

Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24, 2004 WL 2758094 (May 11, 2004)

Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility

Informal Opinion Number 2004-24
May 11, 2004

Your letter to the PBA Committee on Legal Ethics and Professional Responsibility [the Committee] has been referred to me for a response. In your letter, you posed the following question:

In short, then we are seeking an opinion as to whether the practice of collaborative law in a domestic relations context is ethical provided the clients are given full disclosure regarding all methods for resolving their dispute and the rights waived in order to pursue their case through the collaborative method. In addition to your inquiry letter, you submitted 61 pages of materials. These materials included:

1) a seven-page letter you received from retained counsel, who advised you about the ethical propriety of collaborative law practice in a domestic relations context;

2) Elizabeth L. Bennett, Ethical Considerations for Attorneys Practicing Collaborative Law in PBI Program Materials, Ethics Potpourri, Collaborative Law pp. 3-7 (2003)(Carole Lindsay, Course Planner);

3) Appendices A-E to PBI Program Materials, Ethics Potpourri, Collaborative Law pp. 3-7 (2003)(Carole Lindsay, Course Planner). These Appendices included the following:

Appendix A: a Court Stipulation;

Appendix B: a Retainer Agreement;

Appendix C: a Release;

Appendix D: Miscellaneous Documents, which included Ground Rules for the Clients; Statement of Principles of Collaborative Law; Collaborative Family Law Participation Agreement; Staff Letter Regarding the Supreme Court of Ohio Advisory Opinion Subcommittee of the Board of Commissioners on Grievances and Discipline (August 8, 1997); and Table 4, Retooling Negotiations, Collaborative Law; and

Appendix E: American Bar Association, Appendix C (Handbook for Clients).

1. Framing the Issue

Before I respond to your inquiry, I consider it important to clarify the issue that you have asked. From my perspective, inquiries to the Committee typically seek an opinion regarding very specific facts involving a specific lawyer's conduct with respect to representation of a specific client. Your inquiry poses a general question and does not turn on the specific facts of any one matter. Indeed, your inquiry letter itself does not offer a definition of "collaborative law" but instead refers to 61 pages of material.

I assume that you have not sought an opinion from the Committee about whether it agrees with all of the statements contained in the 61 pages of material you submitted. If you had sought such an opinion, I believe it would have been beyond the scope of the Committee's authority.

Finally, I assume that you have not sought an opinion from the Committee regarding the ethical propriety of using the various documents you sent to the Committee, including Appendix B, which is the sample Retainer Agreement. I note that your retained lawyer advised you that you should not use this document unless you add a reference to, and perhaps exhaustively recite, the lists of detriments that might result to the client. Your retained lawyer also concluded that some of the language in Appendix C, the Release, was unethical. Since you have been advised that some of the 61 pages you submitted do not currently comply with the ethical rules and since you have not submitted any revised documents, I assume that you do not seek an opinion on the propriety of using all of the specific documents and language contained in the various documents you submitted.

***2** Thus, in my view, the question you have posed is essentially the following - do the Pennsylvania Rules of Professional Conduct create a per se ban on using a collaborative law process in a domestic relations case? It seems to me that this is the issue that underlies your question about "whether the practice of collaborative law in a domestic relations context is ethical provided the clients are given full disclosure regarding all methods for resolving their dispute and the rights waived in order to pursue their case through the collaborative method."

Even when the issue is framed as above, the issue you have posed is a difficult one. I would note that the term "collaborative law" is not defined in your letter. As the materials you sent pointed out, collaborative law may represent a paradigm shift. In a 70-page law review article published about collaborative law ("CL") within the past six months,

ADR expert Professor John Lande noted that the "drafters of ethical rules did not contemplate the distinctive processes and relationships in CL and thus analysts must rely on imperfect analogies to situations premised on the model of traditional representation." [FN1] Moreover, it is difficult to provide an answer in the abstract because there may be different ways to structure a collaborative law arrangement and the ethical analysis will turn on those details. Professor Julie MacFarlane has documented some of the multiple ways in which Collaborative Law arrangements are structured. [FN2] As mentioned above, I assume that in light of the advice you received from your retained counsel, you will revise some of the documents you sent to the Committee. I also note that Professor Lande has recommended that lawyers consider offering collaborative law without the use of a disqualification agreement. Because I am not sure which parts of the collaborative law process you would consider essential and thus part of your inquiry, I have not addressed the specifics of any one proposal.

2. Conclusion

Although I have some hesitation about whether it is appropriate to answer your very general question, which does not include a definition of collaborative law, I have decided to do so. My answer to the question as posed above is that I am 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. On the other hand, I urge you to carefully consider all of the Pennsylvania Rules of Professional Conduct and to ensure that you comply with all such rules with respect to each lawyer-client relationship you establish.

If you should find that the essential and required elements of a collaborative law system cannot co-exist with the current or proposed [FN3] Pennsylvania Rules of Professional Conduct because collaborative law involves a paradigm shift, then you may want to consider proposing special ethics rules for the collaborative law situation. The Pennsylvania Supreme Court has recently published proposed ethical rules for lawyers who work as ADR neutrals. It may be similarly appropriate to have a separate ethics rule or rules for collaborative law lawyers. The Committee would be glad to consider any recommendation you would like to submit regarding rules changes.

