2014 FAMILY LAW SEMINAR

Issues, Ethics, and Best Practices in Alternative Dispute Resolution

3:15 p.m.- 5:00 p.m.

Presented by

Diane Dornburg
Carney & Appleby, PLC
400 Homestead Building
303 Locust Street
Des Moines, IA 50309
Phone: 515-282-6803

Carlton D. Stansbury
Burbach & Stansbury
10850 W. Park Place
Suite 530
Milwaukee, Wisconsin 53224
Phone: 414-359-9100

Matthew Brandes
Simmons Perrine Moyer Bergman PLC
115 Third St SE Ste. 1200
Cedar Rapids, IA 52401
Phone: 319-366-7641

FRIDAY, OCTOBER 24

"A Trap For the Unwary: How Confidential Understandings in Family Law Mediation May Become Judicially Enforced Settlement Agreements"

This outline examines Iowa's Uniform Mediation Act" and how differences in the Family Law Mediation Programs operated by the Iowa State District Courts may inadvertently lead to differing results with regard to judicial enforcement of agreements reached during a Family Law Mediation.

A. Iowa's Uniform Mediation Act

In 2005, Iowa became one of the first states to adopt the Uniform Mediation Act (the "Act").[1] Iowa Code § 679C.101. The Act was developed following a thirty year expansion of the role of mediation in "dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict". See the Model Act, Prefatory Note at p.1. By 2003, when the Model Act was approved by the National Conference of Commissioners on Uniform State Laws, hundreds of state statutes had been enacted across the nation to establish mediation programs in a wide variety of contexts and to encourage their use. Id. In the opinion of the author of this outline, it is not coincidental that the 30 year expansion of mediation before 2003 occurred following the enactment of no fault divorce legislation in 1970.

At the time the Act was developed, it was well understood that confidentiality is essential to effective mediation process and needed to encourage its use. A primary benefit of mediation is the opportunity for participants to engage in a candid and informal exchange regarding events in the past as well as their perceptions of and attitudes toward these events. Equally important, parties are encouraged to think constructively and creatively about ways in which their differences might be resolved. As noted in the Model Act Prefatory Note, more than 250 mediation privilege statutes had been enacted by state

[1] At present the Act has been adopted by twelve states, and is being considered by two more. http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act

legislatures by 2003. Therefore, one of the central reasons for adoption of the Act was to provide a privilege that assures confidentiality in legal proceedings for mediation communications (*see* Sections 4-6). The Model Act clearly identifies the creation of a statutory privilege to protect mediation communication from judicially compelled disclosure as it's "major contribution". See Model Act Prefatory Note, Promoting Candor.

The Act defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." Iowa Code § 679C.102(1). Mediation communication is defined as "a statement, whether oral or in a record, verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." Iowa Code § 679C.102(2)

Because it is critical to the topic under discussion, Section 679C.103 is set out in full below. This section addresses the scope of the Act and to which mediations it applies.

> Section 679C.103 Scope
>
> 1. Except as otherwise provided for in subsections 2 and 3, this chapter applies to a mediation that occurs under any of the following circumstances:
>
> a. The mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator.
>
> b. The mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure.
>
> c. The mediation parties use as a mediator a person who holds oneself out as a mediator or the mediation is provided by a person who holds oneself out as providing mediation.

2. This chapter shall not apply to a mediation relating to or conducted under any of the following circumstances:

a. Relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship.

b. Relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that this chapter applies to a mediation arising out of a dispute that has been filed with an administrative agency or court.

c. Conducted by a judge who might make a ruling on the case.

d. Conducted at any of the following:

(1) A primary or secondary school if all the parties are students.

(2) A correctional institution for youths if all the parties are residents of that institution.

3. If the mediation parties agree in advance in a signed record, or a record of proceeding reflects agreement by the mediation parties, that all or part of a mediation is not privileged, the privileges under sections 679C. 104 through 679C.106 do not apply to the mediation or part agreed upon. However, sections 679C.104 through 679C.106 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made. Iowa Code Section 679C.103.

Iowa Code § 679C.104(1) provides that a mediation communication is privileged and not subject to discovery or admissible in evidence "in a proceeding" unless privilege has been waived or is precluded by section 679C.105. Pursuant to Iowa Code Section 679C.105(1) A privilege under section 679C.104 may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties and if all of the following apply:

a. In the case of the privilege of a mediator, the privilege is expressly waived by the mediator.

b. In the case of the privilege of a nonparty participant, the privilege is expressly waived by the nonparty participant.

In addition, [a] person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under section 679C.104, but only to the extent necessary for the person prejudiced to respond to the disclosure or representation. See Section 679C.105(2) A "proceeding" is defined as: a. a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and post hearing motions, conferences, and discovery; or b. a legislative hearing or similar process. Iowa Code § 679C.102(7).

The Act specifically outlines the available privileges as follows:

a. A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

b. A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

c. A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant. Iowa Code § 679C.104(2).

A mediator shall not "make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation." Iowa Code § 679C.107(1). While the communications made during mediation are privileged, the mediator may disclose "Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance." Iowa Code § 679C.107(2)(a).

Finally, it is important to note that the privilege granted by the Act is a limited privilege. Iowa Code Section 679C.106 delineates the limits of the privilege

and those situations in which mediation confidentiality must give way to other valid justice system values. Most attorneys are familiar with the limitations on privilege that exist for written agreements, public mediations, threats or plans of criminal activity and in cases of alleged malpractice arising out of a mediation. See Iowa Code Section 679C.106 (1) (a)-(g). Attorneys may be surprised to learn, however, that:

> "**2. There is no privilege under section 679C.104 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in any of the following situations:**
>
> > **a. A court proceeding involving a felony or misdemeanor.**
> >
> > **b. Except as otherwise provided in subsection 3, a proceeding to prove a claim to rescind or reform a contract or a defense to avoid liability on a contract arising out of the mediation.**
>
> Iowa Code Section 679C.106(2). (Emphasis Added).

As can be seen, a court has the authority to eliminate a mediation privilege claim in a civil dispute over whether a settlement agreement should be reformed, rescinded or avoided.

B. Family Law Mediation in Iowa

An understanding of the scope of the Act is critical to the current discussion because of the way in which family law mediation has developed in Iowa. Before 1996, family law mediation was a voluntary process provided through mediators associated with private agencies such as the Iowa Peace Institute, Iowa Mediation Service, Inc. and the Polk County Bar District Court Mediation Program. See Final Report of the Supreme Court's Mediation Study Group pp.10- 13 (3-14-2000) available at Iowa Judicial Branch/Administration/Reports. In 1996, pilot programs for court ordered

mediation in family law cases were created in Iowa's 2nd and 6th (1996) Judicial Districts. In January 2000, District 5C moved to a court ordered mediation program as well. Id.

In 2009, the Iowa Supreme Court requested the eight Iowa judicial districts to provide information on the use of mediation in family law proceedings. While there has been no comprehensive report from court to date, the author of this outline has gathered information from the Iowa Judicial Branch website and the offices of the various district court administrators that was developed in response to this directive. That information was compiled and presented at the 2014 ISBA Annual Meeting in an outline titled "Improved Access to Family Court Through Uniform Rules and Forms" The compilation establishes that court ordered mediation provided by private mediators has become the predominant approach to the delivery of mediation services. There are still districts, or areas in districts, in which mediation is not court ordered. In the case of the Seventh District, a settlement conference conducted by a judge is other than the trial judge is the required form of court ordered mediation. See "Improved Access to Family Court Through Uniform Rules and Forms", supra.

Because of their history and ability to be self-supporting, the family law mediation programs in the 5th and 6th judicial districts are the most well established programs. For purposes of this outline, the most significant difference between the 6th District and the Polk County program is in the timing of mediation. This difference impacts who is most likely to provide mediation service, who attends mediation, and the type of mediation techniques that are employed. Because these two programs have become models for the programs offered in the other districts, it is important to appreciate these differences when it comes to understanding how confidential understandings in family law mediation may become judicially enforced settlement agreements"

In the 6th District, mediation is ordered at the time a family law case is filed. If a request for temporary custody is made or the matter is a contempt, mediation must occur before the hearing takes place. Otherwise, mediation is mandated to take place within 45 days of filing the action. The 45-day requirement is

usually not judicially enforced unless the failure to complete mediation is brought to the Court's attention. Family law cases are not set for trial, however, until a mediation session is completed.

It is common for parties to attend mediation in the 6th District without their attorneys. Mediation in face to face joint session with the mediator rather than in private caucus or "settlement conference" format with party's lawyers in attendance is the exception not the rule. In the 6th District, more mediation work is done by mediators who are not lawyers than in Polk County. By express program rule, "[n]o agreements are signed in mediation. Proposed agreements are submitted to the parties' attorneys, whether directly or through the client for review. Any final agreement must be signed by both parties outside of mediation and then submitted to the court for review and approval." See 6th Judicial District Family Mediation Program History and Policy Document (November 2011) at p. 5; available at http://www.mediateiowa.org/divorce-custody-mediation/policies-procedures.aspx. For ease of reference, this approach is hereafter identified as the "early mediation" model i.e. other than for temporary orders or contempt hearings, mediation occurs before a trial date is assigned. Voluntary, judicially managed "settlement conferences" are available after trial assignment with senior judges from the District.

In Polk County, mediation is court ordered in connection with applications for temporary custody, after pre-trial conferences which generally occur approximately 120 days after a case is filed, and on all contempt matters except those raising financial issues only. It is not necessary to complete mediation to obtain a trial date and mediations generally occur shortly before hearing or trial. The prevailing form of mediation in Polk County is joint session followed by private caucus. 95% of the mediations are conducted with parties and lawyers present. A heavy percentage (90-95%) of the mediation work is being performed by lawyer mediators. This model is referred to hereafter as the "pretrial mediation" model i.e. mediation occurs shortly before the scheduled hearing or trial .

It is beyond the scope of this outline to attempt to determine all the ways in which the other family law mediation programs around the state may differ.

The following is the author's conclusion with regard to where each district falls in the early versus pretrial mediation continuum. Early mediation districts appear to be the 1st, 2nd (Boone and Story County Pilot Projects) otherwise voluntary, 4th, 6th and 8th Districts. The 5th and 7th Districts are Pretrial mediation districts The 3rd District has not adopted a family law mediation program so participation in mediation remains entirely voluntary. Information on alternative dispute resolution and attorney mediators is available through the 3rd District Court Administrator's office.

