Collaborative Law: Ethical Issues in Property Cases
by Norma Levine Trusch

I. INTRODUCTION.

Collaborative Law emerged on the family law scene over 15 years ago, when Minnosota lawyer Stu Webb conceived of the process and began teaching it to his fellow family attorneys. Despite the fact that there has not been one recorded malpractice case or grievance filed against an attorney in a collaborative case, many attorneys agonize over what they perceive to be the ethical challenges of collaborative law. Although this article will address what are perceived as ethical issues in property cases conducted through the collaborative law process, most of the comments herein would apply equally to cases involving children.

II. IS THIS CASE APPROPRIATE FOR COLLABORATIVE LAW?

A. Informing the Client. In most states collaborative law is a creature of contract only. Texans are in the unique position of having collaborative law sanctioned by statute. In 2001 the Texas legislature passed §§ 6.603 and 153.0072 of the Texas Family Code, which declare at the outset that, on a written agreement of the parties and their attorneys, a dissolution of marriage proceeding and a suit affecting the parent child relationship may be conducted under collaborative law procedures.

Collaborative Law should be presented to the prospective client as part of an entire spectrum of approaches to resolving family law disputes. COMMENT: *It is this attorney's conviction that NOT to present all of the alternatives to settlement is, in and of itself, malpractice.*

At one end of the spectrum is the "kitchen table" approach, in which the parties resolve, between themselves, all of the outstanding issues that must be addressed, and the attorney is used as the drafter of documents that will effectuate their agreements. If the client uses this approach, it is the attorney's responsibility to inform him or her of his or her rights under Texas law before they commit to any agreements with their spouse.

Next on the spectrum to be explained to the client is early intervention mediation, a model in which the spouses attend mediation without their attorneys in attendance, and communicate with their attorneys between sessions, if needed. Most jurisdictions have individuals who are trained in early intervention mediation, and the wise practitioners will get to know the ones who practice in their locality. Not all are attorneys. Some are therapists, some financial planners, some are extremely well trained and skillful, and some have virtually no training or qualifications. If your client is thinking of using early intervention mediation, be prepared to supply a list of practitioners whose abilities you respect and who will not allow a party to sign an agreement without your advice and consent.

A thorough explanation of collaborative law and a comparison between collaborative law and the litigation model would include a frank discussion of the disadvantages as well as the advantages of both models. Since collaborative law is the product of a written contract, getting completely informed consent by the client is essential.

B. Don't Ignore the Disadvantages. Many collaborative practitioners are so enthusiastic about the process that they tend to "oversell" it. This is a huge mistake, especially in a property case. Clients should be made completely aware of the following (taken from the "Collaborative Law Disclosure Statement" available to members on the website of the Collaborative Law Institute of Texas courtesy of the Dallas Alliance of Collaborative Family Lawyers):

"The following could be considered disadvantages of the Collaborative Law process:

"The disadvantage most often voiced is that it is less efficient to have two lawyers (the Collaborative Lawyer and then the Litigation Attorney), if the case is not settled. There may be some duplication of effort as the second lawyer catches up.
"There are things that could have been done to prepare for trial that the time delay in getting started on trial preparation may make difficult or impossible – such as the discovery of certain relevant facts that are no longer accessible.
"Court-ordered mechanisms to compel production of information will not be available during a Collaborative Law process.
"A restraining order without prior notice to the other side could prevent unilateral disposition of property, incurring of debt or decisions concerning the children, a remedy for which the Collaborative Law process does not offer.
"You may agree to neutral experts during the Collaborative Law process and then not be able to use them if the case does not settle. You might need to hire and pay for additional experts to support your position in court.

"The following are other considerations relating to the Collaborative Law process:

"The Collaborative Law process is not appropriate when punitive action is sought, such as contempt proceedings to enforce prior orders.
"The Collaborative Law process may not be appropriate if the necessary underlying honesty is lacking. If you believe your spouse is the type of person who would lie and/or would not be truthful in his dealings with you, the Collaborative Law process may not be appropriate for you. In the traditional litigation model, formal discovery may disclose concealed facts.
The Collaborative Law process prohibits taking tactical advantage of the other's mistakes, oversights, and misinformation. In contrast, adversarial litigation allows litigants with the less meritorious case to prevail, in some instances, because of superior advocacy or technicalities unrelated to fairness and justice.
"The Collaborative Law process, like mediation, may not be appropriate if there is a history or pattern of family violence. The court has remedies, such as protective orders, which are not utilized in the Collaborative Law process.

