

**Suggested Protocol to Obtain Clients' Informed Consent
to Use a Collaborative Process**

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This is a discussion draft and is not the policy of the American Bar Association or the Section of Dispute Resolution. Please direct any comments on this draft to the co-chairs of the Collaborative Law Committee, David Hoffman (Dhoffman@BostonLawCollaborative.com) and Larry Maxwell (lmaxwell@adr-attorney.com).

American Bar Association
Section of Dispute Resolution
Collaborative Law Committee
Informed Consent Subcommittee*

Introduction

As a matter of ethical duty and good practice, lawyers must get clients' informed consent to use a Collaborative process. The Collaborative Law Committee of the ABA's Section of Dispute Resolution prepared a Summary of Ethics Rules Governing Collaborative Practice which describes the ethical duty of Collaborative Lawyers to obtain clients' informed consent before undertaking the process.¹ The Summary states:

The requirements for Collaborative Practice are the same as for limitations of the scope of other types of legal representation. The obligations concerning limited scope representation and informed consent are not new considerations for attorneys. It is well established that attorneys must always act with diligence and in the best interests of their clients, no matter what the scope of representation entails. Attorneys are required to consider the facts of each case to determine whether a particular process is appropriate for a client and whether they, as attorneys, are competent to handle the issues at hand.

A two-pronged analysis is needed to ascertain whether a limited scope of representation is appropriate for a particular situation. The first prong involves a determination whether the proposed limitation in scope is *reasonable under the circumstances*. The second prong addresses whether *informed consent* has been properly obtained.²

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¹See ETHICS SUBCOMMITTEE, A.B.A. SECTION OF DISPUTE RESOLUTION, [Summary of Ethics Rules Governing Collaborative Practice](#) (Oct 2, 2008). Although it would be appropriate for all lawyers and other dispute resolution professionals to obtain clients' informed consent in considering various dispute resolution processes, this protocol focuses only on the duties of Collaborative lawyers.

²*Id.* at 4 (italics in original).

Citing an ABA ethics opinion, the Summary states that a limited representation, such as Collaborative Law, may be appropriate when a client has limited objectives for representation.³ Citing ethics opinions from New Jersey and Pennsylvania, the Summary states that lawyers should use a case-specific and fact-specific analysis to determine the reasonableness of a representation and that a “limitation is deemed reasonable if the lawyer believes his or her client’s needs are well-served by participation in the Collaborative process.”⁴ The Summary also cites Rule 1.0(e) of the Model Rules of Professional Responsibility, which defines informed consent as that which “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁵ It cites a Kentucky ethics opinion stating that the lawyer’s explanation:

must include the differences between the adversarial process and Collaborative Practice, the risks and advantages of each, any reasonably available alternatives and the consequences of failure to reach a settlement agreement. The Opinion further notes that the Participation Agreement may touch on these concerns but is unlikely on its own to meet the requirements related to informed decision making. The agreement should serve as a starting point but be amplified by fuller explanation and discussion. The Opinion notes as well that clients must be provided information about the potential for additional time and costs associated with obtaining new counsel, the potential that one might feel pressured to settle in order to avoid having to seek new representation, and the potential for an opponent to effectively disqualify both counselors.⁶

The Summary cites the Kentucky and Pennsylvania opinions recommending that lawyers put in writing the explanation of Collaborative Practice, including the scope of the representation.⁷

In addition, Section 14 of the draft Uniform Collaborative Law Act includes a detailed provision regarding informed consent:

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(a) assess with the prospective party factors the prospective collaborative lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party’s matter;

³*Id.* at 5 (citing ABA Commission on Ethics and Professional Responsibility, Formal Opinion. 07-447 (2007)).

⁴*Id.* at 4-5 (citing N.J. Ethics Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055, 2005 WL 3890576, (2005) and Pa. Bar Ass’n Comm. Leg. Ethics & Prof’l Resp., Informal Op. 2004-24, 2004 WL 2758094, (2004)). The ethics opinions cited in this document are available on the [Committee’s website](#).

⁵*Id.* at 5 (citing MODEL RULES OF PROFESSIONAL CONDUCT RULE. 1.0(e)).

⁶*Id.* at 5-6 (citing Ky. Bar Ass’n Ethics Comm., Op. E-425 (2005)). It is worth noting that parties in litigation may also feel pressured to settle if they cannot finance a trial.

⁷*Id.* at 6.

(b) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(c) advise the prospective party that:

(1) after signing an agreement:

(A) if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates; and

(B) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not thereafter represent a party before a tribunal in such a proceeding except as authorized by Section 9(c), 10(b), or 11(b);

(2) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(3) when the process concludes, the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Section 9(c), 10(b), or 11(b).⁸

The Uniform Collaborative Law Act also includes a provision regarding screening cases involving a “coercive or violent relationship.” This provision is most obviously relevant in family cases but Collaborative practitioners handling other types of cases should consider whether it might apply in their cases. Section 15 states:

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(b) A collaborative lawyer shall throughout the collaborative law process continue to reasonably assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(c) If the collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a collaborative law process; and

⁸[Uniform Collaborative Law Act adopted by the Uniform Law Commission on July 15, 2009.](#)

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a collaborative law process.⁹

Suggested Informed Consent Protocol

Collaborative lawyers can comply with these ethical (and, if applicable, legal) duties by using the following procedures.¹⁰ Of course, the process should be tailored to the needs of each prospective client; lawyers need not use the exact language or procedure described below. In addition, the following protocol identifies general issues that would normally be discussed in more detail. Lawyers should provide their own candid analysis and advice, which may involve elements in addition to those listed below.