C. The Existence of Mediation Privilege May Be Crucial To the Determination of Whether A Court Adopts An Out of Court Settlement as a Final Order Over a Parties' Objection

It is well established in Iowa that a court may order the adoption of a written or oral settlement agreement as a final order in a family law matter. "A stipulation and settlement in a dissolution proceeding is a contract between the parties. Therefore, it is enforceable like any other contract, and a party may not withdraw or repudiate the stipulation prior to entry of judgment by the court." *In re Marriage of Jones*, 653 N.W.2d 589, 593 (Iowa 2002) (internal citations omitted). Like other contracts "The party seeking to establish the existence of a contract, oral or otherwise, bears the burden of proving the existence of a contract." *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). See also, *In re Marriage of Briddle*, 756 N.W.2d 35, 40 (Iowa 2008); *Lamberts v. Lillig*, 670 N.W.2d 129, 134 (Iowa 2003); *In re Marriage of Ask*, 551 N.W.2d 643, 644 (Iowa 1996); *In re Marriage of Johnson*, 350 N.W.2d 199 (Iowa 1984) and *In re Marriage of Hansmann*, 342 N.W.2d 495, 496 (Iowa 1984).

The court must consider a written settlement agreement in determining the distribution of property. Iowa Code 598.21(5)(k). The court may also consider an oral agreement under § 598.21(5)(m) as an "other factor the court may determine to be relevant." *In re Marriage of Johnson*, 350 N.W.2d 199, 201-02 (Iowa 1984). Conversely, because it is permissive, the court may also decline to consider an oral agreement. Finally, while a settlement agreement is treated as a contract for purposes of formation, the court is not necessarily bound by the terms of the settlement agreement. The presence of a legal contract is not conclusive as the court may still modify or disregard the settlement or

stipulation if it does not "constitute an appropriate and legally approved method of disposing of the contested issues." *In re Marriage of Jones*, 653 N.W.2d 589, 593 (Iowa 2002).

It is important to understand the differences in the district mediation programs because the existence of mediation privilege may profoundly affect what evidence is discoverable or admissible in a legal proceeding to establish the fact and terms of a settlement or to avoid a claim of settlement. This is particularly true when the alleged settlement is oral, a relatively common occurrence in the context of mediated settlements. The following sections examine in more detail the factual elements the courts consider in deciding whether to adopt an out of court settlement in a final order.

It should be noted that only a small number of the reported cases cited below make clear under what circumstances the parties reached the settlement agreement. The majority do not. Even when the court states that the agreement arose from a settlement conference or mediation, it is often unclear exactly what procedures were used because the terms are sometimes used interchangeably . For that reason, it is not always possible to distinguish the decision on enforceability based on the setting in which the parties came to the agreement.

D. Specific Factors Considered By the Courts When Determining the Enforceability of an Oral Settlement Agreement

1. Because Contract Principles Control, Courts Look for a Meeting of the Minds

Like any contract, for a settlement agreement to be enforceable there must be a meeting of the minds. In *In re Marriage of Barker*, 786 N.W.2d 874 (Iowa Ct. App. 2010), the parties entered their settlement agreement on the record, and the judge advised one of the attorneys to draft a document reflecting the parties' oral agreement. After two drafts failed to properly capture the oral agreement a third agreement was drafted. Id. By that point, one party determined that she no longer wanted to sign the agreement. *Id.* That party's attorney testified that the third draft reflected the terms of the oral

agreement. *Id.* The court found that a meeting of the minds occurred at the time of the initial oral agreement, and the agreement was incorporated into the decree via the third draft of the written agreement. *Id.* Similarly, if the parties "interpreted the original agreement differently" then the parties did not have a valid agreement. *In re Marriage of Hansmann*, 342 N.W.2d 495, 496 (Iowa 1984).

Similar to the meeting of the minds is the so called "mirror image rule." While this rule has been abrogated by the UCC, it still applies in other contractual settings. *In re Marriage of Masterson*, 453 N.W.2d 650 (Iowa Ct. App. 1990) provides an example of how this principle applies, albeit in terms of written settlement negotiations rather than oral:

> William's attorney's letter of April 24, 1984, did not unequivocally accept Janet's proposition of April 17th, but instead interjected a qualification. As such, William rejected Janet's April 17th offer, and by his letter of the 24th of April, he submitted a counteroffer. Since William had previously rejected Janet's offer, his letter of May 2nd accepting Janet's offer of April 17th was a nullity because there was no longer an offer outstanding which he could accept. We thus deem this correspondence to be in the nature of an offer by William to settle the appeal. Janet's response, by including a new term, again fails to constitute an acceptance. It, too, is in the nature of a counteroffer. Id at 653.

Similarly, in Treimer the Court of Appeals overturned a district court finding that the parties reached an oral agreement. *In re Marriage of Treimer*, 752 N.W.2d 453 (Iowa Ct. App. 2008). The court noted that the faxed writing memorializing the alleged oral agreement was referred to as the "proposed Settlement Agreement," that the documents were to be forwarded to the drafting attorney's client for "review and approval" and that the non-drafting attorney sought changes to the proposed agreement and accepted with "very minor reservations." *Id.* The court found that due to all of the hedging language used throughout the process of formalizing the oral agreement that the parties never in fact reached an agreement during the settlement conference. *Id.* So, in determining if an oral settlement agreement is

enforceable as a contract it is important that the proponent be able to show a meeting of the minds, not a rejection and a counter offer or anything indicating less than full acceptance.

2. Whether the Parties Contemplate That the Proposed Agreement Would be Reduced to Writing

When determining if an oral agreement exists it is important to determine if the parties agreed that the proposed oral agreement would be reduced to writing. *In re Marriage of Eubank*, 725 N.W.2d 659 (Iowa Ct. App. 2006); see also *In re Marriage of Masterson*, 453 N.W.2d 650, 654 (Iowa Ct. App. 1990) (" It goes without saying that whether preliminary negotiations actually ripen into an oral contract depends upon the intention of the parties as gleaned from the facts of the case." If the parties agreed that the agreement would not be final until reduced to writing then the court will likely not enforce the oral agreement. *In re Marriage of Eubank*, 725 N.W.2d 659 (Iowa Ct. App. 2006).

Courts consider several factors in determining whether parties intended to be bound before the execution of a written document: Factors to be considered include whether the contract is of a class usually found to be in writing, whether it is of a type needing a formal writing for its full expression, whether it has few or many details, whether the amount is large or small, whether the contract is common or unusual, whether all details have been agreed upon or some remain unresolved, and whether the negotiations show a writing was discussed or contemplated. *In re Marriage of Masterson*, 453 N.W.2d 650, 654 (Iowa Ct. App. 1990). Consequently, when important terms of the dissolution are omitted from the oral agreement it is less likely to be enforced by the court.

3. Whether Counsel Have Authority to Settle

If the oral agreement is reached between the attorneys it is vital that both attorneys had the authority to bind the parties to the dissolution. In Eubank the court declined to enforce an oral agreement between the parties. In re Marriage of Eubank, 725 N.W.2d 659 (Iowa Ct. App. 2006). The court noted that the attorney for Mr. Eubank testified that he "thought" he had authority to enter into the settlement. Id. However, the attorney provided no factual basis for this belief. Id. Further, the client adamantly denied giving his attorney the

authority to settle. Id. The court determined that the attorney did not have authority, and consequently the oral settlement agreement was not valid. Id.

On the other hand, in Oehler the court determined that the party seeking to avoid the settlement agreement did in fact give authority to his attorney to settle. *In re Marriage of Oehler*, 1999 WL 710820 (Iowa Ct. App. Aug. 27, 1999). In that case the attorney testified that his client gave him authority to make the settlement offer, and that the attorney discussed the terms of the counter offer with his client before the client ultimately accepted. *Id.* In that case the court found that the party "had agreed to the joint stipulation and only later recanted." *Id.* Clearly, the existence of actual authority is a factually sensitive issue. Further, it often relies heavily on the courts determination of the credibility of the party testifying. In practice, it would be beneficial for the attorney to memorialize either through recording or written document the authority granted to the attorney by the client.

4. Whether the Parties Were Represented by Counsel

Courts often note the presence of counsel during negotiations of settlement agreements. This is likely because the presence of counsel is seen as an insulating factor against pressures that may otherwise render the agreement invalid. *See generally Lemke v. Lemke*, 206 N.W.2d 895, 898 (Iowa 1973). Courts have pointed to the presence of counsel during negotiation as a factor in favor of upholding an oral settlement agreement that was dictated to the court. *In re Marriage of Shanks*, 2001 WL 246358 (Iowa Ct. App. Mar. 14, 2001); *In re Marriage of Tolson*, 2001 WL 57991 (Iowa Ct. App. Jan. 24, 2001). In *Ask* the court, in upholding the oral settlement, pointed out "before the hearing started, *the parties and their attorneys discussed settlement* for several hours." *In re Marriage of Ask*, 551 N.W.2d 643, 644 (Iowa 1996).

On the other hand, in refusing to uphold a written relinquishment of parental rights, one factor the court relied on was the party giving up the right was not represented at the mediation where he agreed to the settlement. *Lamberts v. Lillig*, 670 N.W.2d 129, 134 (Iowa 2003). So, in determining the validity of an oral settlement it is relevant whether counsel was present, and the presence of counsel weighs in favor of upholding the oral agreement.

5. Whether Parties Had Full Information Prior to Entering the Settlement

Similar to representation by counsel, the availability of information is relevant because it undermines defenses to the agreement. Again, in Shanks the court noted in upholding the oral settlement dictated to the court that "Randall made full disclosure to permit Lora and her counsel to undertake valuation of the law practice" and Randall had "not engaged in concealment of material information, fraud, misrepresentation, wrongdoing, or unconscionable behavior." In re Marriage of Shanks, 2001 WL 246358 (Iowa Ct. App. Mar. 14, 2001). So, in determining the validity of an oral agreement the proponent should stress to the court that full disclosures were made in the process leading up to the agreement.

