The Collaborative Lawyer as Advocate: A Response

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In a recent edition, this Journal included a thoughtful practitioner's comment by James K.L. Lawrence, a member of the Board of Trustees of the Collaborative Law Center in Cincinnati.[1] After providing a fine summary description of the collaborative process for dispute resolution, as envisioned by Cincinnati's Collaborative Law Center, Mr. Lawrence joined the discussion of the ethical orientation of the collaborative lawyer and the ethical considerations attendant to collaborative lawyering.[2] His thoughts are timely, and the discussion is necessary to the progress of the collaborative law movement. The purpose of this response to his comments is to expand upon some of his thoughts because we perceive that some of his comments may suggest the wrong standard of practice for collaborative lawyers and, more significantly, give rise to a misperception about the manner in which the collaborative lawyer functions.

I. A QUESTION OF HATS

Mr. Lawrence begins his discussion of the ethical position of the collaborative lawyer by distinguishing between the ethical obligations of the traditional lawyer, on the one hand, and the lawyer functioning as a neutral, such as a mediator, on the other.[3] He rightly observes that the lawyer who functions as a neutral owes no fiduciary duty, and minimal other responsibilities, to any participant in the dispute resolution process.[4] His duty is to the process itself and to neutrality, whereas the lawyer functioning in his traditional advocacy capacity owes specific duties to his client. Foremost among them is his duty to guard his client's interests.

After briefly identifying the distinctions between the ethical duties of the lawyer functioning as a traditional advocate and the one functioning as a neutral, Mr. Lawrence makes a leap, suggesting that the collaborative lawyer

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[1] James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO STATE J. ON DISP. RESOL. 431 (2002).

[2] *Id.* at 438–45.

[3] *Id.* at 438–39.

[4] *Id.* at 438.

wears a third hat, distinct from the traditional lawyer's and the neutral's, or that she wears both the hat of the neutral and the hat of the traditional advocate at the same time.[5] This is not so.

II. THE COLLABORATIVE LAWYER IS A TRADITIONAL ADVOCATE

Mr. Lawrence's comments suggest that different ethical standards are required for the collaborative lawyer from those applied to lawyers functioning in their traditional advocacy capacity and that those standards are closer to those applied to neutrals such as judges and mediators. The forum and the format are undeniably different in collaborative law, but the lawyer's fiduciary duty to the client is not. As in mediation or other forms of settlement negotiation, lawyers representing clients in the collaborative dispute resolution model may counsel their clients to concede meritorious legal positions in exchange for finality, achievement of long-term goals, and efficiency, despite their clients' legal entitlements viewed in the short term. The fact that they are prepared to make concessions that they might not make in the judicial process, however, does not diminish the zeal with which they represent their client's interests. It certainly does not make them neutral in orientation.

The change in forum necessitates a change in the manner of achieving resolution. The lawyer who holds assiduously to his legal position to the exclusion of all else is less likely to succeed in mediation and is, arguably, less zealously pursuing his client's interests in mediation than is the lawyer who is prepared to exchange those positions for outcomes that are more desirable to his client.

The lawyer-advocate's conduct in collaborative law is unlikely to differ significantly from that of the lawyer advocate in mediation. She continues to guard her client's interests above all else. Her commitment is to her client and, by agreement, to the process. Nothing about the collaborative law participation agreement explained by Mr. Lawrence suggests that the collaborative lawyer bears any duty to the interests of the other party. The collaborative lawyer is not exempted, by virtue of the terms of that agreement or otherwise, from the zealous representation requirement that applies to all advocates.[6] The achievement of a desirable result for the other party is a concern of the collaborative lawyer, as it is for the lawyer in

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[5] *Id.* at 439.

[6] Zealous representation is not synonymous with a win-at-all-costs mentality that leads to the common misapprehension that out-and-out dishonesty is a facet of zeal.

mediation, but that concern goes no further than does the lawyer's in mediation. It is no more than the traditional win/win balance with which we have long been familiar, but rather in collaborative law, there is an "absolute commitment" on the part of "each attorney and party to negotiate a mutually agreeable settlement."[7]

A fine example of collaborative law in action is in the field of family law. Since the early 1990s, collaborative family law has spread from its beginnings in Minnesota to most major metropolitan areas.[8] The Collaborative Law Center of Cincinnati's Family Section, known as The Collaborative Family Lawyers of Cincinnati, now has sixty-six trained lawyers with well over 200 completed cases.

The ethical concerns raised in Mr. Lawrence's article have, for the most part, failed to materialize. The lawyer-advocate's role, as defined by Mr. Lawrence, has three principal components: fiduciary duties, competence, and diligence. The collaborative lawyer's role encompasses all of those components. What is missing from the lawyer's role in the collaborative process is the puffing, posturing, and positioning that is confused by many with effective advocacy or zeal.