3. Additional Commentary

***3** As noted above, I did not think it was appropriate for me to attempt to evaluate the

ethical propriety of every sentence in the 61 pages of material you sent me. Moreover, as noted above, my answer to your inquiry is that, in the absence of specific facts or a precise definition of collaborative law, I am not willing to conclude that every collaborative law process constitutes a per se violation of the Pennsylvania Rules of Professional Conduct. The ethical propriety of your collaborative law arrangement will depend on the specific facts, documents, conduct and relationships you establish.

Although my conclusion is limited as noted above, I thought it appropriate to flag for you some issues that I believe you should consider. In the absence of specific facts, I do not warrant that this list of issues is complete. I hope that it will be helpful to you, however, to have additional guidance about the rules you should consider as you prepare specific documents for specific clients.

a. The Threshold Question - Who is the Client?

Most of the Pennsylvania Rules of Professional Conduct address a lawyer's obligations with respect to the lawyer's representation of a specific client or clients. Thus, the question of "who is my client?" is a threshold question with which a lawyer's analysis must always begin.

Accordingly, even in the collaborative law context, I believe that the first question you must ask is the question of "who is my client?" Once you have answered that question, you are in a position to examine the Pennsylvania Rules of Professional Conduct and determine what duties you owe toward that client or clients.

The Pennsylvania Rules of Professional Conduct do not permit a lawyer to view him or herself as the "lawyer for the situation." I was troubled by a note in Professor Lande's article indicating that some collaborative lawyers view themselves as representing the divorcing spouse 51% and the family 49% and analogized the situation to the Brandeis "lawyer for the situation." Despite the views of the lawyers cited by Professor Lande, I conclude that if a collaborative law lawyer represents one divorcing spouse, then that lawyer should view him or herself as representing that client 100%, not 51%. [FN4]

In sum, in order to comply with the Pennsylvania Rules of Professional Conduct in a collaborative law situation, you must begin by identifying a specific client (or clients) that you represent. It is not acceptable to view yourself as "the lawyer for the situation." Once you identify your client, you can take steps to ensure that your representation of

that client is consistent with the Pennsylvania Rules of Professional Conduct.

b. Rule 1.7 - Representation of Multiple Clients

If your answer to the question "Who is my client?" shows that you are proposing to represent more than one client, then you must analyze and comply with the conflict of interest provisions found in Rule 1.7 with respect to your proposed representation of multiple clients. This conflicts of interest analysis should occur at the outset of the relationship, before you even agree to represent multiple clients.

***4** The proposed version of Pennsylvania Rule 1.7 is much easier to read than the current version and is subtitled "Concurrent Clients." See <http://www.padisiplinaryboard.org/documents/New%20Preamble%20-%20RPC%201.7.pdf> In my view, if a collaborative lawyer were to view him or herself as having two clients - namely, both spouses in the divorce - then this joint representation would trigger the threshold provision in proposed Rule 1.7(a). Even if you did not view this joint representation as a Rule 1.7(a)(1) conflict because you do not view the interests of the two spouses as directly adverse, my view is that a Rule 1.7(a)(2) conflict exists because there is a significant risk that representation of one spouse will be materially limited by your representation of the other spouse. Therefore, if you view both spouses as your potential clients, you may only go forward with the multiple representations if all of the requirements in Rule 1.7(b)'s exception are satisfied.

Furthermore, it is not at all clear to me that proposed Pennsylvania Rule 1.7(b) would permit a lawyer to represent both husband and wife during pre-filing divorce negotiations. In order for the exception in Rule 1.7(b) to apply, all four conditions must be satisfied. It is clear that once divorce litigation is begun, proposed Rule 1.7 prohibits a lawyer from representing both husband and wife in the same litigation. This is because the condition in Rule 1.7(b)(3) cannot be satisfied ("the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.")

Because a collaborative law lawyer might decide, however, not to represent the client during any actual litigation, the condition in Rule 1.7(b)(3) may not pose a bar to a lawyer's dual representation of husband and wife. Thus, in the pre-litigation stage, assuming informed consent by the clients to the dual representation, the key issue with respect to a lawyer's dual representation of a divorcing husband and wife likely would

be the issue raised by proposed Rule 1.7(b)(1). This condition asks whether "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Because of the use of the word "reasonably," this requirement has both a subjective and objective element.

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. Reasonable minds often disagree about the application of Rule 1.7(b)(1). 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.

I have never heard of this happening, but I suppose that collaborative lawyers might possibly view themselves as having dual clients, in which one client is one of the divorcing spouses and the second client is "the family," which might be viewed as an organization or entity pursuant to Rule 1.13.

***5** Viewing "the family" as an organizational client obviously will be difficult, as well as non-traditional. In particular, I have a hard time imagining how a lawyer could decide to act on behalf of the "family" since the interests of the family may not be clear and since the constituents from whom the lawyer takes direction may not be able to agree on a particular course of action and there is no mechanism for establishing a hierarchy or resolving such differences.