6. Establishing the Terms of the Oral Settlement

If the court determines that the parties reached an oral settlement agreement the next step is to determine what the terms of that agreement are. The easiest cases occur when the parties dictate the terms of the oral settlement in court on the record. *See In re Marriage of Tolson*, 2001 WL 57991 (Iowa Ct. App. Jan. 24, 2001); *In re Marriage of Shanks*, 2001 WL 246358 (Iowa Ct. App. Mar. 14, 2001); *In re Marriage of Hall*, 2002 WL 1586167 (Iowa Ct. App. July 19, 2002). Unfortunately, this does not always happen, or one party attempts to repudiate the agreement before it can be entered into the record. In these cases, the court faces the difficult task of proving the terms of the agreement when one party denies its existence and both witnesses are interested in the outcome of the decision. The two issues that are frequently relevant in these cases are the applicability of Iowa Code 679C and its provisions regarding the privileged nature of mediation, and whether counsel will be forced to withdraw so he or she may testify as to the terms of the agreement.

Attorneys should be cognizant of situations which may force the attorney to testify. In several cases regarding the enforcement of oral settlement agreements one of the parties' attorney was called to testify about the existence or terms of the oral settlement agreement. *In re Marriage of Eubank*, 725 N.W.2d 659 (Iowa Ct. App. 2006); *In re Marriage of Dawson*, 2002 WL 531532 (Iowa Ct.

App. Mar. 27, 2002); *In re Marriage of Barker*, 786 N.W.2d 874 (Iowa Ct. App. 2010); *In re Marriage of Stanbrough*, 695 N.W.2d 505 (Iowa Ct. App. 2005); *In re Marriage of Curnes*, 690 N.W.2d 701 (Iowa Ct. App. 2004). The fact that many of these cases refer to the testifying attorney as the former counsel indicates that due to ethical considerations the testifying attorney frequently needed to withdraw in order to testify. As an attorney it makes good sense to avoid situations where the attorney may become a witness and be forced to withdraw.

7. Avoidance of an Otherwise Valid Settlement

Similarly, the court applies general contract principles in determining whether an otherwise valid settlement agreement can be avoided. The same defenses available to avoid a contract are available to avoid a settlement agreement i.e. "one may repudiate the agreement because of actual or supposed defenses thereto-lack of consideration, fraud, duress, and the like-such as would be available against any other contract. *In re Marriage of Tolson*, 2001 WL 57991 (Iowa Ct. App. Jan. 24, 2001) *see also In re Marriage of Curnes*, 690 N.W.2d 701 (Iowa Ct. App. 2004) (party to settlement agreement seeking to withdraw from agreement due to duress and undue influence); *In re Marriage of Briddle*, 756 N.W.2d 35, 40 (Iowa 2008) (party to settlement seeking to avoid enforcement of settlement agreement due to fraudulent inducement by former spouse); *In re Marriage of Shanks*, 2001 WL 246358 (Iowa Ct. App. Mar. 14, 2001) (party to settlement agreement sought to withdraw the agreement due "fraud, misrepresentation, unconscionable behavior, or mistake").

8. Summary and Practical Conclusions

Given the prevalence of mediation in family law matters and the general belief that settlement discussion is confidential and non-binding, it is extremely important for lawyers and clients to be aware that claims of a judicially enforceable settlement agreement can be based on oral agreements made in a mediation. In the author's opinion, this is the most critical takeaway from this program.

When claims of binding out of court settlement a are made, party and mediator privilege may be implicated because the factors Iowa judges must

consider in deciding whether to adopt an out of court settlement as a final, family court order, may be best found in evidence of otherwise privileged mediation communications. While there is a tendency to think that mediation privilege is absolute, attorneys and clients should always be mindful that there can be efforts made post mediation to circumvent mediation privilege both in support and avoidance of judicial adoption of out of court settlement agreements. In fact, it is surprising that there are not more reported Iowa cases of this kind.

Attorneys should use care to make sure that client expectations for confidentiality are met. The process should begin when first meeting with clients. Clients should also be made aware that informal settlement agreements made with the help of non-professional mediators may not be confidential and may be adopted by a court. When dealing with private mediators, best practice suggests that expectations for confidentiality be spelled out in mediation contracts and a careful review of contract provisions for confidentiality is always in order.

If a client is attending mediation without counsel, the client should be counseled that nothing is to be signed at the mediation regarding settlement. Unconditional expressions of agreement to settlement at mediation or settlement conferences should also be avoided. Attorneys participating in judicially supervised settlement conferences should use care that the judicial officer is not a judge "who might make a ruling on the case". Clients should also be made aware that a helpful trial judge's offer to facilitate settlement negotiations immediately before a trial or hearing may result in a binding, non-confidential understanding that may later become an order.

IDENTIFICATION, ASSESSMENT AND MANAGEMENT OF COERCIVE CONTROL AND/OR DOMESTIC VIOLENCE IN ALTERNATIVE DISPUTE RESOLUTION

Diane L. Dornburg

Outline based on and adapted from

The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers by Nancy VerSteegh, 38 Hofstra Law Review 699 (2009)

Full article available at: http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1211&context=facsch

1. ALTERNATIVE DISPUTE RESOLUTION INCLUDES
    a. Mediation
        i. Rule 11
    b. Collaborative law
        i. Definition: A voluntary dispute resolution process in which parties settle without litigation. Requires collaborative participation agreement, full disclosure without formal discovery, representation of both parties by trained attorneys, and disqualification of attorneys if collaborative process fails
        ii. Uniform Collaborative Law Act (not adopted) serves as a model and guideline
        iii. International Academy of Collaborative Professionals Standards
    c. Parenting coordination

i. Definition: a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.

ii. Association of Family & Conciliation Courts guidelines

iii. Court order

2. DEFAULT POSITION regarding domestic violence

a. Iowa Code 598.7 The provisions of this section shall not apply to actions which involve domestic abuse pursuant to chapter 236.

b. The court shall, on application of a party, grant a waiver from any court-ordered mediation under this section if the party demonstrates that a history of domestic abuse exists as specified in section 598.41, subsection 3, paragraph “j”.

c. Collaborative law should not be done if there is violence or coercive control

d. Parenting coordination is designed for high-conflict cases, which may or may not include violence or coercive control.

e. Rationale: alternative dispute resolution requires

i. Transparency – full disclosure without formal discovery

ii. Equal bargaining power

f. Problems with default position

i. Too broad: may deprive a victim of the benefits of ADR and force into a litigated situation where the abuser may do well and the victim may do poorly

ii. Too narrow: criteria for waiver – statutory existence of a no-contact order may miss coercive control without violence or not recognize unequal bargaining power from a cause other than violence

1. 598.41j Whether a history of domestic abuse, as defined in section 236.2, exists. In determining whether a history of domestic abuse exists, the court's consideration shall include but is not limited to commencement of an action pursuant to section 236.3, the issuance of a protective order against the parent or the issuance of a court order or consent agreement pursuant to section 236.5, the issuance of an emergency order pursuant to section 236.6, the holding of a parent in contempt pursuant to section 664A.7, the response of a peace officer to the scene of alleged domestic abuse or the arrest of a parent following

response to a report of alleged domestic abuse, or a conviction for domestic abuse assault pursuant to section 708.2A.

2. Ch. 236 grounds from Ch. 708.1 a. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act. b. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act. c. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

3. NEEDED: A more comprehensive understanding of coercive control and domestic violence
    a. Heightened awareness of factors
    b. Collaborative lawyers may be the only professionals in a position to detect domestic violence or coercive control
        i. Rule 32:1.1 Lawyer obligation of competence includes knowledge of domestic violence

c. Mediator in cases without attorneys may be the only professionals in a position to detect domestic violence or coercive control. Even with attorneys, mediator may be the best qualified professional to detect.

    i. Rule 32:2.4 Responsibility of attorney as third-party neutral

d. Parenting coordinator is the last resort and may be the first to interact with both parties together to observe/experience coercive control/violence patterns.

    i. Rule 32:2.4 Responsibility of attorney as third-party neutral

    ii. Rule 51, parts I, IV

e. The integrity of all forms of alternative dispute resolution depends on the process adopting sound practices

4. GUIDELINES

    a. UCLA Section 15

    b. IACP – DV task force recommendations for collaborative practitioners and trainers

5. WHAT IS DOMESTIC VIOLENCE/COERCIVE CONTROL?

    a. Iowa Code Ch. 236, Iowa Code 708.1

    b. ICADV definition (Liz Albright): One party's use of the tools of power and control to maintain control over the other party in a relationship.