The dynamic of representation in the collaborative process is different in its very essence. From the first time the client enters the family lawyer's office, he is apprised of the process options available to terminate his marriage and the consequences of those options. The process decision lies with the client. A subtle shift in control has occurred. The client controls the process selection and the outcome. The lawyer is the bearer of information about the available processes, the law, and the potential consequences of the options. When both the husband and the wife have chosen the collaborative law process, the lawyer for each works to help the client articulate and understand his interests. Clients may initially focus on positions, and this phase of the process is the skilled lawyer's opportunity to help the client understand that frequently more than one option will meet his or her interests and that fixating on one position may be counterproductive to the client's ultimate goal. An additional role for the lawyer at this stage is to help prepare the client for negotiation.

The next step is a meeting between the lawyers to set an agenda, confer about the "hot spots" and familiarize each other with the case. This meeting

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[7] Patricia Gearity, *ADR and Collaborative Lawyering in Family Law*, MD. BAR J., June 2002, at 2, 7.

[8] *See* Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, BOSTON BAR J., Dec. 2001, at 12, 27 (discussing the origins of collaborative law).

ensures that the four-way meeting with lawyers and clients will have a shared and understood choreography.

At the initial four-way meeting, the clients are anchored into the process with a review of the collaborative law contract, an understanding as to how the case will proceed, and a discussion about how information will be gathered and how options will be created. During the course of the four-way meetings, interests are shared, information is efficiently gathered, options are generated, and settlement is ultimately reached. The "discovery standard" contractually adopted by the Collaborative Family Lawyers of Cincinnati is as follows:

> No formal discovery procedures will be used unless specifically agreed to by the parties. The parties acknowledge that by using informal discovery, they are giving up certain investigative procedures and methods that would be available to them in the litigation process. They give up these measures with a specific understanding that both parties have made full and fair disclosure of all assets, income, debts, and other information necessary for a principled and complete settlement.[9]

Regular discussions among the Collaborative Family Lawyers of Cincinnati about the process have confirmed that this standard has not resulted in a failure to disclose assets. Significant peer pressure and a real awareness of the "what goes around comes around" reality of the practice of law militate in favor of honoring both the terms and the spirit of the collaborative law contract. Later discovery of a breach of this contractual duty to disclose could also be the basis for reopening the settlement or for a breach of contract damages claim.

During the process, clients are often counseled about the "court model," and what a court outcome might mean for a client. Clients are counseled at all times to ensure that they are operating in their own best interests. At no time in the process does the lawyer ever take the role of a neutral. The lawyer understands that it is in his or her client's articulated interest to resolve the case without a court outcome, and, as long as the client is entering into the collaborative law agreement with a clear understanding, the lawyer is, in fact, serving as advocate.

Many clients have come to believe that through collaborative law, they can reach outcomes that are far more imaginative and that these outcomes may be better tailored to the needs of their families. For example, barring some disability, once a child reaches the age of eighteen or graduates from

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[9] Collaborative Family Law Participation Agreement § VII (Collaborative Law Center 2001) (on file with authors).

high school, whichever occurs later, Ohio courts have no jurisdiction over the child, including the financial issues related to continuing education.[10] For many families, the issue of college choices and expenses related to college are of paramount importance. The lawyer's responsibility is to advise a client of the law and the consequences of choosing to include college expenses in a legal document. The client, however, is empowered to make the decision, taking into account which of his interests are met with the inclusion of the provision and how the provision relates to the entirety of the agreement.

The lawyer's role includes three primary functions. As a negotiation facilitator, the lawyer assists in active listening, keeps the process moving forward, ensures that all information is on the table, and reframes the issues when necessary. As a negotiation coach, the lawyer serves as an example of positive negotiation behavior, helps the client to focus on interests, and assists the client in navigating through an emotionally charged situation. Finally, as the information provider, the lawyer advises the client of the law that applies, helps generate options, and provides information about the consequences of those options. Each of those functions falls squarely within the advocacy definition suggested by Mr. Lawrence. None is a traditional, or even appropriate, function of a neutral.

So, where along the spectrum between advocacy and neutrality do the collaborative lawyer's ethical responsibilities lie? They lie at the advocacy extreme, alongside those of the lawyer in mediation, arbitration, and other established forms of dispute resolution. The differences between collaborative law and the traditional litigation model for dispute resolution do not nudge the collaborative lawyer one tick closer to neutrality, contrary to Mr. Lawrence's suggestion.[11]

The collaborative format does have some impact on the lawyer's conduct. The major ethical issue relating to collaborative lawyering is the appropriate level of candor for the lawyers in the process.[12] That issue arises, in part, from the format imposed by the collaborative law participation agreement but mostly from the forum. As in mediation or negotiation without a neutral, the lawyer in the collaborative forum is aware that increased candor may result in an improvement in the level of trust between the parties

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[10] *See* OHIO REV. CODE ANN. § 3119.86 (Anderson 2001).