But if a collaborative lawyer were to view him or herself as having dual clients that consist of a spouse, on the one hand, and "the family" on the other hand, then that lawyer would have to comply with the multiple clients conflicts of interest provisions in Rule 1.7.

In my view, the threshold requirements of proposed Rule 1.7(a)(2) would be triggered by representation of concurrent clients consisting of a spouse and the family because I think there would be a significant risk that the lawyer's representation of the spouse would be materially limited by the lawyer's representation of a second client, which is the organization called "the family." Furthermore, it is not clear to me that a lawyer could satisfy all conditions in the exception found in Rule 1.7(b). I am not sure from whom informed consent should be sought if one represents "the family" nor am I sure that the lawyer could "reasonably" believe "that the lawyer will be able to provide

competent and diligent representation to both the Client/spouse and the Client/"family." Thus, I believe the most likely answer to the question "who is my client?" will be that the CL lawyer represents one client, which is one of the divorcing spouses. (The issue of possible lawyer-client conflicts under Proposed Rule 1.7(a)(2) is discussed later in this letter.)

c. Rules 1.1 and The Duty of Competence

According to [Pennsylvania Rule of Professional Conduct 1.1](#), a lawyer owes a duty of competence to each of the lawyer's clients. Although many of the Rules of Professional Conduct permit client waivers, [Rule 1.1](#) contains no such exception. Thus, in the collaborative law context, once you have identified the client or clients that you represent, then you must be satisfied that you can provide competent representation to your client(s).

In my view, competent representation does not necessarily mean that you have to assist your client, the divorcing spouse, to receive the maximum dollar settlement possible. Clients often have interests and goals that are non-financial. [FN5] The Pennsylvania Rules of Professional Conduct recognize that it is perfectly proper for a lawyer to advise a client about issues other than wealth maximization - Rule 2.1 states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

*6 Thus, in my view, there are many ways that a lawyer may provide competent representation to a client. Provided there has been adequate consultation and consent, I think it is perfectly proper and competent for a lawyer to obtain a result that is not the largest possible monetary settlement, but that includes non-tangible benefits. On the other hand, unlike some of Collaborative Law lawyers cited in the articles by Professors MacFarlane and Lande, I believe that [Rule 1.1](#) requires a collaborative lawyer to represent the client 100%, not 51%.

d. [Rules 1.1](#) and [1.2\(c\)](#) - The Duty of Competence and the Scope of Representation

The version of [Rule 1.2\(c\)](#) that is pending before the Pennsylvania Supreme Court would permit a lawyer and client to agree on a limited scope of representation for the lawyer, provided that the limitation is reasonable and that the client gives informed

consent. As the proposed comment to [Rule 1.2\(c\)](#) makes clear, however, the lawyer must still be able to comply with [Rule 1.1](#)'s obligation to provide competent representation:

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See [Rule 1.1](#).

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., [Rules 1.1](#), [1.8](#) and [5.6](#).

Section 19 of the Restatement of the Law Governing Lawyers has a similar provision. Although the Restatement's Reporters' Notes provide some case examples, none of them addresses issues related to collaborative lawyering.

***7** Your retained counsel noted the following about [Rule 1.1](#):

anyone considering collaborative family law should have the necessary experience and knowledge to handle any family law matter and has a duty to

seek the services of, or associate with, another lawyer or professional who is competent to handle those areas for which he may not be fully prepared.

I agree with this conclusion. To my mind, however, an equally important question in the collaborative law context is whether the scope of representation is "reasonable" and permits the lawyer to do a competent job for the particular client. Your retained counsel noted "With your group [\[RPC 1.1 and 1.3\]](#) are the least troubling ethics provisions, given the demonstrated level of skill which the group's members possess." In contrast to your retained counsel, I find the interplay of [Rules 1.2\(c\)](#) and [1.1](#) to be one of the most difficult issues presented by collaborative law. I would carefully consider, in each case, whether your proposed limited scope of representation is reasonable and whether it permits you to deliver competent representation.

Let me give you a specific example that you might want to consider. Page 5 of the Ethics Potpourri materials states that the lawyer must obtain the client's informed consent to "specific rights waived by an agreement not to litigate, such as discovery, the right to subpoena third parties, the right to file affidavits ..." I can imagine that in some specific fact patterns, one could question whether it would be reasonable or competent representation for the lawyer to request the client to permanently waive these rights. (I find that any such agreement is much more problematic than a Scope of Representation agreement that simply states that the lawyer only represents the client during the collaborative law process and that if the client later chooses to litigate his or her divorce, then the client must hire a new lawyer for those proceedings.) Thus, I believe that in evaluating [Rules 1.1](#) and [1.2](#), you must take into consideration the specific situations of specific clients.