    c. Behavior must be evaluated in context

i. History

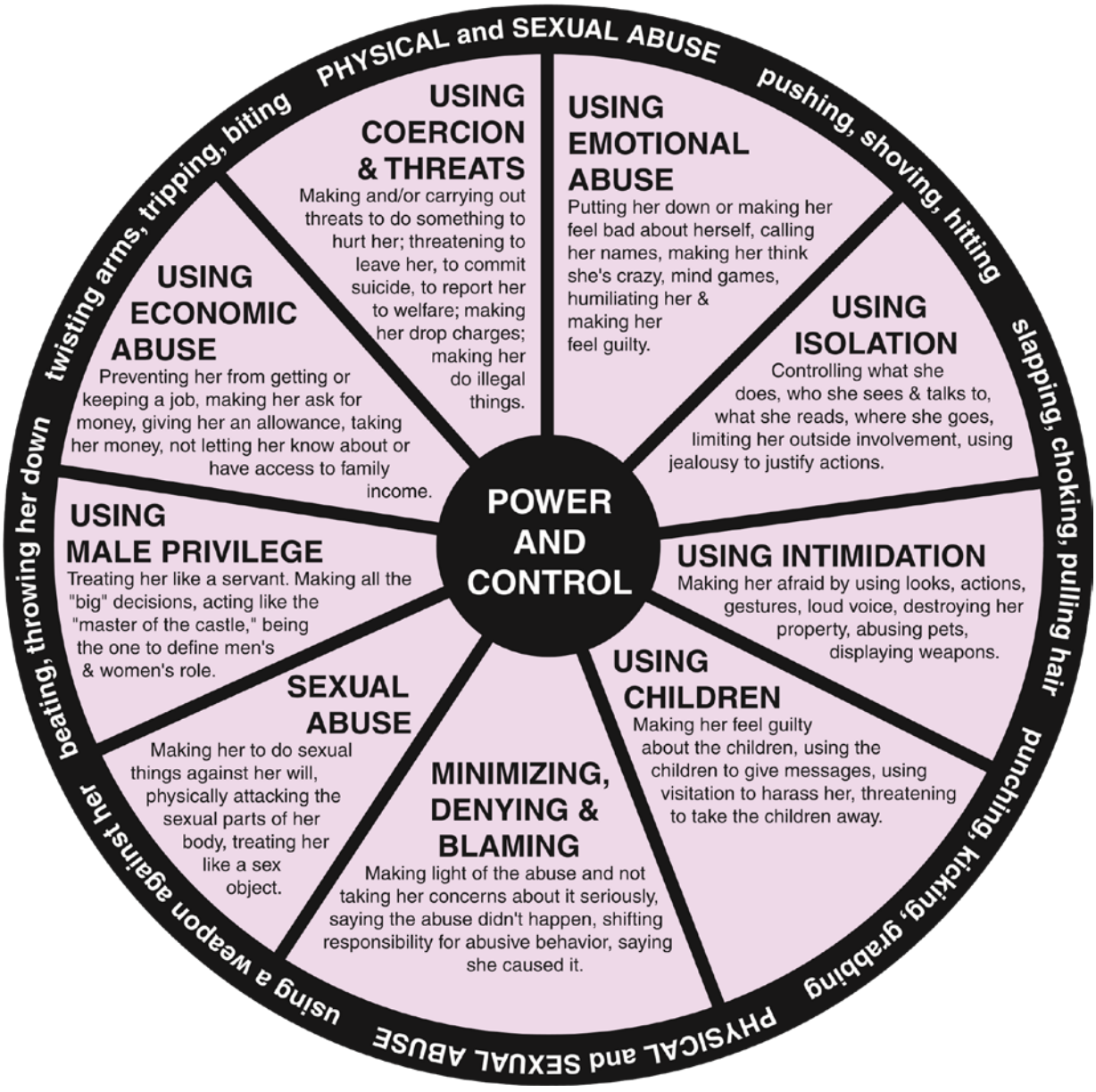
ii. Impact

iii. Consequences

iv. Dangerousness

6. PATTERNS OF DOMESTIC VIOLENCE/COERCIVE CONTROL

Power & control wheel



a. Distinguishing types

	Coercive	Non-coercive
Violent (Ch. 236)	"Battering" "Domestic violence" Frequent Severe Escalates Frequently a male perpetrator; two types: dependent, antisocial. Probably looks good in court Effect on victim: injury, fear, anxiety, denial	1. Violent resistance to coercion, a reaction to abuse. "Mutual" 2. Conflict-instigated Emotional spiral Mental illness Single minor incident Male or female instigator
Non-violent	"Incipient intimate terrorism" Threats Intimidation Economic Control Manipulation of children Isolation Emotional abuse	

b. Things may or may not be as they seem.

7. BEST PRACTICE IN ALL FORMS OF ALTERNATIVE DISPUTE RESOLTUION REQUIRES
    a. Reasonable initial inquiry
    b. Continuous assessment
8. REASONABLE INQUIRY
    a. Screening to determine if the party is capable of negotiating
    b. Screening protocol is needed to determine the
        i. Existence
        ii. Frequency
        iii. Nature
        iv. Purpose
        v. Effect of the domestic violence/coercive control
9. SCREENING PROTOCOL
    a. Confidential face-to-face interview
    b. Written questionnaire
        i. ABA Tool for Attorneys to screen for domestic violence http://www.americanbar.org/content/dam/aba/migrated/domviol/screeningtoolcdv.authcheckdam.pdf
        ii. Michigan mediator standards and questionnaire http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Domestic%20Violence%20Screening%20Protocol.pdf

iii. Other tools can be adapted

c. Observation/check-in/confidential debriefing

10. WHEN IS ALTERNATIVE DISPUTE RESOLUTION APPROPRIATE?

a. REQUIRED: INFORMED CONSENT – Rule 32:1.0(e)

i. Attorney provides information

1. General principles
2. Mandatory attorney disqualification in collaborative law
3. Reaching an agreement is not required
4. “Informed consent” will include more information regarding all aspects of collaborative law, differences from traditional

ii. Is it safe

1. Risk assessment by all professionals involved (lawyer, mediator, coaches, neutrals)
2. Safety planning at home
    a. Limiting harm
    b. Child safety
    c. How to escape
3. Safety planning during meetings
    a. Ground rules
    b. Separate arrival and departures
    c. Limit contact outside meeting

iii. Is court involvement likely?
    1. Will participation in ADR advantage/disadvantage a party in subsequent court proceedings?
    2. Motivation of participants
        a. Trial strategy
        b. Disqualify counsel
        c. Amplify coerciveness
iv. Is either party impaired?
    1. What is the impairment
    2. How does the impairment affect participation
v. Is participation voluntary?
    1. Pressure from attorney
    2. Pressure from other party
vi. Can both parties assert their individual interests and make fair and voluntary agreements?
    1. Are both lawyers capable of negotiating in situations of high-conflict, violence, coercive control?
    2. Are both lawyers capable of picking up cues from perpetrators?
        a. Blatant cues
        b. Cues apparent only to the victim
    3. Will both parties make disclosures and act in good faith

a. Both honest?

b. Both trust the other?

c. Awareness of motivation of both attorneys and parties

vii. Consequences of breakdown of collaborative process

1. Attorney disqualification

2. Utilization of disclosures made in meetings

viii. Client decides

11. WHAT MODEL IS USED

a. Best practice: private attorney-client meetings and direct attorney to client advice

i. Rule 32:1.4 Communication to client

b. Limitation on disclosures related to safety

c. Attorney loyalty to the client rather than to the family as a whole or to the process

d. Types of meetings

i. Conference

ii. Caucus

e. Professional team members

i. Coaches

ii. Financial neutrals

iii. Child specialist neutrals

iv. Use of mediator in collaborative process

v. Domestic violence expert

12. WHAT ARE THE ALTERNATIVES

a. Litigation

b. Arbitration

c. Cooperative law

d. Early neutral evaluation: team pre-assessment of case. Evaluator must have substantial experience with domestic violence

13. LAWYER'S OBLIGATION If there is a history of domestic abuse, and after informed consent, the clients wants to proceed with a collaborative process:

a. Extent of required informed consent Rule 32:1.0(e) and comment 6

b. Per UCLA: Must not proceed if safety cannot be adequately protected

14. MODIFICATIONS TO PROCESS

a. Include a domestic violence expert

b. Establish and enforce ground rules assuring safety

c. Regular confidential attorney-client meetings separate from group meetings

d. Other modifications tailored to the needs of the participants

15. Enhanced training for all participants (lawyers, mediators, parenting coordinators)

a. Minimum standards for collaborative attorneys, mediators and parenting coordinators
b. Rule 32:1.1 Lawyer obligation of competence includes knowledge of domestic violence

Collaborative Divorce, Limited Scope of Representation, ADR And Other Ethical Issues

Or

If You Only Have a Hammer, Everything Looks Like a Nail

2014 ISBA Family Law Seminar

By Carlton D. Stansbury
Burbach & Stansbury S.C.
10850 West Park Place, Suite 530
Milwaukee, WI 53224
Phone: (414) 359-9100
Facsimile: (414) 359-8900
cstansbury@burbach-stansbury.com

I. Starting Propositions

A. Family law clients who litigate their cases are rarely, if ever, satisfied.

B. Most family law clients really do not want to go to trial. Most cases settle, so why do we treat it as a trial?

C. The cost of litigation can be extremely expensive, resulting in a significant depletion of a client's net worth, increase accounts receivables for the lawyer, risk of bankruptcy, slow payments, or discounted lump sum payments for the work performed.

D. Litigation can be stressful to the client, families, the attorney, and the attorney's family.

E. There is not a direct correlation between the time and money invested in litigation and the results obtained.

F. An extremely large percentage of malpractice claims and ethics complaints are in the family law, close only to criminal law.

G. The market is changing. At one time it was expected that a client with modest to significant income or assets would have an attorney. Now, the majority of divorce cases are *pro se*, and lawyers must "compete" for a smaller market share of consumers.

II. What Do We Want to Happen?

In the ideal situation, we want the following:

A. Satisfied clients that pay the bill and refer quality clients to us.

B. An outcome that is reasonable under the circumstances, and provides something to the client that the client could not achieve in a trial.

C. A personal sense of worth in the fact that what we do has some positive, long-term and redeeming value and was worth the effort expended.

D. An increase in the demand for our services so that we can be selective of the work we do and the time we spend working.

III. ADR Techniques in Family Law Litigation

There is a dramatic increase in the use of alternative dispute resolutions in the family law area. However, unless the process used is Collaborative Practice, all forms of ADR remain within the context of the litigation process. The question becomes: how can you use effective techniques of the different ADR processes to make the litigation process one that increases client and attorney satisfaction and results?

A. <u>Collaborative Law</u>

1. What is Collaborative Law?

2. What is not Collaborative Law?

3. How does Collaborative Law fit in our ethical guidelines?

B. <u>Use of Mental Health Professionals</u>

Mental health professionals are typically involved in family law cases as therapists or evaluators. The collaborative movement has recognized the value the mental health community can provide to a divorcing family, and has expanded the role of mental health

professionals. However, not every family is able to successfully complete the collaborative process. The increased role of mental health professionals can be utilized in the litigation process. This can lead to a higher quality process for the client, better results for the client, and a greater source of referrals for the attorney.

1. *Child Specialist/Parenting Consultant:* Rather than hire an "evaluator," try working out an agreement with counsel to retain a mental health professional as an advisor for the parties to reach their own arrangement for the child. The child specialist/consultant would talk to the parties individually and together, talk to the child, and then meet again to talk to the parents. The child specialist could also talk to collateral sources, such as other parents, teachers, doctors, etc. Rather than giving a "recommendation" or imposing a particular placement schedule, the child specialist would provide feedback to the parents on the child's perspective and individual needs, feedback on how the child is doing, information on the child's strengths and weaknesses, and information on other people's perspective. All of the information is conveyed in a healthy, helpful manner. With this information, the child specialist can work with the parties to draft a parenting plan that accommodates the information, and other information on the child's developmental needs as the information relates to a particular placement schedule and family.

