

When Loyalty and Collaborative Transparency Collide (797 words)

By Curtis W. Harrison

Two of the foundational cornerstones of the collaborative model are transparency and candor. In practice, however, reconciling those principled commitments with the attorney's undivided duty of loyalty to the client frequently proves challenging and, occasionally, irreconcilable.

For example, during a collaborative divorce, the wife belatedly discloses to her attorney that she is already involved in a serious relationship outside of the marriage. The husband is unaware and the wife does not want the information to be disclosed before the conclusion of the case out of fear that the disclosure will disadvantage her in the final settlement. How should the collaborative attorney navigate issues like this example?

Ethical Standards in Theory v. in Practice

Section 15.110 of the Texas Collaborative Family Law Act specifically states that signing a participation agreement does not affect either the lawyer's duty of undivided loyalty to the client or the lawyer's professional responsibilities to others. Among other things, this means that a collaborative lawyer has the same ethical duty as the litigation attorney to refrain from disclosing the client's confidential information without the client's permission or as otherwise provided by law.

Yet, in practice, it is not quite that simple. Information about the existence of adultery during a divorce proceeding can materially affect the outcome of the case. Although Texas is a no-fault divorce state, adultery is one of four statutorily defined fault-based grounds of divorce. Fault grounds can be pleaded to try to gain a larger share of the community estate or to justify a request for post-divorce spousal maintenance.

In divorce litigation, attorneys therefore not only routinely resist disclosing such bad facts to the other side, we also counsel clients to hold such information close to the vest: Don't lie, but don't volunteer an answer until the lawyer has exhausted all efforts to obfuscate or redirect the inquiry.

In fact, the litigation lawyer's duty to disclose is triggered only (i) when a client makes a false statement of a material fact; (ii) when necessary to avoid making the lawyer a party to a criminal act; or (iii) to avoid knowingly assisting a fraudulent act perpetrated by the client. As a result, unless the client actually lies about the adultery, the attorney-client privilege trumps and the lawyer avoids having to reconcile the potential ethical conflict.

A Higher Standard Favoring Disclosure

By design, the standard for disclosure is higher in a collaborative proceeding, potentially making the lawyer's ethical quandary unavoidable. By signing the participation agreement, the participants contractually agree to proactively provide "full and candid disclosure of information." This language mirrors the statutory language found in Section 15.109 of the Act calling for participants to make "timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. "

Although the statutory version of the duty is specifically conditioned "on the request of another party," the standard family law participation agreement imposes an additional duty on

the clients to “correct known mistakes, errors of fact or law, or miscalculations” of the other side. Further, the clients affirmatively “authorize every member of the Collaborative Team to do the same.”

Taken together, these additional duties effectively raise the bar on transparency and candor in a collaborative proceeding. The clients assume responsibility for voluntarily and proactively disclosing material facts relevant to the collaborative matter, *especially* if those facts are unknown to the other side and could disadvantage the ignorant party.

The collaborative lawyers, by extension, undertake the same obligations. In the adultery example, the husband’s ignorance of this material fact triggers both the wife’s and the attorney’s affirmative duty to correct that mistake of fact.

Had the wife been candid with her lawyer about bad facts before signing the participation agreement, the quandary could have been avoided – one way or another. Yet, in the middle of the case, the collaborative lawyer’s options are limited. If the wife steadfastly refuses to disclose, then her lawyer cannot disclose the information and must withdraw.

Under the terms of the participation agreement, however, the withdrawing attorney also possesses the conditional right to terminate the collaborative process in its entirety. Therefore, the lingering question with which the withdrawing lawyer must contend is whether mere withdrawal under such circumstances is sufficient to cure the conflict without leaving a taint on the integrity of the collaborative process.

Conclusion

The collaborative model provides participants with the tools, the process, and the environment in which to jointly build a constructive path to resolution. It only works, however, so long as collaborative lawyers hold themselves and their clients accountable to adhere to the standards undertaken. When the competing duties of loyalty and transparency collide, preserving the integrity of the model could require the collaborative attorney to make the hard call.

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