1. In an initial consultation with a prospective client, ask about factors relevant to the choice of dispute resolution procedures including the following:
 - a. What are each party's highest priority interests in the matter (e.g., achievement of specific goals, respectful treatment, and preservation of relationships)?
 - b. Based on any past contacts with the other parties, does the prospective client anticipate that they would be able to cooperate with each other in a face-to-face meeting?
 - c. How much do the parties want to participate actively in the dispute resolution process directly with each other (rather than delegate the process to others such as lawyers or judges)?
 - d. Based on any past experience, how trustworthy are the parties? Are they likely to be honest (or is there reason to believe that one or more parties will withhold or misrepresent relevant information)?
 - e. Are there particularly difficult or complex issues to resolve (e.g., allegations of fraud or other serious wrongdoing)?
 - f. Are there any factors that would undermine the parties' ability to make responsible decisions (e.g., limited knowledge or cognitive abilities, coercion or fear, substance abuse, or mental illness)? If any such factors exist, would the use of additional professionals adequately address the problems?
 - g. What additional professionals, if any, might the parties engage (e.g., financial experts, appraisers, or other professionals)?

⁹ *Id.*

¹⁰ Although this list of factors is presented regarding Collaborative Law, it is good practice for lawyers to use the questions in parts 1 and 2 to assess all dispute resolution processes, including litigation.

- h. If the other party has hired a lawyer, is that lawyer is likely to handle the matter cooperatively?
 - i. Is time of the essence?
 - j. What considerations should be made in regard to scheduling?
 - k. Is the other party (or parties) located a substantial distance away?
 - l. Is choice of law a consideration?
 - m. How important is confidentiality?
 - n. Is the prospective client willing to participate in voluntary discovery?
 - o. Is the prospective client prepared to hear the interests and concerns of the other party or parties and to explain his or her own interests and concerns?
 - p. Is the prospective client prepared to accept responsibility for his, her, or its role in the creation of the dispute and participate in the actions necessary to arrive at resolution?
2. Based on this information, discuss with the prospective client the dispute resolution options that seem most appropriate under the circumstances. These might include a Collaborative process, Cooperative process,¹¹ mediation, arbitration, litigation, or other processes, depending on the circumstances.
- a. Help the prospective client understand the potential benefits and risks of each option (including relevant variations of each option as appropriate) and invite them to ask questions.
 - b. Lawyers may provide information to parties in various ways including posting materials on their websites; including links to information on other websites; providing bibliographies of books, articles, videotapes, DVDs, or other materials oriented to parties; or maintaining client libraries in their office waiting rooms.
3. If the prospective client is considering a Collaborative process:
- a. Explain clearly how the disqualification agreement works, possibly reviewing a standard Collaborative participation agreement. The explanation should include the facts that:

¹¹A formal Cooperative negotiation process involves an agreement to negotiate cooperatively but does not include a disqualification agreement. For further description, see David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in *INNOVATIONS IN FAMILY LAW PRACTICE* 71 (Nancy ver Steegh & Kelly Browe Olson eds., 2008).

- i. All parties have the right to unilaterally terminate a Collaborative law process for any reason.
 - ii. The Collaborative process terminates if any party initiates or intervenes in a legal proceeding related to the Collaborative case.
 - iii. If the Collaborative process terminates, the Collaborative lawyers for all parties and any lawyer in a law firm with which the collaborative lawyer is associated may not represent a party in a legal proceeding. In a multiparty dispute, a party may give notice that the process is terminated and the other parties may sign new participation agreements and continue without that party.
 - iv. There may be additional time and costs involved with hiring new lawyers if the Collaborative process terminates. As a result, parties may feel pressured to settle to avoid hiring new lawyers.
 - b. Decide whether you believe that it would be reasonable for the prospective party to use a Collaborative process under the circumstances. If you have doubts whether a Collaborative process would be appropriate or believe that it would not be appropriate, discuss this with the prospective client. Note that even if a client gives informed consent, a lawyer may not ethically provide a limited representation if it is unreasonable under the circumstances.
4. If you determine that a Collaborative process would be reasonable for the prospective client and the prospective client gives informed consent, document this agreement in writing. This may be done as part of a single retainer agreement or as an addendum to a standard retainer agreement. You may ask the client to separately initial the description of the disqualification agreement to focus the client's attention and document the client's consent to the representation in a Collaborative process.
5. If you proceed with a Collaborative process, review the process at the first joint meeting with all the parties, lawyers, and any other professionals. This may be done by reviewing key points in a participation agreement.
6. As the process proceeds, if you have significant concerns about whether it would be in the client's interest to continue in the process, promptly discuss those concerns with the client, the other lawyer(s) and any appropriate team members and act accordingly. Continuing the collaborative process when a client appears to be at a disadvantage, no progress is being made, or one of the parties or lawyers is not abiding by the participation agreement is a disservice to the other participants and the integrity of the process.

For Additional Information

Sherrie R. Abney, [Nailing Down Informed Consent](#).

Nancy Cameron Q.C. and Dr. Susan Gamache, *Assessment Tool to Help Determine the Least Intrusive, Most Supportive, Process Option for Clients*.

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 (2004).

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).

Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision-Making*, 2008 J. DISP. RESOL. 163.