   Pros:
   - Gives the child a healthy "voice" in the process without allowing the child to take control.
   - Involves the parents directly in the process to determine the outcome.
   - Less expensive than a formal "evaluation" and avoids the battle of the experts.
   - Focuses on information directly relevant to the particular family.
   - Provides a healthy forum to resolve post-judgment disputes.

   Cons:
   - If the process does not work, then time and money may have been wasted and the matter may have been delayed.

- People may have revealed something in the process that they would not otherwise have revealed.
- Mental health professional did not do the work in anticipation of litigation.

The last two concerns can be addressed by using a Stipulation and Order as attached to protect the process from litigation.

2. *Divorce Coach:* One of the frustrations of family lawyers is to deal with the client's emotional issues during the process. A client's therapist is not always helpful because his or her role is to work on specific mental health issues, and not to aid counsel in his or her work with the client. Further, the therapist's work is confidential, and a breach or waiver of the privilege could lead to unintended consequences. A coach does not act as a therapist; rather, the coach can work directly with the client and counsel on developing techniques and providing information to help the client get through the divorce process. Because the coach is the attorney's consultant the coach is covered under the work product doctrine. The coach can do things such as help the client articulate his or fears, concerns and needs. The coach can give the client techniques in communicating with the other spouse and children, assistance in making judgment calls under the stress of the divorce, and assistance with techniques in dealing with the spouse in settlement conferences, depositions, hearings, and trials. The coach can also provide feedback to counsel on how counsel can most effectively work with the client.

3. *Communication/co-parenting counseling:* A mental health professional can be invaluable in meeting with both parents to work out how the two will communicate and co-parent in two different households. The mental health professional can counsel the couple in communication techniques and strategies, and educate each on the possible consequences of certain communication styles on the children. The mental health professional can work through ways in which the parents can introduce third parties to each other and the children.

4. *Mental Health Professionals as Mediators:* Mental health professionals trained in mediation can be excellent mediators. In theory, the mental health professionals are not as influenced and bound to the law as lawyers, and can focus on more meaningful underlying interests of the parties. Mental health professionals carry credibility on issues that affect children that can be used to effectively resolve a conflict.

5. Not only can the mental health professional be an invaluable resource in a family law matter, but expanding your connections in the mental health community can greatly increase your source of referrals. Many parties will seek mental health counseling, or marriage counseling, prior to taking the first step in starting a divorce action.

C. Walk the Talk, and Talk the Talk

As a general rule, we underestimate the impact of the words we use. The words we use set a tone, carry implications, and influence how the listener reacts. And, it is inconsistent to talk settlement in litigation language.

1. *For example, here are some contrasts in the words and phrases we use:*

Litigation	Settlement
You have a right…	You have a need….
Off to battle….	Work on solutions…
We have issues….	We have challenges…
You are wrong….	I see it differently…
My client demands…	Susan wishes…..
If you do that, then….	I am concerned about what might happen

2. *Avoid the use of the word "fair" as much as possible!*

"I have often been asked to be fair and view a matter from all sides. I did so, hoping that something might improve if I viewed all sides of it. But the result was the same. So I went

back to viewing things only from one side, which saves me a lot of work and disappointment. For it is comforting to regard something as bad and to be able to use one's prejudice as an excuse."

Karl Kraus (1874-1936, Austrian writer).

3. *Use of Language applies in written and oral form.* Sometimes our letters, or even settlement proposals, are loaded with value-laden words and judgment. Try having a letter reviewed by someone else in the office before it goes out. Try setting the letter aside overnight if possible.

D. Consider the Use of a Neutral Evaluator

1. Attorneys and/or clients become quite invested in their desired outcome. While he or she is feels perfectly dispassionate, he or she still cannot see the risks.

2. Or, settlement has stalled because nothing seems to break the log-jam. The creative juices stop flowing, and resentment, frustration, and anger begin to rise to the surface.

3. An option would be for the attorneys to jointly retain another attorney with specialized knowledge and experience in an area (or a retired judge, or an expert in a field which is the subject of the dispute), and each present his or her "case" to the neutral evaluator. The neutral evaluator, with fresh eyes and no stake in the outcome, would provide input. The input may include the strengths and weaknesses of each case, a view as to likely outcomes for each party, and a new perspective on settlement options.

4. This process works best when both attorneys know and trust the neutral.

5. Choreography is important. Is the presentation to the neutral simultaneous? Is the input from the neutral simultaneous? Are the client's present? For which part?

E. Consider Using Four-way Meetings

1. The use of four-way meetings in litigation is under-utilized. Assuming that the parties are somewhat civil to each other, the power of such a meeting is immense.

2. These meetings are more than settlement conferences. These are meetings that counsel and parties use to set temporary orders, decide how information will be shared, share information, brainstorm about options that each party would accept, or efficient problem solve a specific issue or event short of going to court.

3. The benefits of four-way meetings include:

   i. Extremely efficient. Information shared immediately without letters, forms, or formal discovery. Immediate follow up questions and clarifications can be made, which limits the risk of misunderstandings and litigation over mistakes or assumptions.

   ii. The parties and counsel becomes less "demonized." You view the "opposing" party never as horrible as described. Your client does not view the other lawyer quite as the "devil" he or she perceives.

   iii. Gives you the chance to listen directly from the other party and build a relationship that could lead to coming up with creative settlement options.

   iv. The clients witness first hand the progress of the case and become more of an integral part of his or her case.

4. The risks of four-way meetings include:

   i. The meetings can go badly and ill feelings are created that permeate the rest of the case.

   ii. There can be a false sense of security. If a party appears credible, information is taken at face value

without the appropriate back-up. Due diligence can falter.

iii. If progress is not made, then clients complain about the cost and time for a "wasted" meeting.

Tip: at the conclusion of a four-way meeting, provide a written summary of what was discussed, what was decided, and what actions each person will do after the meeting. If provided at the meeting and each person reads and approves, then it is almost impossible for anyone to argue with its contents. It then provides accountability. And, everyone walks out of the meeting with a "product" in hand that helps the sense that the matter is moving forward. The "memo" can be handwritten, or dictated and typed. Attached is a form that allows a handwritten memo to be completed during a meeting and provided at the meeting's conclusion.

F. Does Arbitration Have to be All of Nothing? In some cases, the resolution of one issue will create a domino effect, and the resolution of several issues will immediately follow. By submitting a narrow issue to an arbitrator, resources are spent efficiently and the likelihood of satisfactory results increases.

VI. Conclusion

Albert Einstein purportedly said that "any fool can make things bigger, more complex, and more violent. It takes a touch of genius—and a lot of courage—to move in the opposite direction."

If we take the leap of faith and move in the opposite direction of litigation, and incorporate the best of what the alternate dispute resolution process offers, then we increase the chance that we will have more satisfied clients that pay our bill and refer qualify clients to us, we achieve outcomes that are reasonable under the circumstances, we gain a personal sense of worth in the fact that what we do has some positive, long-term and redeeming value and was worth the effort expended, and we have an increase in the demand for our services so that we can be selective of the work we do and the time we spend working.

STATE OF WISCONSIN CIRCUIT COURT * COUNTY
FAMILY COURT BRANCH

In re the marriage of:

Petitioner, Case No.

-and- Case Code:
FAMILY BRANCH

Respondent.

STIPULATION AND ORDER

WHEREAS, the parties are currently in a divorce action, and they have ___ minor children, specifically: **

WHEREAS, the parties believe that the parents and children will benefit from the assistance of a child specialist/parenting consultant;

WHEREAS, the parties wish to obtain such services independent from any court action so that the services are not affected by the litigation process now or in the future;

THEREFORE, the stipulation is set forth below and may be entered by the court without further notice to either party.

_____ _____
**, Petitioner **, Respondent

Date: _____ Date: _____

STIPULATION

1. The parties shall jointly retain _____ to act as a child specialist/consultant. Both parents will have access to _____ and be able to receive input from him/her about the children. Both parents will be able to provide information to _____ about the children. Both parents will sign the appropriate releases as requested by _____ to obtain any necessary information about the children, and both agree that _____ may meet and talk to the children.

2. _____ notes and any other contents of his/her file shall not be subject to subpoena or discovery in any matter or method. _____ shall not be called as a witness in any court proceeding, now or in future. The intent of this agreement is to ensure that both parents use _____ to help them resolve any placement issues in the best interests of the children, and each agree and understand that the confidential nature of the process will help each provide the necessary information freely and without fear of the information being used against him or her in the future.

3. This stipulation and order is in the children's best interests.

4. This stipulation and order shall survive the Judgment of Divorce and shall remain in full force after the entry of the Judgment of Divorce. This stipulation and order shall be enforceable now and in the future.

5. This stipulation and order may be amended only by written agreement of the parties.

ORDER

Based upon the foregoing,

IT IS ORDERED.

Dated at _____, Wisconsin this ____ day of _____, 2008.