"If you feel threatened or intimidated or feel like you are in an unequal bargaining position when you are in the presence of your spouse and do not feel that having your attorney present would help you overcome those feelings, the Collaborative Law process is not suitable for you.
"No one who feels coerced into submitting to the Collaborative Law process should participate in that model.
"If you require a public forum to vindicate and defend yourself from accusations of wrong-doing, the privacy of the Collaborative Law process may not be satisfying.
"There may be a preliminary question of law or fact upon which all the negotiations depend that should be determined by the court at the outset."

COMMENT: *Discussing both the advantages and the disadvantages of using the collaborative process not only affords the client the ability to give truly informed consent to the participation agreement, but insulates the attorney from the accusation that the process was oversold to the client. The best practice would be to provide the client with a copy of the Collaborative Law Disclosure Statement referenced above as part of a complete packet of information about collaborative law.*

III. ETHICAL REQUIREMENTS OF THE PROTOCOLS

The Collaborative Law Institute of Texas, Inc., has promulgated Protocols of Practice for Collaborative Family Lawyers. The Protocols, although aspirational and without the force of law or court rule, have set the tone for collaborative practice in Texas. Most collaborative lawyers include in their participation agreements a commitment to adhere to the Protocols. Some of the provisions are not without dissent among practitioners outside of Texas. The most noteworthy are the following:

A. Section 2.02. Suitability of Matter for Collaborative Law

(a) The collaborative lawyer should be aware that certain matters may be inappropriate for using the collaborative law process. Inappropriateness may include without limitation: client objectives that are inconsistent with the principles of collaborative law, dishonesty of purpose and fraud. The collaborative lawyer should use careful judgment in accepting or declining to handle a collaborative law matter. A collaborative lawyer should decline representation of the prospective client if it appears that the client is seeking to use collaborative law to gain an advantage, however slight, in anticipated litigation.

COMMENT: *At first blush, the idea of not using any means to gain an advantage in anticipated litigation might seem shocking to the uninitiated family attorney. To the author, it's a question of honesty or misrepresentation. You either are a collaborative lawyer, or you are not. You should not hold yourself out as a collaborative lawyer if you are willing to involve yourself in a corruption of the process. The success of the process is dependent on the attorneys' ability to trust each other to protect the integrity of the process, and therefore demands a commitment to the process as well as to the client.*

(b) A collaborative lawyer should decline representation of a prospective client if the collaborative lawyer learns the prospective client has engaged a litigation lawyer for the matter or the client will be simultaneously consulting with a litigation lawyer.

COMMENT: *This does not preclude the engagement of a "second opinion lawyer" during the process if such engagement would help avoid an impasse. But such engagement should be limited to an evaluation of settlement options, not strategizing about how to utilize the process to prepare for litigation.*

B. Section 2.03. Faithful Representation of Client.

(c) The collaborative lawyer should at all times be faithful in the representation of the client and zealously represent the client in pursuit of the client's stated goals. This faithful representation includes informing the client about the law and its application to the client's matter on a continuing basis, preserving confidential communications, and assisting the client to develop approaches, collaboratively with the other participants, to resolving the matter without judicial intervention.

COMMENT: *Participating in the collaborative process is not, as many critics have said, just two attorneys acting as mediators, rather than as attorneys. It's called collaborative law, not collaborative mediation. Collaborative lawyers have the same ethical obligations to their clients as they do when they are representing clients outside the collaborative process – the main difference is the cooperative aspects of their relationship with the other attorney and party and the absence of posturing, threatening and obfuscating.*

C. Section 3.04. Sharing of Communications**.**

The collaborative lawyer recognizes that clients in a collaborative law matter may or may not choose to communicate directly with each other. A collaborative lawyer should not discourage those communications so long as the communications are agreed upon and assist the collaborative law process. The collaborative lawyer should forward promptly to the other lawyer all client to client communications received.

The drafters of the Protocols comment that, "Because of the fundamental nature of the collaborative law process, each lawyer should have access to all communications between parties. Further, because clients are not discouraged in communicating directly, any such communications received by one lawyer should be forwarded to the other lawyer."

