

Uniform Collaborative Law Act – Frequently Asked Questions:

Submitted by:

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1. Why is a collaborative law act, necessary?

The International Academy of Collaborative Professionals reports that there are 22,000 lawyers worldwide that have been trained in collaborative law. Collaborative professionals are practicing Collaborative Law in all 50 of the United States, Canada, the United Kingdom, New Zealand, Australia, France, Germany, Austria, Switzerland, the Czech Republic, Israel, Uganda and Ireland.

The American Bar Association Formal Opinion 07-447, Ethical Considerations in Collaborative Law Practice makes it clear that a potential collaborative client must provide informed consent prior to selecting this model. Section 12 of the UCLA provides very strict informed consent requirements.

The Model Rules of Professional Conduct define informed consent as ‘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 an reasonably available alternatives t the proposed course of conduct.’ Model Rules of Professional Conduct R.1.0(e)(2002).

Section 12(a) of the UCLA states, “Before a prospective party executes a collaborative law participation agreement, a prospective collaborative lawyer shall provide the party with sufficient information to make an informed decision about he material benefits and risks of collaborative law as compared to the material benefits and risks of other reasonably available alternatives for resolving the matter such as litigation, arbitration or expert evaluation.”

In order to protect the consumer seeking legal services, it is important to make the disqualification agreement uniform. Client's seeking to resolve their dispute in the collaborative model, need to be guaranteed that the disqualification will be applied.

If a client believes they are in a collaborative case and the disqualification agreement has not been signed, that client may subject themselves to risk in discovery and in negotiations. The client may be under the assumption that they are never going to court, while the other side may elect the option to go to court. If one party seeks to go to court, the other party may not be adequately prepared in terms of discovery and protection of information that they believed was happening in a collaborative context.

- 2. The fact that the opposing party can cause my disqualification seems unfair and confining to my client who now will have to retain new counsel and bring new counsel up to speed. Will this raise the cost representation? Will this force a result via settlement with which my client may not feel comfortable?**

One important benefit the UCLA provides is the requirement for attorneys to appropriately screen a case, prior to recommending Collaborative Practice as an alternative. Screening involves interviewing the client about their ability to resolve disputes as well as their opinion of their spouse's ability to resolve disputes. In addition, screening involves an assessment how much knowledge the client has about the parties finances, their access to that information as well as the other spouses ability to share this information. This is similar to a non-collaborative case, where the lawyer must assess the cost benefits of full discovery versus a streamlined approach which costs less in attorney's fees.

The cost of representation may be increased if the collaborative case fails and goes to litigation. However, collaborative cases rarely fail with appropriate screening. In addition, this risk is something that the client provides informed consent to.

It is a rare collaborative lawyer who will settle a case, just so the collaborative process does not fail. It is important to remember that the other side has the same incentives to keep the case from failing. If the other side won't agree to a reasonable settlement, a collaborative lawyer sticks with the issue tenaciously until it is resolved – for both parties. The other major benefit of collaborative practice is that the opposing lawyer has received special training in collaborative practice as well as mediation. They have skills that you can rely on to work with their client to take reasonable positions. As you are pushing your client's issues tenaciously, the opposing lawyer is working with their clients on the pros and cons of their resistance to the issue at hand. The use of mental health professionals can help break an impasse when the impasse is the result of

emotional issues. The use of a neutral financial person can help break an impasse, by generating various financial options.

3. The Colorado ethics opinion holds that the collaborative contract creates a contractual obligation to a third party which is a conflict of interest in violation of Rule 1.7(1)(2)

The American Bar Association Formal Opinion 07-447, Ethical Considerations in Collaborative Law Practice specifically rejects this issue raised in the Colorado ethics decision, and states:

“The one opinion that expressed the view that collaborative practice is impermissible did so on the theory that the “four way agreement” creates a non-waivable conflict of interest under Rule 1.7(a)(2). We disagree with that result because we conclude that it turns on a faulty premise... We do not disagree with the proposition that this contractual obligation to withdraw creates on the part of each lawyer a ‘responsibility to a third party’ within the meaning of Rule 1.7(a)(2) We do disagree with the view that such a responsibility creates a conflict of interest under that Rule. ...

It has been suggested that a lawyer’s agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client. We disagree, because we view participation in the collaborative process as a limited scope representation.

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer’s agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client’s limited goals for the representation.”

4. What about domestic violence and other emergency matters (ie: child removed from jurisdiction)?

The UCLA has addressed the concern of whether or not domestic violence is appropriate in Collaborative cases.

The UCLA imposes a responsibility on lawyers to address domestic violence concerns. Section 12(b) requires collaborative lawyers to screen a potential party to collaborative law for a history of domestic violence. Section 12© requires that the lawyer not commence or continue collaborative law if a potential party is a victim of domestic violence unless the victim consents and the lawyer reasonably believes that the victim’s safety can be protected while the process goes on.

Section 6 creates an exception to the stay of proceedings in a collaborative case for “emergency orders to protect the health, safety, welfare or interests of a party or family or household member.”

Section 8©(2) creates an exception to the disqualification requirement for a collaborative lawyer to represent a victim in seeking emergency orders. This insures that a victim of domestic violence will continue to have assistance of counsel to access the court. This is consistent with the rules of professional conduct for withdrawal which states that a “lawyer may withdraw from representing a client if...withdrawal can be accomplished without material adverse effect on the interests of the client.”

Reconciling the need to insure safety for victims of domestic violence with the party autonomy that alternative dispute resolution processes assumes is an ongoing challenge for policy makers.

- 5. Where information discovered during the collaborative process is not permitted to be used in the litigation process, such an agreement creates a strong disincentive to terminate the collaborative process for the economically weaker spouse, even if it would be in his or her best interest to do so.**

Many states require mandatory disclosure in divorce cases. (New York, New Mexico, Alaska – to name a few). In addition, section 14© states that “evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a collaborative law process.”

It is standard practice for new litigation counsel in a failed collaborative case to stipulate to use documentation obtained in the collaborative process that is typically discoverable.

6. The attorney potentially puts the client in a worse legal position than if the attorney had undertaken no obligation to perform legal services
- 7. Collaborative practice is for the benefit of lawyers, not for clients;**

Collaborative practice is a client centered process. Collaborative professionals who engage in collaborative practice do so consistent with Rule 1.2© and comment 2 which provides, “[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.”

It is important to note that statistically speaking, lawyers earn less in fees in Collaborative cases than they do in litigation cases.

8. Will collaborative practice destroy the practice of Family Law and do grave harm to those in the public who rely on our skills and advice in what is inherently a matter of competing interests?