My conclusion that you should use a case-specific and fact-specific analysis when you consider [Rules 1.1](#) and [1.2\(c\)](#) is consistent with the literature that I have read. For example, in John Lande and Gregg Herman, *Fitting the Forum to the Family Fuss, Choosing Mediation, Collaborative Law or Cooperative Law for Negotiating Divorce Cases*, 41 *Family Court Review* (2004)(forthcoming), the authors recommend that lawyers take into account the individual parties' capabilities, attitudes about professional services, and preferences about risk when recommending a process to clients. In her extensive empirical study, Dr. Julie MacFarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, supra note 2, at nn. 64 and 65, observes that her collaborative law empirical research has shown that some practitioners offer collaborative law to all clients, whereas other practitioners consider the suitability of collaborative law for their clients. She discusses efforts among

experienced CL practitioners to develop protocols for cases involving domestic violence. Dr. MacFarlane also discusses cases in which client consent was obtained but the clients and lawyers did not appear to fully understand the ramifications of their decisions to select collaborative law. After reading this literature, I have concluded that you must consider each client's situation (especially those who are victims of domestic violence) when deciding whether a [Rule 1.2\(c\)](#) limitation on the scope of representation is reasonable and whether you can, indeed, provide competent representation to a client under the limited scope of representation.

***8** In sum, I recommend 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. I think that what constitutes competent representation will be case-specific and depend on the particular clients, their situations and needs.

e. Rule 1.5(b) and Written Agreements about the Scope of Representation

Unlike Rule 1.5(b) of the ABA Model Rules of Professional Conduct, the Pennsylvania proposed version of Rule 1.5(b) does not require that the scope of representation be in writing. Although the Pennsylvania Supreme Court proposal does not require a writing on this point, I think that from your perspective and the client's perspective, it is preferable to specify in writing the scope of representation. I think this is particularly true since your materials describe collaborative lawyering as a "paradigm shift."

In addition to recommending a writing, I recommend that you make sure that it is completely clear which written documents create the lawyer-client relationship and establish the scope of representation. For example, I can imagine that you might currently intend to use a variation of the engagement letter in Appendix B, the Stipulation in Appendix A, and the Collaborative Family Law Participation Agreement in Appendix D. I urge you to clarify the relationship of these documents to one another and to make sure they do not contain any language that differs with respect to the lawyer's obligations toward the client and the scope of the representation. I think the most cautious approach would be to have only one document that defines the lawyer's relationship and obligations to the lawyer's client. I also think you would be well advised to include a statement in such a document noting that the lawyer must comply with the Pennsylvania Rules of Professional Conduct with respect to the issues of confidentiality and withdrawal. See, e.g., Rules 1.6, 1.16, 3.3 and 4.1. I am sure that you would not

want to be in a position in which you have contractually agreed to do something that is not permitted by the ethics rules.

I also recommend that you carefully consider the language you use to define the scope of your representation. For example, I am not sure that the language found on page 1 of Appendix B - Retainer Letter would be adequate. This letter states: "I will not be your attorney of record, except for purposes of processing your divorce pleadings and filing agreed upon orders as part of the final divorce decree." This language might lead to confusion about whether you represent the client during the collaborative law divorce negotiations (as opposed to the filing of documents); whether you are subject to [Rule 1.1](#) and have malpractice exposure for your advice during the negotiations; and whether you have a duty of loyalty to, and are obligated to look out for the client's best interests, during those negotiations.

f. Rule 7.5 - Joint Advertising

***9** Your materials suggest that you might participate in joint advertising with other collaborative law lawyers, making clear that the group is not a law firm but an association of independent contractors. Before you do so, I recommend that you carefully consider Rule 7.5(d). This rule states "Lawyers shall not state or imply that they practice in a partnership or other organization unless that is the fact." The rule itself does not state that lawyers may advertise together if they "make clear that the group is not a law firm but an association of independent contractors." The ABA Annotated Model Rules of Professional Conduct at p. 565 (5th ed. 2003) lists several state bar opinions that have concluded that it was improper for non-partner lawyers to use a single law firm name. The book doesn't include any cases or opinions that authorized the use of a common-name for "an association of independent contractors." The issue of Rule 7.5(d) is an important issue both in its own right and because joint advertising could create a risk that the Collaborative Law lawyers who jointly advertise would be treated as part of a single law firm, with imputation of conflicts from one advertising lawyer to all advertising lawyers.

If you engage in joint advertising, it is possible that a court might analogize your situation to one involving lawyers in an "of counsel" relationship. The courts and ethics committees generally have held that if a lawyer holds him or herself out as "of counsel," that lawyer's conflicts are imputed to the entire firm. See, e.g., ABA Formal Opinions 1995-8 and 2000-4; [People ex rel. Dept. of Corporations v. SpeeDee Oil Change](#)

[Systems, Inc., 20 Cal.4th 1135, 1154, 86 Cal.Rptr.2d 816, 980 P. 2d 371 \(1999\)](#)(the court concluded that, since the moniker "of counsel" could not be used unless the relationship between the lawyer and the firm to which he is "of counsel" was "close, personal, continuous, and regular," [id. at 1154](#), the same policies that justified imputing conflicts among all lawyers in a firm justified imputing them among those who have "of counsel" relationships.)