BY THE COURT:

_____
Honorable **
Circuit Court Judge

DRAFTED BY:
Attorney Carlton D. Stansbury
Burbach & Stansbury S.C.
10850 West Park Place, Suite 530
Milwaukee, Wisconsin 53224
(414) 359-9100
(414) 359-8900-FAX
State Bar No. 1001556

SESSION SUMMARY

Names:	
Four Way Meeting No. ____	Date:
Tentative Agreements:	

Homework:		
Who will be doing?	Deadline	What needs to be done?
Agenda for next meeting:		
Date for next meeting:		Location for next meeting:

Central Iowa Parenting Coordinators

ROLE	DEFINITION	LEGAL AUTHORITY	WHEN APPROPRIATE	CAUTIONS	WHO
Arbitrator	The settling of a dispute by an arbitrator or arbitrators based upon a written agreement between the parties to submit the issue(s) to arbitration. A written agreement to submit to arbitration an existing controversy is valid, enforceable and irrevocable unless grounds exist at law or in equity for the revocation of the written agreement. Upon application of a party, the district court shall confirm an award, unless grounds are urged for vacating, modifying or correcting an award.	Iowa Code 679A	Similar to when parties would attempt to resolve a dispute via a parenting coordinator, i.e., when a minor dispute exists regarding interpreting the terms or conditions of a Decree or Order and both parties are willing to agree in writing to submit the dispute to binding arbitration with the understanding the decision may be subject to judicial review	Issue(s) submitted to arbitration cannot usurp judicial authority; similar to the cautions associated with the use of a parenting coordinator	Kozlowski Marberry McCollom Noble Stockdale Rosenbaum Vald
Attorney for child	Attorney appointed to represent a child in a traditional attorney/client relationship. The attorney is obligated to advocate for the child's wishes.	Iowa Code 598.12(1) Little case law, if any, related to an attorney for the child under chapter 598.	When the child is of sufficient age and maturity to articulate and rationalize his or her wishes. Most appropriate when there is a GAL and the child's wishes are diametrically opposed to the GAL's determination of the child's best interest (per case law arising out of chapter 232).	Puts child squarely in the middle of the conflict and the litigation. Creates attorney/client relationship. All communication is confidential. Possible conflict arises when one parent pays for the services of a child's attorney.	Dornburg Kozlowski Marberry McCollom Noble Stockdale Rosenbaum Verdoorn
Conciliator	The focus of marriage conciliation counseling is to assist parties in making an informed and thoughtful decision regarding their marital relationship.	Iowa Code Section 598.16	When one party to the marriage believes that the marriage can be preserved with the assistance of a marriage counselor.	Both parties must understand that during the counseling process, no coercion is used to try to force reconciliation. The final decision regarding the marriage is made by the spouses themselves.	Hemesath Wedmore
Co-parenting counselor	Co-parent counseling is an effective way to assist separated or divorced parents to keep communication about child-related issues respectful and constructive. Each parent gains skills to build a more cooperative co-parenting relationship that is focused on meeting the needs of the child(ren).	Voluntary or Court order	Co-parent therapy can help through the restructure of family resulting from divorce. Co-parent counseling may help one or both parents resolve some of their anger or grief related to the ending of the relationship so that both can focus more fully on parenting issues and the best interest of the child(ren).	Co-parent counseling is not for every separated or divorced parent who cannot resolve issues with their child's other parent. Individuals who cannot tolerate sitting together in a room or constructively contribute to a dialogue in which issues are identified and resolved may find co-parent counseling frustrating and ineffective.	Gauger Hemesath Wedmore

Custody evaluator	A custody evaluator is responsible for assessing each parent and the entire family unit. The purpose of the evaluation is to assess the strengths and weaknesses of each parent and give recommendations to the court regarding a permanent arrangement for physical care of the children. The primary focus of the evaluation is to determine the best interests of the child/ren.	Primarily court order, but can be done by voluntary agreement of the parties.	When parents are unable to agree or mediate a resolution to the permanent custody arrangements for their child/children.	Cautions – Parents must understand the expenses involved in a full custody study and the requirement that most evaluators will expect the fees for the study to be paid up front.	Gauger Von Gillern
Guardian ad Litem	Attorney appointed to represent the best interests of the child. No obligation to advocate for child's wishes; rather, make an independent investigation and determination as to what is in the child's best interest and advocate for that position.	Iowa Code 598.12(2)	Custody modifications (especially with teenagers); high conflict initial custody matters (especially when parents try to use child as leverage); initial paternity cases when child has little or no relationship with parent OR when child is very young; when parents are very young and may need guidance on a schedule that is age-appropriate; when a child refuses to see a parent; all TPR cases; some adoption cases (not necessarily in step-parent adoptions).	Court order should specify responsibilities. Parents need to be financially able to pay a GAL, as it is unfair to the GAL for the court to assess fees as part of the court costs. No confidentiality re: communications with parents or child. GAL should *never* testify in a hearing or trial because of the conflict. Issues may arise as to admissibility of GAL's report as hearsay.	Dornburg Kozlowski Marberry McCollom Noble Stockdale Rosenbaum Verdoorn
Joint physical care evaluator	A professional with training and experience in evaluating families who are seeking joint physical care. Purpose of the evaluation is to determine if the parents have a realistic and workable care plan, have the communication skills necessary to make joint physical care manageable, and to determine whether the parties meet the standards for joint physical care in the state of Iowa. Can also assist parents develop a realistic and workable care plan when parents are committed to joint physical care and need assistance with their parenting plan.	Request of the court, attorneys or parties	In situations where the court or attorneys are unsure of the feasibility of joint physical care based on the facts of the case. In cases where there is a prior history of concerns (drug abuse, alcoholism, domestic violence, criminal involvement) that would not lend itself to a cooperative effort in raising the children. In cases where the court wants more information regarding the parents' ability to make the commitment to joint physical care. In cases where the parents are committed to joint physical care and need assistance developing their parenting plan.	Some parents are capable of passing an evaluation of this kind by misconstruing facts and history. Some professionals would be unwilling to go against what parents say they desire. Some professionals could have difficulty reporting to the court if there were negative indications that could compromise joint physical care. Some professionals do not have a clear understanding of joint physical care, Iowa guidelines, or how to perform an evaluation of this kind.	Dornburg Gauger Kozlowski Marberry McCollom Von Gillern

Mediator	A mediator is a third party neutral who facilitates a discussion between the parties, most frequently with their lawyers also present. The goal is for the parties to develop a settlement of their matter in a way that works for them.	Iowa Code 598.7 Ordered in 5th Judicial District family law cases	Mediation is effective in most any case, as it gives the parties a chance to be "heard" and to hear where the other side is coming from.	All communications are confidential. While some mediators offer opinions or suggestions, the mediator does NOT decide the case. The results are determined by the parties and their lawyers. If an agreement is signed at the mediation it is most often enforced by a court.	Dornburg Kozlowski Marberry McCollom Noble Rosenbaum Stamatelos Stockdale Vald Verdoorn Von Gillern
Mediator (long term)	A long term mediator is a mediator who stays involved with the family on an ongoing basis, making themselves available to mediate problems as they erupt.	Court order or agreement	Many parties elect to have a "mediate before filing" clause in the decree, so the long term mediator is also accessed for situations where filing a lawsuit is contemplated. A long term mediator may work independently with the parties only, or with the lawyers and the parties	Same as above	Dornburg Marberry McCollom Stamatelos Stockdale Von Gillern
Parenting coordinator	A quasi-legal, mental health, alternative dispute resolution process that combines assessment, education, case management, conflict management and sometimes decision-making functions. A child-focused process for facilitating the resolution of disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and the court, making decisions within the scope of the court order or appointment contract.	Court order	To assist high conflict parents to implement their parenting plan. To monitor compliance with the details of the plan. To resolve conflicts regarding their children and the parenting plan in a timely manner. To protect and sustain safe, healthy and meaningful parent-child relationships. Provided as a contingency when appropriate joint physical care parents need assistance to resolve disputes.	NOT a solution where joint physical care is inappropriately granted to high conflict parents. NOT confidential except as to HIPAA-protected records. DELEGATION of decision-making requires consent of both parents and a court order.	Dornburg Gauger Kozlowski Marberry McCollom Noble Stockdale Rosenbaum Stamatelos Vald Verdoorn Von Gillern

Reunification therapist	The purpose is an attempt to identify the relationship between the child and the reunifying parent while identifying the stressors which have impacted the relationship. The goals vary however often include communication, trust and addressing residual feelings contributing to the estrangement.	Court order	Consider high conflict or other divorce cases where one parent is not seeing the child. Is only appropriate if the reunification therapist or other appropriate professional is able to assess the estranged parent in order to determine if an attempt at reunification is in the best interest of the child.	Appropriate ONLY AFTER an assessment of the entire family to determine the cause of the child's rejection of the parent. All pertinent records and contact with collateral professionals and governing agencies must be available to the reunification therapist. The Court Order should include the expectations of cooperation by both parents, the Court's concerns and treatment goals and what interventions will be used, parameters for extended family involvement, discretion to the therapist to set arrangements for treatment, payment arrangements for the therapist, and contingencies in the event of re-litigation.	Gauger Wedmore
Special master	Referee, examiner or auditor, with any authority delegated by a judge	Iowa Rules of Civil Procedure, Rule 1.935-1.942	When additional evidence is needed, a report to the court is requested, facts need to be determined on a limited issue, e.g., how to make up lost visitation time, the value of an asset, selling property	Special master is subject to judicial rules; ex parte communications are prohibited	Dornburg Marberry McCollom Noble Rosenbaum Stamatelos

UNIFORM COLLABORATIVE LAW ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Collaborative Law Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

Alternative A

is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

(A) marriage, divorce, dissolution, annulment, and property distribution;

(B) child custody, visitation, and parenting time;

(C) alimony, maintenance, and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

Alternative B

is described in a collaborative law participation agreement.

End of Alternatives

(6) "Law firm" means:

(A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

(8) "Party" means a person that signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(11) "Prospective party" means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter; or

(B) a legislative body conducting a hearing or similar process.

SECTION 3. APPLICABILITY. This [act] applies to a collaborative law participation agreement that meets the requirements of Section 4 signed [on or] after [the effective date of this [act]].

SECTION 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT;

REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intention to resolve a collaborative matter through a collaborative law process under this [act];

(4) describe the nature and scope of the matter;

(5) identify the collaborative lawyer who represents each party in the process; and

(6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.

(b) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this [act].

SECTION 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW PROCESS.

(a) A collaborative law process begins when the parties sign a collaborative law participation agreement.

(b) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(c) A collaborative law process is concluded by a:

(1) resolution of a collaborative matter as evidenced by a signed record;

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative law process terminates:

(1) when a party gives notice to other parties in a record that the process is ended;

(2) when a party:

(A) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(ii) requests that the proceeding be put on the [tribunal's active calendar]; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the parties:

(1) the unrepresented party engages a successor collaborative lawyer; and

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(B) the agreement is amended to identify the successor collaborative lawyer; and

(C) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

(h) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

SECTION 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Sections 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and

the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

(e) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

***Legislative Note**: In enacting this Section, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Section 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.*

SECTION 7. EMERGENCY ORDER. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

SECTION 8. APPROVAL OF AGREEMENT BY TRIBUNAL. A tribunal may approve an agreement resulting from a collaborative law process.

SECTION 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Sections 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before

a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

SECTION 10. LOW INCOME PARTIES.

(a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party with or without fee.