COMMENT: *The intention of the attorneys to share copies of any communications between the clients that they receive from their own client should be made clear to the clients at the very beginning of the collaborative process. In order to make sure the*

clients understand that intent, many attorneys utilize a Written Communications Authorization form, to be signed by the parties and the attorneys.

D. Section 5.02. Honesty and Full Disclosure.

The collaborative lawyer recognizes that honesty and full disclosure of relevant information is critical to the successful outcome of a collaborative law matter and should assist the client in complying with the requirement of making a full and candid exchange of all relevant or requested documents and information to the appropriate participants.

The drafters of the Protocols comment, in a wonderful short essay written by Jennifer Broussard: "A major paradigm shift for a lawyer handling a collaborative matter is the requirement for disclosure of documents and information. It is the antithesis of litigation practice but the cornerstone of the safe environment sought to be created by the collaborative law process. 'Requested documents and information' requires minimal thought. If the documents and information are requested, they must be delivered or divulged. The parties may negotiate the manner and method of production.

"However, 'relevant information' not specifically requested presents a substantial challenge to the lawyer and client, both of whom have made a commitment to the collaborative process. In our 'don't-ask-don't-tell' society, the disclosure of unrequested, but relevant information goes against the grain. The appropriate minimum standard for disclosure should be thus posited: 'Putting the shoe on the other foot, would my client need, expect or desire such information in attempting to make an informed decision?' The definitions of 'relevant' should guide the lawyer and client in disclosing the information: 'having significant and demonstrable bearing on the matter at hand,' 'affording evidence tending to prove or disprove the matter at issue or under discussion,' 'having social relevance,' and 'implying a traceable, significant, logical connection.' Phrased differently: Is the information appropriate for the occasion? Is the information so close to the matter at hand, that it cannot be ignored without a serious impact on the decision making process?"

COMMENT: *The intent of this requirement is to avoid all of the game-playing associated with formal discovery, and acknowledge what is evident to most honest practitioners – that there is very little in the way of information about property that shouldn't be produced to the other marital partner. The standard in collaborative law is: if the information is something that a party would need in order to feel comfortable negotiating a settlement, then it should be produced. Obviously an attorney cannot disclose information against the wishes of the client, but the client needs to be aware of the possible consequences of their unwillingness to disclose – including the possibility that the process will be terminated by their spouse and the same materials will be requested and, perhaps, ordered to be disclosed in a litigated case.*

E. Section 5.03. Inventory and Appraisement.

In a divorce, a sworn joint inventory and appraisement should be prepared by the parties and the lawyers describing the parties' assets and liabilities, unless waived in writing or unless the parties agree to prepare individual inventories and appraisements.

COMMENT: *If the parties waive the preparation of the sworn I&A, then it would be wise (and probably malpractice if not done) to include the following in the participation agreement:*

> *"It is understood and agreed that the final documents reflecting the parties' financial settlement shall include the following, or similar, provisions:*
>
> ***"Representations and Disclosures**. The parties represent to each other that the property listed represents all of the property in which either of them may have an interest.*
> ***"Property and Liabilities Mistakenly Omitted**. Any property which is not listed or described and which is later determined to be the separate property of a party shall be and remain the separate property of that party. Any mistakenly omitted property which is not listed or described and is later determined to be the community property of the parties, shall be subject to future division by the court. Any mistakenly omitted liabilities which are later determined to have been the joint liabilities of the parties shall be subject to future allocation by the court.*
> ***"Property and Liabilities Intentionally Omitted**. Any assets later determined to be have been intentionally and fraudulently undisclosed by a party are set aside 100% to the other party. Any liabilities determined to have been intentionally and fraudulently undisclosed by a party are allocated 100% to the party who incurred the debt."*

F. Section 5.05. Correction of Mistakes.

The collaborative lawyer shall not take advantage of known mistakes, errors of fact or law, miscalculations and other inconsistencies. The collaborative lawyer should disclose such errors and seek to have them corrected.

The drafters of the Protocols comment on this section as follows: "Overcoming the win-lose, one-upmanship mentality of litigation, requires the greatest paradigm shift for the lawyer. That critical shift in thinking is the bedrock standard established by this protocol. That shift is made more difficult by the television-movie inspired mindset of parties in the divorce situation. But, strict adherence to this provision is essential to the enduring integrity of the parties' agreement and to collaborative law as an institution. It requires more than simply avoiding fraudulent and intentionally deceitful conduct. Misunderstandings should be corrected and not relied upon in the hope that they will benefit the client. The crucial consideration should be whether the lawyer or the client

either induced the misunderstanding or is aware that any other participant is relying on an assumption that is inaccurate."