Courts also have been willing to impute conflicts among law firms that are affiliated. See, e.g., [Mustang Enters., Inc. v. Plug-in Storage Sys., Inc., 874 F. Supp. 881 \(N.D. Al 1995\)](#). The Annotated Model Rules, supra at p. 190 described this case as follows: broadcasting "Affiliated Firm" designation to the world of clients and potential clients without "cabining" it in any respect is the functional equivalent of establishing two-office law firms for conflicts purposes; thus, a law firm "affiliated" with defendant's patent counsel was disqualified from representing the plaintiff in a patent action.

On the other hand, conflicts are not necessarily imputed among all law firms that have a referral arrangement. See, e.g., Webpage of Lex Mundi, an organization of independent [international] law firms, available at [http://www.lexmundi.com/lexmundi/About Lex Mundi.asp?SnID=192294730](http://www.lexmundi.com/lexmundi/About%20Lex%20Mundi.asp?SnID=192294730) ("The members of Lex Mundi shall maintain complete autonomy; shall render professional services to their respective clients on an individual and separate basis; shall not be restricted in referring, handling or accepting cases or in joining other professional organizations; and are not affiliated for the joint practice of law.") Therefore, I think the exact contents of your joint advertising will be very important; you will want to make sure that you offer some explanation of your affiliation if you want to minimize the risks of conflict imputation and you might consider explicitly stating that conflicts are not imputed.

***10** When you consider this issue, you might also want to consider Proposed Rule 1.0 - Terminology. Subsection c offers the following definition:

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

Comment 2 adds information that might be relevant to joint advertising of collaborative lawyers. It states:

Whether two or more lawyers constitute a firm within paragraph (c) can depend on the

specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules.

In sum, it is not clear to me whether joint advertising by a CL group of lawyers might lead a court to impute conflicts of interest within the CL group. This is an issue worth considering carefully. Should you decide to advertise jointly, I recommend that you include language that makes it clear that you are independent lawyers and do not plan to impute conflicts of interest.

g. Rule 1.16 - Withdrawal/Disqualification

Some of the documents you submitted specify the circumstances under which your representation of your CL client terminates. For example, the PBA Ethics Potpourri, Appendix B - Retainer Letter, includes the following statements:

My representation is terminated by any party's decision to litigate, whether or not it was your decision. I will not represent you in any family law litigation against your spouse should the collaborative process end before settlement. I will not represent you if I believe either party is breaching their obligation to provide full disclosure You and I both retain the right to withdraw from this contract if either of us feels we cannot abide by the principles of collaborative family law by notifying the other in writing. I agree to give you fifteen (15) days notice of my intention to withdraw We reserve the right to terminate our professional relationship in the event that you are unable to pay for our services

The third item in Appendix D to the PBA Ethics Potpourri, which you submitted, was entitled Collaborative Family Law Participation Agreement. Sections IX, XII and XII of that Agreement, which is to be signed by both clients and both attorneys, also addressed the issue of withdrawal of the lawyer, although in language quite different than the language in Appendix B.

Normally, when a lawyer withdraws from representation, the lawyer must comply with Rule 1.16. On the other hand, when the matter for which a lawyer has been retained naturally concludes, that lawyer normally does not need to follow Rule 1.16.

***11** Thus, one of the issues you must consider is whether you must comply with Rule

1.6 if you terminate your relationship with a CL client before their divorce is completely resolved. In my mind, this issue is not completely clear. On the one hand, one might argue that as soon as a CL case goes beyond the written scope of representation, the matter for which the lawyer was hired has naturally concluded and therefore the lawyer need not "withdraw" pursuant to Rule 1.16. In support, you might cite Comment [1] to Rule 1.16, which states "Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded." See [Rules 1.2\(c\)](#) and [6.5](#). See also [Rule 1.3, Comment \[4\]](#)."

On the other hand, because the lawyer has been representing a client and now intends to "terminate" that representation or withdraw before the underlying divorce matter is resolved, one could argue that the lawyer should comply with Rule 1.16's withdrawal provisions. In support of this view, one could cite Comment 8, which states that Rule 1.16(b)(5) applies when "the client refuses to abide by the terms of an agreement relating to the representation, such as ... an agreement limiting the objectives of the representation."

Because this issue is unclear, the more conservative approach would be for you to comply with Rule 1.16 when you terminate your relationship with your client before the client's divorce is final. Although I can understand the argument that compliance with Rule 1.16 is not required if the retainer agreement specifies that the representation terminates upon the commencement of litigation, some experts have disagreed with this view and I believe that some courts might conclude that Rule 1.16 applies if a lawyer withdraws from representing a client who is in the middle of a divorce dispute. [FN6] My personal view is that because the consequences of termination are both significant and similar to the reasons for which the rule was created, you should comply with Rule 1.16 when you terminate your representation. Therefore, I recommend that when you terminate your relationship with a CL client, you make sure that your withdrawal of representation is in compliance with Rule 1.16.

If a lawyer withdraws from representation for any reason, the lawyer must comply with Rule 1.16(c) and (d). Thus, if you as the collaborative lawyer had filed an appearance for the client in court, Rule 1.16(c) would require that you seek the court's permission to withdraw. Rule 1.16(d) requires you to take those steps that are reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled. Whether 15 days is sufficient may depend on the specific facts of

the case.