(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Section 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:

(1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;

(2) the collaborative law participation agreement so provides; and

(3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

SECTION 11. GOVERNMENTAL ENTITY AS PARTY.

(a) The disqualification of Section 9(a) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.

(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:

(1) the collaborative law participation agreement so provides; and

(2) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

SECTION 12. DISCLOSURE OF INFORMATION. Except as provided by law other than this [act], during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

SECTION 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED. This [act] does not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or

other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

SECTION 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS. Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

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

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

(3) advise the prospective party that:

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

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

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

SECTION 15. COERCIVE OR VIOLENT RELATIONSHIP.

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

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

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

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

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

SECTION 16. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION. A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than this [act].

SECTION 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.

(a) Subject to Sections 18 and 19, a collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication.

(2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

SECTION 18. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 17 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(b) A person that makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Section 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

SECTION 19. LIMITS OF PRIVILEGE.

(a) There is no privilege under Section 17 for a collaborative law communication that is:

(1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

(2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(3) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Section 17 for a collaborative law communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Section 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under Section 17 do not apply if the parties agree in advance in a

signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

SECTION 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.

(a) If an agreement fails to meet the requirements of Section 4, or a lawyer fails to comply with Section 14 or 15, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they:

(1) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(2) reasonably believed they were participating in a collaborative law process.

(b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:

(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Sections 5, 6, 9, 10, and 11; and

(3) apply a privilege under Section 17.

SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,

but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 23. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

***Legislative Note**: Include this section only if the state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 24. EFFECTIVE DATE. This [act] takes effect.....

***Legislative Note**: States should choose an effective date for the act that allows substantial time for notice to the bar and the public of its provisions and for the training of collaborative lawyers.*

Selected Iowa Rules of Professional Responsibility
And Selected Commentary

Rule 32:1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Rule 32:1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 32:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(1) The client's informed consent must be confirmed in writing unless:

(i) the representation of the client consists solely of telephone consultation;

(ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit or court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or

(iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in a writing signed by the client, there shall be a presumption that:

(i) the representation is limited to the attorney and the services described in the writing; and

(ii) the attorney does not represent the client generally or in any matters other than those identified in the writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See rule 32:1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 32:1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. *See* rule 32:1.16(b)(4). Conversely, the client may resolve the disagreement bydischarging the lawyer. *See* rule 32:1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 32:1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

….

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of 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 32:1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Iowa Rules of Professional Conduct and other law. *See, e.g.,* rules 32:1.1, 32:1.8, and 32:5.6.

Rule 32:1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 32:1.0(e), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Iowa Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* rule 32:1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. The lawyer should also discuss relevant provisions of the Standards for Professional Conduct and indicate the lawyer's intent to follow those Standards whenever possible. *See* Iowa Ct. R. ch. 33. In some situations–depending on both the importance of the action under consideration and the feasibility of consulting with the client–this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate

decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls
should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the clientprospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in rule 32:1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* rule 32:1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* rule 32:1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 32:3.4(c) directs compliance with such rules or orders.
[Court Order April 20, 2005, effective July 1, 2005]

Rule 32:1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Iowa Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) 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;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law

Rule 32:2.1: ADVISOR

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.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 07-447 **August 9, 2007**
Ethical Considerations in Collaborative Law Practice

NO conflict
Limited Scope

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.[1]

In this opinion, we analyze the implications of the Model Rules on collaborative law practice.[2] Collaborative law is a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement. It had its roots in, and shares many attributes of, the mediation process. Participants focus on the interests of both clients, gather sufficient information to insure that decisions are made with full knowledge, develop a full range of options, and then choose options that best meet the needs of the parties. The parties structure a mutually acceptable written resolution of all issues without court involvement. The product of the process is then submitted to the court as a final decree. The structure creates a problem-solving atmosphere with a focus on interest-based negotiation and client empowerment.[3]

Since its creation in Minnesota in 1990,[4] collaborative practice[5] has spread

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. We do not discuss the ethical considerations that arise in connection with a lawyer's participation in a collaborative law group or organization. *See* Maryland Bar Ass'n Eth. Op. 2004-23 (2004) (discussing ethical propriety of "collaborative dispute resolution non-profit organization.")

3. *See generally* Sherri Goren Slovin, "The Basics of Collaborative Family Law: A Divorce Paradigm Shift," 18 Amer. J. of Family Law 74 (Summer 2004), available at http://www.mediate.com/pfriendly.cfm?id=1684.

4. Minnesota Collaborative Family Law FAQs, available at http://www.divorcenet.com/states/minnesota/mnfaq01.

5. The terms "collaborative law," "collaborative process," and "collaborative resolution process" are used interchangeably with "collaborative practice." Although col-

rapidly throughout the United States and into Canada, Australia, and Western Europe. Numerous established collaborative law organizations develop local practice protocols, train practitioners, reach out to the public, and build referral networks. On its website, the International Academy of Collaborative Professionals describes its mission as fostering professional excellence in conflict resolution by protecting the essentials of collaborative practice, expanding collaborative practice worldwide, and providing a central resource for education, networking, and standards of practice.[6]

Summary

Although there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a "four-way" agreement). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the four-way agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.

Several state bar opinions have analyzed collaborative practice and, with one exception, have concluded that it is not inherently inconsistent with the Model Rules.[7] Most authorities treat collaborative law practice as a species of limited scope representation and discuss the duties of lawyers in those situa-

laborative practice currently is utilized almost exclusively by family law practitioners, its concepts have been applied to employment, probate, construction, real property, and other civil law disputes where the parties are likely to have continuing relationships after the current conflict has been resolved.

6. *See* http://www.collaborativepractice.com/t2.asp?T=Mission.

7. Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007), "Ethical Considerations in the Collaborative and Cooperative Law Contexts," available at http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth, is the only opinion to conclude that a non-consentable conflict arises in collaborative practice. Other state authorities analyze the disqualification obligation under Rules 1.2, 1.16, or 5.6. *See e.g.*, Kentucky Bar Ass'n Op. E-425 (June 2005), "Participation in the 'Collaborative Law' Process," available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; New Jersey Adv. Comm. on Prof'l Eth. Op. 699 (Dec. 12, 2005), "Collaborative Law," available at http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; North Carolina State Bar Ass'n 2002 Formal Eth. Op. 1 (Apr. 19, 2002), "Participation in Collaborative Resolution Process Requiring Lawyer to Agree to Limit Future Court Representation," available at http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/ 2002&to=4/2002; Pennsylvania Bar Ass'n Comm. on Legal Eth. & Prof'l Resp. Inf. Op. 2004-24 (May 11, 2004), available at http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf. Several states have special rules for collaborative law practice. *See, e.g.*, CAL. FAM § 2013 (West 2007); N.C. GEN. STAT. § 50-70 to 50-79 (2006); TEX. FAM. CODE ANN. §§ 6.603 & 153.0072 (Vernon 2005).

tions, including communication, competence, diligence, and confidentiality. However, even those opinions are guarded, and caution that collaborative practice carries with it a potential for significant ethical difficulties.[8]

As explained herein, we agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication. We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).

Rule 1.2(c) permits a lawyer to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent. Nothing in the Rule or its Comment suggest that limiting a representation to a collaborative effort to reach a settlement is per se unreasonable. On the contrary, Comment [6] provides that "[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."

Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation.[9] The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.[10]

The one opinion that expressed the view[11] 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. As we stated earlier, the four-way agreement that is at the heart of collaborative practice includes the promise that both lawyers will withdraw from representing their respective clients if the collaboration fails and that they will not assist their clients in ensuing litigation. 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.

---

8. *Supra* note 6.

9. Rule 1.0(e).

10. *See also* Rule 1.4(b), which requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

11. Colorado Bar Ass'n Eth. Op.115, *supra* note 7.

A conflict exists between a lawyer and her own client under Rule 1.7(a)(2) "if there is a significant risk that the representation [of the client] will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer." A self-interest conflict can be resolved if the client gives informed consent, confirmed in writing,[12] but a lawyer may not seek the client's informed consent unless the lawyer "reasonably believes that [she] will be able to provide competent and diligent representation" to the client.[13] According to Comment [1] to Rule 1.7, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." As explained more fully in Comment [8] to that Rule, "a conflict exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer's other responsibilities or interests.... The conflict in effect forecloses alternatives that would otherwise be available to the client."

On the issue of consentability, Rule 1.7 Comment [15] is instructive. It provides that "[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."

Responsibilities to third parties constitute conflicts with one's own client only if there is a significant risk that those responsibilities will materially limit the lawyer's representation of the client. 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.[14] We disagree, because we view participation in the collaborative process as a limited scope representation.[15]

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. A client's agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer's representation of the client will be materially limited by the lawyer's obligation to withdraw if settlement cannot

12. Rule 1.7(b)(4).

13. Rule 1.7(b)(1).

14. Colorado Bar Ass'n Eth. Op.115, *supra* note 7 (practice of collaborative law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful).

be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement.[15]

15. See *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*, 2003 A.B.A. SECTION OF LITIGATION, at 27-29, available at http://www.abanet.org/litigation/taskforces/modest/report.pdf.

16. *See* Lerner v. Laufer, 819 A.2d 471, 482 (N.J. Super. Ct. App. Div.), *cert. denied*, 827 A.2d 290 (N.J. 2003) (stating that "the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them," court rejected malpractice claim against lawyer who used carefully drafted limited scope retainer agreement); Alaska Bar Ass'n Eth. Op. No. 93-1 (May 25, 1993) (lawyer may ethically limit scope of representation but must notify client clearly of limitations on representation and potential risks client is taking by not having full representation); Arizona State Bar Ass'n Eth. Op. 91-03 (Jan. 15, 1991) (lawyer may agree to represent client on limited basis as long as client consents after consultation and representation is not so limited in scope as to violate ethics rules); Colo. Bar Ass'n Ethics Comm. Formal Op. 101 (Jan. 17, 1998) (noting examples of "commonplace and traditional" arrangements under which clients ask their lawyers "to provide discrete legal services, rather than handle all aspects of the total project").

IACP INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

Collaborative Practice Definition

Collaborative Practice is a voluntary dispute resolution process in which parties settle without resort to litigation.

