated 4/15/09.
- 4 Ehrenhalt, A. (1996). *The Lost City: The Forgotten Virtues of Community in America*. Chicago: Basic Books.
- 5 Daicoff, S. (2005). *Law as a Healing Profession: The Comprehensive Law Movement*, Retrieved May 12, 2009, <http://law.bepress.com/expresso/eps/1331>
- 6 The quality of this information and amateur interpretations are often obstacles for professional assistance.
- 7 Fauss, K.P. (2008). Collaborative Professionals as Healers of Conflict: The Conscious Use of Neuroscience in Collaboration. *Collaborative Review*, 10(2), 1-9.
- 8 See Comment [6] of Rule 1.1.
- 9 Breton, D. (2001). *The Mystic Heart of Justice: Restoring Wholeness in a Broken World*. West Chester, PA: Swedenborg Foundation Publishers.
- 10 Coontz, S. (2005). *Marriage: A History*. New York: Viking.
- 11 MacFarlane, J. (2008). *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Van Couver: UBC Press.
- 12 Schneyer, T. (2008). The Organized Bar and the Collaborative Law Movement: A Study in Professional Change, *Arizona Law Review*, 50(1), 289-336, at 305-310.
- 13 *Ibid* at 307 FN 86.
- 14 *Ibid* at 316.
- 15 See Comment [2] of Rule 1.3.
- 16 Schneyer *supra* at 316 FN 130.
- 17 MacFarlane *supra* at 206.
- 18 See Comment [1] to Rule 1.2, requiring lawyers to inform clients of options. This obligation has not been uniformly adopted by other states.
- 19 Tesler, P. H. (2008). Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts. *Journal of Dispute Resolution*, 2008(11), 83-130, at 99-104.
- 20 Schneyers *supra* 302.
- 21 Tesler *supra* 116 FN 57.
- 22 MacFarlane *supra* at 221.
- 23 Schneyers *supra* 308 FN 92.
- 24 Am. Acad. of Matrimonial Law., *Bounds of Advocacy* (2000) at <http://www.aaml.org/go/library/publications/bounds-of-advocacy/>, cited by Schneyers *supra* at 316 FN 134.
- 25 See www.collaborativepractice.com.
- 26 IACP Ethic Commentary to Standard 2: Competence. <http://www.collaborativepractice.com/lib/Ethics/Ethical%20Standards%20Jan%20%2008.pdf>.
- 27 Uniform Collaborative Law Act, available at <http://www.nccul.org/Update/CommitteeSearchResults.aspx?committee=279>.
- 28 The National Conference of Commissioners on Uniform State Laws adopted the UMA in 2001. It was endorsed by the ABA in 2002.