G. Section 5.10. Professional Fees.

The agenda for the first four-way meeting should address payment of lawyers' fees. When a decision is made to engage an allied professional or neutral expert, the payment of related fees should be addressed. At any subsequent meeting, the status of fees is a legitimate agenda item.

Rather than using the strategy of financially starving the other party into submission, the drafters of the protocols state that "The collaborative lawyer acknowledges that any payment schedule of fees (including withholding or deferral), other than prompt payment according to employment contracts, results in an imbalance of power and an abuse of the process. Thus, the collaborative lawyer should encourage the client to take all actions required to pay promptly all professional fees according to employment contracts. A collaborative lawyer's withdrawal from the matter or the termination or conclusion of the matter, does not preclude the lawyer or other allied professional retained in the process from collecting outstanding fees and testifying in support of their reasonableness.**"**

COMMENT: *It is standard operating procedure among collaborative lawyers to bring their invoices to the joint sessions so the clients can come to an agreement about which community account should be used to pay their bills. Since the clients have been present when almost everything they are being billed for has been incurred, there is rarely an argument about the amount of time for which they are being charged.*

H. Section 12.03. Termination of the Process**.**

(a) A collaborative lawyer should explain to the client that the collaborative law process is entirely voluntary and may be terminated by the client at any time and for any reason.

(b) A collaborative lawyer should seek to obtain authority in the employment agreement to terminate the collaborative law process on behalf of the client, without giving a reason, if the lawyer discovers that the client has violated or proposes to violate the collaborative law participation agreement in a manner that would compromise the integrity of the process.

(c) The collaborative lawyers should seek to incorporate in the participation agreement authority to empower the collaborative lawyers to terminate the collaborative process on behalf of their respective clients, without giving a reason, if the lawyer discovers that the client has violated or proposes to violate the collaborative law participation agreement in a manner that would compromise the integrity of the process.

*COMMENT: These provisions may be among the most controversial in the Protocols. Some of the collaborative lawyers outside of Texas, known to the author, have found this provision absolutely frightening. Texas lawyers, and specifically the drafters of the Protocols, do not frighten so easily. In fact, the drafters state in a comment to this section: "During the course of the collaboration, a circumstance can occur in which the client refuses to honor commitments previously made, yet invokes attorney-client privilege to prohibit the collaborative lawyer from disclosing the violation. Under these circumstances, withdrawal by the lawyer would be ineffective to protect the other participants, as well as the integrity of the process, because the client could retain a new collaborative lawyer who is unaware of the violation, and thereby take unfair advantage. Absent contractual authorization to take this action, the collaborative lawyer may be ethically constrained from this guardianship role. As a practical matter, one should rarely, if ever, be required to make such declaration of termination, because the recalcitrant client, given the choice of declaring termination or having it done by counsel, would almost assuredly elect personally to make that declaration.***"**

Just in case the client does not meet the expectations of the drafters as stated above, the Participation Agreement recommended by the Collaborative Law Institute of Texas contains the following provision:

> **"Termination by Lawyer**. If a party refuses to disclose information, including the existence of documents, which in the lawyer's judgment must be provided to other participants, answers dishonestly any inquiry made by a participant in the collaborative law process, or proposes to take an action that would compromise the integrity of the process, the collaborative law process must be terminated. Under any of these

> circumstances, if the offending party refuses to terminate the collaborative process, each party acknowledges that his/her respective lawyer has a duty to terminate the collaborative law process on behalf of the client, and each party authorizes his/her lawyer to terminate the process by written notice to all participants and the court. The lawyer may not reveal whose decision it was to terminate the collaborative process.**"**

IV. CONCLUSION

Collaborative law, and specifically the Protocols followed by most Texas lawyers, hold the lawyer to a higher ethical standard of honesty and integrity than required by the Texas disciplinary rules, and demand of the attorney a major paradigm shift in the way he views his role in representing his client. Since attorneys in collaborative law rely heavily on their colleagues to keep the process honest, the attorney who wishes to make collaborative law a significant part of his practice should know that the reputation he makes for himself in the collaborative process may determine the willingness of other attorneys to collaborate with him.