In addition to subsections c and d, which must be considered for all withdrawals, Rule 1.16 includes both permissive and mandatory withdrawal provisions. I have not identified any specific facts that would require mandatory withdrawal under Rule 1.16(a). Rule 1.16(b) addresses permissive withdrawal. It identifies reasons that would permit, but not require, a lawyer to withdraw. Because your inquiry does not involve specific facts and a specific client, it is difficult to say whether withdrawal would be permitted. I have addressed below some of Rule 1.16(b)'s provisions that might provide the basis for withdrawal in a specific case.

***12** Rule 1.16(b)(1) permits withdrawal if it "can be accomplished without material adverse effect on the interests of the client." You might be able to rely on this subsection if the grounds for termination arose very early in the relationship, before the CL client had invested much time, energy and legal fees in the matter.

Even if your withdrawal would adversely affect your client in a material way, Rule 1.16(b) permits you to withdraw if the following conditions (or others that aren't relevant) are satisfied:

- . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement [Rule 1.16(b)(4)];
- . 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 [Rule 1.16(b)(5)]; or
- . if other good cause exists [Rule 1.16(b)(7)].

It is not completely clear to me whether all courts would agree that Rule 1.16(b)(4) supports withdrawal in the CL context. Professor Lande's law review article indicated that the courts have tried to draw a line about if and when disagreement with a client over settlement constitutes grounds for withdrawal. On the one hand, courts have strongly disapproved lawyers who try to withdraw simply because the clients have not followed the lawyers' advice about settlement; on the other hand, Rule 1.16(b)(4) permits a lawyer to withdraw if the client insists on acting in a manner with which the lawyer has a fundamental disagreement. See Lande, *supra* note 1, at n. 102 and accompanying text.

Rule 1.16(b)(5) likely would support some instances of withdrawal, but not all. To the

extent that your own client violates a promise contained in the CL retainer agreement, this could support withdrawal under Rule 1.16(b)(5). But I don't believe that Rule 1.16(b)(5) would apply to withdrawals due to the opposing party's failure to comply with the CL agreement.

Rule 1.16(b)(7) also might provide the basis for withdrawal since it permits withdrawal for good cause. But in the absence of a specific retainer agreement and the specific facts of a case, I cannot opine about whether "good cause" would exist or whether withdrawal would be viewed by the courts and disciplinary authorities as justified by Rule 1.16(b)(7). I would point out that at least some authorities, such as Professor Lande, have expressed doubts about whether good cause exists when withdrawal is based on the opposing party's actions.

In sum, if you do terminate your representation of a collaborative law client before the divorce is resolved, I recommend that you comply with Rule 1.16(c) and (d). I also recommend that you consider why you believe you have grounds for the withdrawal under either Rule 1.6(a) [mandatory withdrawal] or 1.6(b) [permissive withdrawal.]. I further recommend that you memorialize the basis for your withdrawal under Rule 1.16, rather than simply relying on your prior retainer agreement with your client.

h. [Rule 1.2\(a\)](#) - the Client's Right to Settle

***13** The proposed version of [Pennsylvania Rule of Professional Conduct 1.2\(a\)](#) states "A lawyer shall abide by a client's decision whether to settle a matter." Comment I states "The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions." Professor Lande's article indicates that it is possible that some U.S. courts will find that some types of collaborative law withdrawal or disqualification agreements would be improper because they unduly pressure the client to settle and thus impinge upon the client's right to make the decision about settlement. See *id.* at n. 121 and accompanying text.

Thus, as you prepare and enforce your retainer agreement(s) with your client, I recommend that you keep [Rule 1.2\(a\)](#) in mind. Your actions may be examined later to determine whether they impinged upon the client's right to settle. I think you should do whatever you can to ensure that the client understands that it is the client's decision whether to settle.

i. Rule 1.7 - Lawyer-Client Conflicts and Nonconsentable Conflicts of Interest

Even if a lawyer only represents one client in the collaborative law setting, the lawyer would be well advised to consider the conflicts of interest provisions in Rule 1.7 insofar as they address conflicts of interest between the lawyer and client. The threshold provision in proposed Rule 1.7(a)(2) would apply if a lawyer concludes that there is a significant risk that the lawyer's representation of one spouse will be materially limited by the lawyer's own interests (for example, by the lawyer's interest in practicing in a collaborative law setting).

If proposed Rule 1.7(a)(2) is triggered, then representation can proceed only if all of the conditions in the exception are satisfied. Thus, the client must give informed consent and the lawyer must reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client.