[11] *See* Lawrence, *supra* note 1, at 438–39.

[12] "Candor" is not used here as a synonym of "honesty." The issue of honesty in the practice of law, whether traditional or collaborative, is left for another day. To the extent that the failure of honesty in the practice of law is a concern, it is no less so in the traditional practice than in collaborative law. If new ethical rules addressing honesty are required, they ought to apply equally in the traditional practice as in collaborative law and other alternative forms of dispute resolution.

and in movement toward an agreeable resolution. The only significant addition in the collaborative forum is the agreement to exchange relevant information in good faith. An agreement to adhere to a standard for disclosure other than that embodied in court-adopted rules of evidence does not challenge ethical requirements. Rules of evidence and court rules governing discovery are not ethical considerations and have no applicability outside the litigation process in which they control.[13]

So, collaborative law, as envisioned by the Collaborative Law Center, incorporates a liberal standard for the exchange of information.[14] Some of the exchanged information will inevitably be of the sort that is non-discoverable in the traditional litigation format.

Likewise, the agreement signed by attorneys and participants in the collaborative process requires the withdrawal of counsel on both sides in the event that the dispute is not resolved in the collaborative law process.[15] The ethical rules applicable to all lawyers include no prohibition upon any of the conduct dictated by the collaborative law participation agreement, including the withdrawal requirement and the liberal standard for the exchange of information. Collaborative law clients, also signatories to the agreement, are on notice of those requirements. By signing the agreement, they make an informed decision to agree to the format because they perceive that it will advance their interests. Zealous representation does not preclude a mutual agreement that counsel withdraw in the event that collaborative lawyering fails, as Mr. Lawrence observes.[16] Nor does it prohibit an exchange of information that may be broader than that permitted under rules governing discovery in the traditional litigation format.

III. A GOOD STARTING POINT

Mr. Lawrence's comments suggest an unduly complicated starting point for the discussion of the ethical orientation of the collaborative lawyer. Reference should not be made to the standards applicable to the lawyer functioning as a neutral. The collaborative lawyer is, in every sense, an advocate. The ethical considerations applicable to traditional lawyering apply to collaborative lawyering equally, without need for alteration. Thus, a starting point exists that will result in a much shorter journey to a resolution of the ethical issues surrounding this new model for dispute resolution. That

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[13] *See* FED. R. EVID. 101; FED. R. CIV. P. 1.

[14] *See* Lawrence, *supra* note 1, at 444.

[15] *See* Collaborative Law Participation Agreement for General Matters § IX (Collaborative Law Center 1999) (on file with authors).

[16] *See* Lawrence, *supra* note 1, at 442–45.

starting point is the ethical considerations applicable to all lawyers acting as advocates. Because the context is different and relatively new, ethical questions in the collaborative law setting will be plentiful, as will the opportunities for examination of those questions.

The collaborative format presents many of the same ethical issues as do mediation and negotiation without a neutral. Whatever interesting ethical questions might be raised in collaborative law, a body of comment has developed recognizing the zeal of the lawyer in mediation and negotiation that will apply equally to the collaborative lawyer.[17]

Mr. Lawrence's analysis of some of the ethical implications of collaborative lawyering, specifically, fee division and the sharing of information with replacement counsel in the event of withdrawal, will undoubtedly generate further discussion.[18] That analysis suggests answers to some of the initial questions without reference to the ethical rules or considerations governing lawyers functioning as neutrals.

If any uncertainty remains, let it be put to rest. The collaborative lawyer has not taken off his advocacy hat or donned the hat of neutrality.

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[17] *See, e.g.*, Gearity, *supra* note 7, at 6 (suggesting that zealous representation includes the application of zealous energy to whatever process, including mediation, is likely to achieve the client's long-term and short-term goals); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARVARD NEG. L. REV. 143 (2002) (distinguishing between "adversarial" and "zealous" in the negotiation context and concluding that effectiveness does not depend upon adversarial behavior).

[18] *See* Lawrence, *supra* note 1, at 442–45. These issues are unique to collaborative law because collaborative law is the only dispute resolution process in which withdrawal of counsel is required in the event of a failure to reach settlement. Mr. Lawrence's suggestions regarding these issues are among the first, but as collaborative law expands its reach, additional examination of the ethical sequelae of the withdrawal requirement is inevitable.