In Collaborative Practice:

1. The parties sign a collaborative participation agreement describing the nature and scope of the matter;

2. The parties voluntarily disclose all information which is relevant and material to the matter that must be decided;

3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement;

4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;

5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and

6. The parties may jointly engage other experts as needed.

IACP INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

IACP Ethical Standards for Collaborative Practitioners

Preamble Collaborative Practice differs greatly from adversarial dispute resolution practice. It challenges practitioners in ways not necessarily addressed by the ethics of individual disciplines. The standards that follow:

1) Provide a common set of values, principles, and standards to guide the Collaborative practitioner in his or her professional decisions and conduct,

2) Create a framework of basic tenets for ethical and professional conduct by the Collaborative practitioner, and

3) Identify responsibilities of Collaborative practitioners to their clients, to Collaborative colleagues, and to the public.

GENERAL STANDARDS

1. Resolution of Conflicts between ethical standards.

1.1 Any apparent or actual conflict between the Ethical Standards governing the practitioner's discipline and these Standards should be resolved by the practitioner consistent with the Ethical Standards governing the practitioner's profession.

2. Competence.

2.1 A Collaborative practitioner shall maintain the licensure or certification required by the practitioner's profession in good standing and shall adhere to the Ethical Standards governing the practitioner's discipline.

2.2 A Collaborative practitioner shall have completed a minimum of twelve hours of Collaborative Practice/ Collaborative Law training or Interdisciplinary Collaborative training consistent with IACP Minimum Standards for Collaborative practitioners, prior to commencing a Collaborative case or engaging in Interdisciplinary Collaborative Practice.

2.3 A Collaborative practitioner shall practice within the scope of the Collaborative practitioner's training, competency, and professional mandate of practice, as specified by the IACP Minimum Standards for Collaborative practitioners. The practitioner shall be mindful of the client's individual circumstances and the over-all circumstances of the case that may require the involvement of other professionals, both within and outside of the Collaborative process.

Comment

As Collaborative practitioners experience a greater diversity in their client population they become confronted by more complexity in physical, psychological and emotional factors affecting the client. It is important for the practitioner to be able to recognize these factors, as they will necessarily influence the Collaborative process and the client's decision making. It is even more important for the practitioner to recognize the limits of his or her ability to effectively deal with these factors and with the client's response to them. In fully addressing the client's needs, interests and goals, the Collaborative practitioner must be willing to turn to other professionals both within and outside of the Collaborative process, such as mental health professionals, medical professionals, financial professionals, vocational specialists and possibly rehabilitation counselors in the areas of physical disability, substance abuse, and domestic violence.

3. Conflicts of Interest.

3.1. A Collaborative practitioner shall disclose any conflicts of interest as defined by the practitioner's respective professional guidelines and Ethical Standards.

Comment

Upon full disclosure of a conflict of interest, the client(s) affected may waive the conflict in writing consistent with the practitioner's professional guidelines.

4. Confidentiality.

4.1 A Collaborative practitioner shall fully inform the client(s) about confidentiality requirements and practices in the specific Collaborative process that will be offered to the clients.

4.2 A Collaborative practitioner may reveal privileged information only with permission of the client(s), according to guidelines set out clearly in the Collaborative practitioner's Participation Agreement(s) or as required by law.

Comment

The rules of confidentiality are among the most important core values of the legal and mental health professions. Those standards may be modified by the terms of the Collaborative practitioner's fee and/or Participation Agreement with the client(s), so long as the modifications are consistent with the ethical standards of the practitioner's discipline. A competent Collaborative practitioner will be knowledgeable regarding the requirements of his/her professional standards pertaining to the necessity of obtaining a client's informed consent, and shall provide sufficient information to enable the client to give informed consent.

5. Scope of Advocacy.

5.1 A Collaborative lawyer shall inform the client(s) of the full spectrum of process options available for resolving disputed legal issues in their case.

5.2 A Collaborative practitioner shall provide a clear explanation of the Collaborative process, which includes the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process.

5.3 A Collaborative practitioner shall assist the client(s) in establishing realistic expectations in the Collaborative process and shall respect the clients' self determination; understanding that ultimately the client(s) is/are responsible for making the decisions that resolve their issues.

5.4 A Collaborative practitioner shall encourage parents to remain mindful of the needs and best interests of their child(ren).

5.5 A Collaborative practitioner shall avoid contributing to the conflict of the client(s).

Comment

This section highlights the special obligations undertaken by the Collaborative practitioner that specifically result from the unique nature of Collaborative Practice. Psychologists and social workers are free to recommend outcomes to their client(s) believed to be in the client(s') (or the clients' family's) best interest, provided that they take care to do no harm. The traditional model of lawyering includes advocacy by the lawyer for the client's position so long as that position is legally supportable. Thus, this section has particular impact for lawyers because it reflects the considerations underlying law society and bar association rules in a number of jurisdictions. For example, Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct recognizes that the role of the attorney encompasses more than providing purely technical legal advice. As the Comment to Rule 2.1 explains, the attorney's advice can properly include moral, ethical, and practical considerations, and may indicate that there is more involved in resolving a particular dispute or even the client's entire case than strictly legal considerations. In Collaborative Practice, the practitioner specifically contracts with the client(s) to provide advice that recognizes a full range of options for dispute resolution and takes into consideration relationship and family structures when looking at the possible outcomes for the client(s).

6. Disclosure of Business Practices.

6.1. A Collaborative practitioner shall fully disclose to the client(s) in writing his/her respective fee structure, related costs, and billing practices involved in the case.

6.2 A Collaborative practitioner shall be truthful in advertising his/her Collaborative Practice and in the solicitation of Collaborative clients.

7. Minimum Elements of a Collaborative Participation and/or Fee Agreement.

7.1. A Collaborative Participation Agreement and/or Fee Agreement shall be in writing, signed by the parties and the Collaborative practitioners, and must include provisions containing the following elements:

A. Pertaining to Full Disclosure of Information

1. No participant in a Collaborative case, whether a Collaborative practitioner or a client, may knowingly withhold or misrepresent information material to the Collaborative process or otherwise act or fail to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process;

2. If a client knowingly withholds or misrepresents information material to the Collaborative process, or otherwise acts or fails to act in a way that undermines or takes unfair advantage

of the Collaborative process, and the client continues in such conduct after being duly advised of his or her obligations in the Collaborative process, such continuing conduct will mandate withdrawal of the Collaborative practitioner and if such result was clearly stated in the Participation and/or Fee Agreement, the conduct shall result in termination of the Collaborative process.

3. In the event of a withdrawal from or termination of the Collaborative process, the Collaborative practitioner shall notify the other professionals in the case.

B. Prohibiting Contested Court Procedures

1. Undertaking any contested court procedure automatically terminates the Collaborative process;

2. A Collaborative practitioner shall not threaten to undertake any contested court procedure related to the Collaborative case nor shall a Collaborative practitioner continue to represent a client who makes such a threat in a manner that undermines the Collaborative process.

3. Upon termination of the Collaborative process, the representing Collaborative practitioners and all other professionals working within the Collaborative process are prohibited from participating in any aspect of the contested proceedings between the parties.

PRACTICE PROTOCOLS

8. Consent.

8.1 Each Collaborative practitioner shall obtain written permission from his/her client(s) to share information as appropriate to the process with all other Collaborative professionals working on the case.

9. Withdrawal/Termination.

9.1 If a Collaborative practitioner learns that his or her client is withholding or misrepresenting information material to the Collaborative process, or is otherwise acting or failing to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process, the Collaborative practitioner shall advise and counsel the client that:

A. Such conduct is contrary to the principles of Collaborative Practice; and

B. The client's continuing violation of such principles will mandate the withdrawal of the Collaborative practitioner from the Collaborative process, and, where permitted by the terms of the Collaborative practitioner's contract with the client, the termination of the Collaborative case.

9.2 If, after the advice and counsel described in Section 9.1, above, the client continues in the violation of the Collaborative Practice principles of disclosure and/or good faith, then the Collaborative practitioner shall:

A. Withdraw from the Collaborative case; and

B. Where permitted by the terms of the Collaborative practitioner's contract with the client, give notice to the other participants in the matter that the client has terminated the Collaborative process.

9.3 Nothing in these ethical standards shall be deemed to require a Collaborative practitioner to disclose the underlying reasons for either the professional's withdrawal or the termination of the Collaborative process.

9.4 A Collaborative practitioner must suspend or withdraw from the Collaborative process if the practitioner believes that a Collaborative client is unable to effectively participate in the process.

9.5 Upon termination of the Collaborative process, a Collaborative practitioner shall offer to provide his/her client(s) with a list of professional resources from the Collaborative practitioner's respective discipline from whom the client(s) may choose to receive professional advice or representation unless a client advises that he or she does not want or need such information.

ETHICAL STANDARDS SPECIFIC TO PARTICULAR COLLABORATIVE ROLES

10. Neutral Roles.

10.1 A Collaborative practitioner who serves on a Collaborative case in a neutral role shall adhere to that role, and shall not engage in any continuing client relationship that would compromise the Collaborative practitioner's neutrality. Working with either or both client(s) or with their child(ren) outside of the Collaborative process is inconsistent with that neutral role.

A. A Collaborative practitioner serving as a neutral financial specialist in a Collaborative case shall not have an ongoing business relationship with a Collaborative client during or after the completion of the Collaborative case, but may assist the clients in completing the tasks specifically assigned to them by the clients' written, final agreement. Such assistance may not include the sale of financial products or other services.

B. A Collaborative practitioner serving as a child specialist may assist the family in divorce related matters for the child(ren). Such assistance may not include becoming the child(ren)'s therapist.

C. A Collaborative practitioner serving as a neutral coach may assist the family in divorce related matters. Such assistance may not include acting as a therapist for one or both parties.

11. Coaches/Child Specialists.

11.1 A Collaborative practitioner who serves in the role of coach on a Collaborative case shall not function as a therapist to the Collaborative practitioner's client after the case has ended. Coaches should remain available to continue to help the clients/family address specific divorce issues after the divorce is final. A therapist for a client shall not serve in the role of coach or child specialist on a Collaborative case involving a client with whom the therapist has acted in a therapeutic role.

11.2 A Collaborative practitioner serving as a child specialist shall inform the child about the child specialist's role and the limits of confidentiality as appropriate, taking into account the child's age and level of maturity.