Dr. MacFarlane's empirical research suggests that although some clients may consent to collaborative law, they may not have truly understood the nature of the disclosures that will be required of them (and the disclosures provided by the lawyers), including information that otherwise might not be required to be made available in a litigation context. You may find it helpful to review Dr. MacFarlane's examples to learn where misunderstandings might occur and to identify disclosures that might help you obtain truly informed consent. [FN7]

Professor Lande's article points out that there has been disagreement about the kinds of conflicts to which clients should be permitted to consent:

Reflecting, in part, different preferences about autonomy and protection, scholars and policymakers debate about where to draw the line between conflicts of interest that clients should and should not be permitted to authorize. For example, lawyers differ whether clients—even sophisticated ones—can intelligently waive lawyers' potential future conflicts of interest and, thus, whether ethical rules should permit them to do so. The difference between the U.S. and Canadian rules about traditional withdrawal agreements reflects similar differences in perspectives and values. Whereas the U.S. position is presumably based on a value of client protection, the Canadian position gives greater weight to client autonomy. Similarly, people may have different values about whether CL clients can provide adequate informed consent to the disqualification agreement

and whether the law should permit them to do so. With more experience dealing with CL issues, policymakers may develop a consensus in the future about whether client autonomy or client protection should determine the rules governing disqualification agreements.

***14** See Lande, *supra* note 1, at nn. 160-161 and accompanying text. One of the commentators quoted in his article shows you the attitudes that you might encounter about whether a collaborative law agreement might create a "non-consentable" conflict of interest between lawyer and client;

Malpractice lawyer Gary Young argues that CL lawyers have a conflict of interest because each CL lawyer commits to make extensive disclosures to the other side and correct the other side's inadvertent errors. He contends that CL lawyers cannot provide clients with sufficient information to effectively consent to the representation. It is unclear if this analysis is correct

See *id.* at n. 85 and accompanying text.

Thus, when you structure your arrangements, I recommend that you keep Rule 1.7 in mind and consider whether there are any conflicts between the client's interests and your interest in practicing collaborative law. If so, you should make all necessary disclosures in an effort to obtain truly informed consent and satisfy yourself that any conflict is consentable, as required by proposed Rule 1.7(b)(1).

j. Prospective Waivers of Liability

Although I have not reviewed for accuracy all of the 61 pages of materials that you sent me, I did want to point out one statement I noticed that might be misleading. Pages 3-4 of the PBI Ethics Potpourri article correctly cites [Pennsylvania RPC 1.8\(h\)](#)'s requirement that in order for a lawyer to receive a prospective waiver of malpractice liability, such waivers must be permitted by law and the client must be independently represented. After reciting this accurate statement, however, the material continues by noting:

Thus, the Collaborative Fee Agreement includes a provision which advises the prospective client that she/he has a right to independent advice of counsel with reference to the analysis of the potential limitations of the collaborative process.

This second statement is misleading, at best. As noted above, [Rule 1.8\(h\)\(1\)](#) requires the client to actually HAVE independent counsel when signing a prospective malpractice waiver. In contrast to [Rule 1.8\(h\)\(2\)](#) regarding the settlement of actual or

potential claims, [Rule 1.8\(h\)\(1\)](#) is not satisfied if the Collaborative Fee Agreement simply advises the client of the RIGHT to independent counsel, but the client does not retain independent counsel.

k. Available Resources

As you consider the Pennsylvania Rules of Professional Conduct and as you structure your collaborative law practice, I encourage you to consult the various articles cited in this opinion. Indeed, in addition to the articles cited in this opinion, which I have included with this opinion, you may want to consult some of the additional articles that were cited in the articles that I have relied upon. [FN8] These additional resources may provide help as you consider whether your specific arrangements comply with all of the Pennsylvania Rules of Professional Conduct.

***15** I hope this letter has been helpful. Please don't hesitate to contact me if you have additional questions.

Sincerely yours,

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Committee on Legal Ethics and Professional Responsibility

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FN1. 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, 1372 (2003).

FN2. See Julie MacFarlane, *Experiences of Collaborative Law: Preliminary Results*

from The Collaborative Lawyering Research Project, ____ J. Dispute Resolution ____ (2004) (forthcoming).

FN3. The Disciplinary Board of the Pennsylvania Supreme Court has published for notice and comment proposed changes to the Pennsylvania Rules of Professional Conduct. The recommended changes are based, in large part, on the recommendations of the ABA Ethics 2000 Commission. See [http://www.padisciplinaryboard.org/ethics 2000.htm](http://www.padisciplinaryboard.org/ethics%2000.htm). At the time this letter was written, these rules had not yet been adopted. Because adoption of these rules is likely, in this letter, I have referred to and relied upon these proposed rules.

FN4. The Vermont Bar Journal recently published two columns on collaborative law - one pro and one con. One of the points in the column critical of CL focused on the CL lawyer's role. See Apel, Collaborative Law: A Skeptic's View, 30 SPG Vermont B.J. 41 (Spring 2004) ("Robert Collins, professor of alternative dispute resolution, voices this role confusion as follows. He believes that collaborative law is "NOT creative, fair negotiations between attorneys who have foregone the threat of court, done in the presence of their clients, but really IS co-mediation with two non-neutral mediators." Thus, the lawyer is not a partisan, as in traditional negotiation, and is not a neutral, as a mediator is required to be. S/he is something else, a role that is ill-defined and difficult to determine.") The "pro" column was Buckholz, Collaborative Dissolution, 30-SPG Vermont B. J. 37 (Spring 2004).

FN5. See Buckholz, *supra* note 4, at n. 4 and accompanying text.

FN6. This is the conclusion reached in Apel, *supra* note 4, at nn. 19-20 and accompanying text.

