

FITTING THE FUSS TO THE 'FORM': THE ETHICAL CONTROVERSY OVER COLLABORATIVE LAW CONTRACTS

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Collaborative Law (also commonly known as Collaborative Practice) is a dispute resolution derivative in which the clients and their lawyers agree by way of a limited retainer agreement to negotiate settlement without resort to the courts. This retainer agreement specifies that the solicitor/client relationship is restricted to settlement negotiations and is automatically terminated if the matter proceeds to court. The lawyer and her firm are disqualified from litigation representation.

A further contract, commonly known as the Participation Agreement, is signed by each lawyer and each client at the outset of the collaboration. Among other things, it reiterates the provision that neither lawyer, nor any member of her law firm can act for the client in the event that *either* client withdraws from the process and pursues litigation.

In recent months discussion about the Participation Agreement has centered on the ethical issue of conflict of interest. Is the lawyer compromising her duty to act for a client by contractually binding herself to the other client in agreeing not to pursue every opportunity to promote their client's position?

A decision by the Colorado Bar Association Ethics Committee¹ found that the Participation Agreement, as a species, creates a conflict of interest under the Colorado

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¹ Colorado Bar Association Ethics Committee, *Formal Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts* (2007) <<http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts-02/24//>> at 22 September 2008.

Rules of Professional Conduct. In contrast, the American Bar Association found that the same species of agreement did not violate conflict principles.²

In a recent article, Peppet takes on both sides and concludes that neither has properly put the question thus concluding that neither opinion can draw a reasoned conclusion.³ Peppet suggests that the analysis is much more complex because, he argues, the agreements cannot be viewed *in specie*. No two agreements are likely to be identical as each local group of Collaborative Lawyers in the US, Canada, Australia, UK, the EU, etc has developed a version that reflects jurisdictional needs. Further, neither opinion relies upon the fact that the Participation Agreement echoes the limited retainer agreement, and does not create a new agreement.

On reviewing dozens of examples of these Participation Agreements, Peppet reflects that they are on a continuum from guidelines to contracts and that some may create privity for all parties including the lawyers.⁴ Certainly, it would seem unlikely that there was ever an intent to grant the lawyers a contractual right to sue each other and the other's client. Peppet alleges that there has been a lack of scrutiny by drafters of Participation Agreements and that blind spots have been created by putting function before form.⁵

In tracing the origins of the Participation Agreement, Stuart Webb, the Minnesota attorney who first described and initiated the collaborative process in his local community, reports that the early cases were conducted without any agreements. The first Participation Agreement was developed once there was a critical mass of about 10 attorneys who all subscribed to the same principle, that of withdrawal in the event of litigation.⁶

Webb also contextualises the appearance of a Participation Agreement, as the family law statutes in Minnesota require certain court filings of stipulations and joint petitions to ratify agreements. In effect, he speculates that the need for cooperation between counsel in light of the court requirements and timing issues may have been the underlying impetus for the creation of an agreement. Once there was one, there were many. However, he emphasises that the process is workable, in his view, with or without the lawyers as parties to the Participation Agreement.

The collaborative community is reviewing these decisions in a healthy internal dialogue that goes to the root of the collaborative process. If some contracts clearly create privity that is not waived creating standing for collaborative lawyers against one another, is that what was intended? If not, do the lawyers actually need to be parties to the contract? If they are not, is the process diluted in some way, and if so, how?⁷ Is there a symbolism inherent in a four party agreement that creates greater certainty for the client?

² American Bar Association Committee on Ethics and Professional Responsibility, *Formal Opinion 07-447* (2007) American Bar Association <<http://www.abanet.org/>> at 22 September 2008.

³ S Peppet, 'The Ethics of Collaborative Law' (2008) 1 *Journal of Dispute Resolution* 131.

⁴ *Ibid* 139-41.

⁵ *Ibid* 132.

⁶ Interview with Stuart Webb (Telephone interview, 2 June 2008).

⁷ P Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association Section of Family Law, 2001) 231. Tesler poses the question: 'Why is it so important to sign on formally to the official Collaborative Law Agreement?' and answers that there is a synergy created when all parties are signatories, and that everyone knows where the others

The edge of this internal debate is what is called 'Cooperative Law'. In this model, the four-way meetings are conducted, as in the collaborative process, but with neither the limited retainer agreement restrictions, nor the Participation Agreement commitments.⁸ The participants adopt guidelines that reflect their intention to work towards settlement, provide full disclosure, agree to be cooperative and use interest based negotiations. No written guarantee is provided that the lawyers will be disqualified, as in the collaborative process.

The collaborative/cooperative debate is about the formality of the collaborative rule that the clients cannot head off to court with the same lawyers that assisted them at the settlement table. Although there are anomalies that flow from the strictness of this rule,⁹ it remains the lynchpin of the fast growing multi-continent movement.

Query whether the clients, who are already accepting the consequence of losing their lawyer if the collaboration breaks down, would accept a contracting out provision that barred them from court at all? Can clients waive their rights to access the courts? Are they not already doing so in many agreements that refer disputes to mediation and or arbitration?

It is interesting to note that the overwhelming number of cases that are being resolved in Collaborative Practice are family matters. The civil community has been slow to entertain this approach notwithstanding the scholarship dedicated to the application of it in contexts other than family law,¹⁰ and the energy of collaborative practitioners to expand the reach. It may be that the limited retainer agreement is proving too restrictive. If Collaborative Lawyers could withdraw without disqualifying their firms in the event of litigation, might there be more incentive for the large firms to create collaborative departments?

This takes us back to the 'fuss' over the 'form', being the Participation Agreement. If the essence of collaboration is the disqualification of the settlement lawyers from representing the clients at court, do we need Participation Agreements? Are we in the same process if the clients bind one another by contract to limit their legal representation? Are limited retainer agreements the sufficient and necessary component?

Collaborative Practice is nascent. Its rapid growth is testament to its appeal for clients. For lawyers, it is an unbundled service, and, as such, legal and ethical issues will arise. Legal culture is self-examining with regard to liability, and ethics and liability are intertwined. Fundamental to its ongoing success will be the adaptability of collaborative services to respond to the external 'fuss' it attracts.

stand. However, Tesler goes on to suggest that the Contract (Participation Agreement) is what binds the lawyers to the process and she does not discuss the effect of the limited retainer agreement.

⁸ See J Lande, 'Principles for Policymaking about Collaborative Law and other ADR Processes' (2007) 22 *Ohio State Journal on Dispute Resolution* 619, 632 n 62 for more citations on Cooperative Law.

⁹ For example, both clients have the lost costs of changing lawyers when only one may decide to resile from the process.

¹⁰ See such advocates as D Hoffman, 'Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR' (2008) 1 *Journal of Dispute Resolution* 11.