FN7. See also Apel, *supra* note 4 (suggesting that clients' consent may not truly be informed).

FN8. For example, Professor Lande cited the following as articles that discuss collaborative law, including the ethics issues. See Marsha Baucom, Collaborative Divorce, 41 Orange County Law., July 1999, at 18, 18-20, 28-33; Diane S. Diel et al., Collaborative Divorce is a Proven, Ethical Solution, 75 Wis. Law. May 2002, at 15, 15, 17 (2002); Brian Florence. A Different Divorce-Collaborative Lawyering, 13 Utah B.J., Dec. 2000, at 18; Patricia Gearity, ADR and Collaborative Lawyering in Family Law, 35

Md. B.J., May-June, 2002, at 2, 2-7; Gutterman, *supra* note 3, at 58-59; Gutterman, *supra* note 22, at 57-59; David A. Hoffman & Rita S. Pollak, 'Collaborative Law' Looks to Avoid Litigation, 28 Mass. Law. Wkly. 1989 (2000); Steven Keeva, Working it Out Amicably: Collaborative Lawyers Agree Up Front to Settle Disputes Out of Court, A.B.A. J., June 2003, at 66, 66-67; James K. L. Lawrence, [Collaborative Lawyering: A New Development in Conflict Resolution](#), 17 Ohio St. J. on Disp. Resol. 431, 733-38 (2002); Nurse & Thompson, *supra* note 13, at 234; Rack, *supra* note 3, at 8; Reynolds & Tennant, *supra* note 2, at 25; Diana Richmond, Point of View: Collaborative Law, 10 Cal. Fam. L. Monthly, Oct. 1995, at 244, 244-45; D. Todd Sholar, Collaborative Law-A Method for the Madness, 23 Memphis St. U.L. Rev. 667, 669-75, 71 (1993); Pauline H. Tesler, [Collaborative Law: A New Paradigm for Divorce Lawyers](#), 5 Psychol. Pub. Pol'y & L. 967, 988-95 (1999); Pauline H. Tesler, Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It, 13 Am. J. Fam. L. 215, 221 (1999); Pauline H. Tesler, Collaborative Law; A New Approach to Family Law ADR, 2 Conflict Mgmt. 12 (1996); Pauline H. Tesler, [Collaborative Law Neutrals Produce Better Resolutions](#), 21 Alternatives to High Cost Litig. 1, 9, 14-15 (2003); [hereinafter Tesler, Collaborative Law Neutrals]; William van Zyverden, Collaborative Law-Moving Settlement Toward Resolution, 20 Vt. B.J. & L. Dig., Feb. 1994, at 35, 35-36. For the only serious critiques found to date, see Penelope Eileen Bryan, "[Collaborative Divorce](#)": Meaningful Reform or Another Quick Fix?, 5 Psychol. Pub. Pol'y & L. 1001, 1001-03 (1999); Deborah L. Rhode., Ethics in Counseling, 30 Pepp. L. Rev. 602, 610-11 (2003); Editorial Board, Collaborative Lawyering: An Oxymoron?, (Md.) Daily Record, April 14, 2003; Franklin R. Garfield, United to Divide? Compared to Mediation, Collaborative-Divorce Practice Lacks Efficiency, L.A. Daily J., June 11, 2003, at 8; Gary M. Young, Malpractice Risks of Collaborative Divorce, 75 Wis. Law., May 2002, at 14, 14-16, 54-55 (2002); John Wade, Collaborative Lawyering-Some Preliminary Thoughts for Australia 9-10 (June 20, 2003) (unpublished manuscript on file with the author). For replies to some of these critiques, see Daniel R. Cross & Jolene D. Schneider, Collaborative Process, Itself, Doesn't Lead to Malpractice, 75 Wis. Law., May 2002, at 18, 18; Pauline H. Tesler, The [Believing Game, The Doubting Game, and Collaborative Law: A Reply to Penelope Bryan](#), 5 Psychol. Pub. Pol'y & L. 1018-19 (1999); Richard W. Shields et al., Collaborative Family Law: Another Way to Resolve Family Disputes xiv (2003); Victor T. Tousignant, Collaborative Law: Survival Guide for the New Millennium 9 (2002) ("Collaborative Law is an idea whose time has come.") (material prepared for Collaborative Law and Collaborative Lawyering Program, Osgoode Hall Law School, on file with author); James K. L. Lawrence, Review, Retooling the Practice of Law Through Collaborative Law, Disp. Resol. Mag., Spring 2002, at 27

("Collaborative lawyering is a practice skill whose time has come for lawyers in domestic relations"); Tom Arnold, Collaborative Dispute Resolution: An Idea Whose Time Has Come, at <http://conflict-resolution.net/articles/arnold.cfm> (last visited Oct. 4, 2003); Jennifer Jackson et al., The First Fourway Meeting: "Do's" and "Don't's", Collaborative Rev., Spring 2001, at 1, 3.

There is an organization entitled International Academy of Collaborative Professionals. See <http://www.collabgroup.com> (last visited Mar. 26, 2004). Their journal is entitled The Collaborative Review.

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