Malpractice Risks of Collaborative Divorce

Gary M. Young
Law Offices of Gary M. Young
Madison, Wisconsin
(608) 233-6800
www.younglaw.net

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Proponents of collaborative divorce (CD) call it "a new paradigm for divorce lawyers."[1] But despite CD's admirable goals, Wisconsin divorce lawyers must beware, because CD threatens to be a new paradigm for legal malpractice.[2] The CD lawyer walks a tightrope, trying to balance conflicting duties to two spouses with conflicting interests. This article explains the CD lawyer's dilemma and shows how it arises from essential features of CD.

Three documents structure the CD process.[3] First, each spouse signs a retention agreement with one lawyer.[4] Second, both spouses and both lawyers sign a Stipulation for Participation in Collaborative Law Process (the CL Stipulation).[5] The CL Stipulation refers to a third document, the Principles and Guidelines for the Practice of Collaborative Law (CL Principles), which the four participants also sign.[6] These documents commit CD lawyers to four obligations they would not otherwise have.

Gary M. Young, U.W. 1978, practices law in Madison and teaches professional liability and legal writing at the University of Wisconsin Law School. The author is grateful to Attorney Linda Roberson for comments and suggestions. The author also profited from the comments of participants at the seminar on Ethics of Collaborative Divorce at the April 27, 2001, meeting of the Wisconsin Chapter of the American Academy of Matrimonial Lawyers, where a short early draft of this article was presented. Neither Attorney Roberson nor any other Academy member is responsible for the views in this article.

The four obligations of CD lawyers

The CD lawyer's duty not to represent either spouse in an adversarial proceeding. The central goal of collaborative divorce is to avoid an adversary divorce proceeding. "[T]he essence of 'Collaborative Law' is the shared belief by participants that it is in the best interests of parties and their families in typical family law matters to commit themselves to avoiding litigation."[7] The primary means to avoid litigation is the disqualification of CD counsel from representing either spouse in an adversary proceeding. The CD retention agreement provides that the attorney "will not represent [the spouse] in any family law litigation against [the other spouse] should the Collaborative Process end before settlement."[8] The CL Stipulation and CL Principles then turn this agreement between lawyer and spouse into a four-way agreement among all four CD participants: "[N]either of our lawyers can ever represent us in court in a proceeding against the other spouse."[9] In particular, the CD lawyer makes this contractual commitment to the "other" spouse -- the spouse with whom the lawyer does not have a retention agreement. This is the first sign of the serious malpractice risks that lie ahead.

Proponents of CD say the disqualification provision gives all participants an incentive not to resort to an adversary proceeding.[10] It gives counsel a reason to continue the CD process, because when the process ends, so does CD counsel's involvement in (and remuneration from) the case. It gives the spouses an economic incentive to stick with the CD process, for if they abandon CD, they must start again with new counsel, with the attendant duplication of time, effort, and costs. "In other words, in collaborative law as in no other dispute-resolution modality, the risks and costs of failure are distributed to the lawyers as well as the clients."[11]

The CD lawyer's duty to withdraw. "[O]ur collaborative law attorney will withdraw from a case and/or will terminate the collaborative law process as soon as possible upon learning that his or her client has withheld or misrepresented information or otherwise acted so as to undermine or take unfair advantage of the collaborative law process," including "failure to participate in *the spirit* of the collaborative process."[12] This commitment requires that "collaborative law counsel will withdraw if they mistrust *the good faith* of their own clients."[13] Withdrawal will entail retention of new counsel for at least one spouse – and for both, if the withdrawal precipitates an adversary proceeding. Proponents of CD say this provision gives the spouses an incentive to act in good faith and participate in the spirit of CD.[14]

The CD lawyer's duty to disclose. Clients may waive the right of confidentiality,[15] and in a CD proceeding each spouse must do just that. In the retention agreement, the spouse gives up "the right to formally object to producing any documents or to providing any information to the other side that [the spouse's lawyer] determine[s] is appropriate."[16] The spouse authorizes the lawyer "to fully disclose all information which in [the lawyer's] discretion must be provided to [the other] spouse and his or her lawyer."[17] In the four-way agreement, the participants then "agree to give full, honest and open disclosure of all information, whether requested or not."[18]

The CD lawyer's duty to correct others' mistakes. The four CD participants agree that they will "maintain a high standard of integrity and specifically shall not take advantage of each other or of the miscalculations or inadvertent mistakes of others, but shall identify and correct them."[19] Suppose you are the wife's lawyer. You know that the husband plans to sell certain property after the divorce, and that his lawyer believes that he will have no adverse tax consequences from that sale. You know that a recent change in the law imposes significant tax obligations upon the husband

if he sells that property. CD obligates you to disclose that to the husband and his attorney. Doing otherwise would "undermine" the CD process and violate its "spirit."

Together, the duty to disclose and the duty to correct mistakes give each participant a contractual right to all relevant information, both factual and legal, that any other participant has.

The CD lawyer's contract liability to the other spouse

As a CD lawyer, you are answerable to the other spouse in both contract and tort. Contract is obvious. Under the CL Stipulation and Principles, you have four contractual obligations to the other spouse. If you breach any of those obligations, the other spouse can sue you for breach of contract. Few if any legal malpractice policies cover breach of contract claims. You must reserve for them.

Moreover, if the other spouse sues his or her own lawyer for, say, negligent tax advice, then either of them can join you as a defendant: You have a contract with both, and promised to correct their errors. Any malpractice action against one CD lawyer will ensnare the other.

The CD lawyer's liability for negligence: both spouses are clients

CD puts more than contractual liability into play. In Wisconsin, an essential element of a legal malpractice (negligence) claim is the plaintiff's attorney-client relation with the defendant lawyer.[20] CD makes both spouses your clients. You are vulnerable to malpractice claims by either spouse.

Suppose the husband is the other spouse. You have promised that you will disclose to him all factual and legal information relevant to the divorce; that you will correct any relevant factual or legal errors he makes; that you will not disclose any information he gives you, at least without his informed consent; and that you will not represent the wife in any litigation against him. In short,

you have offered to provide legal services to the husband, and in the four-way agreements he has accepted your offer.

Offer, acceptance -- and consideration: The husband has promised to pay for your services. In the CL Principles both spouses affirm that both lawyers must be paid for their services, "and that *the first task* in a collaborative matter is to ensure parity of payment to each of them. *We* agree to make funds available for this purpose."[21] And even if only the wife, not the husband, agreed to pay you, the husband could enforce the agreement against you.[22]

You and the husband have entered into an enforceable agreement in which you promise to provide professional legal advice to him for pay. Any person to whom you render professional legal services is your client.[23] The husband is therefore your client. *Both* spouses are your clients.

The CD documents try to negate this conclusion, but fail. According to the CL Principles, "[e]ach of our attorneys . . . represents only one party in our collaborative marital dissolution process."[24] The CL Stipulation states similarly that "(Petitioner's lawyer) has been retained by Petitioner to advise Petitioner during the course of this proceeding; (Respondent's lawyer) has been retained by Respondent to advise Respondent during the course of this proceeding."[25] But these general statements cannot negate your plainly-stated, specific, contractual duties to the other spouse, the duties that make the other spouse your client. Familiar rules of contract interpretation support this result, among them the admonitions to give meaning and effect to all contract terms; to give greater weight to specific language than to general; and to construe ambiguities against the drafter,[26] who is here a lawyer, with a fiduciary duty to clients.[27]

CD's fatal ethical flaw: Unavoidable conflict of interest

Because the other spouse is your client, you owe that spouse not merely what you have expressly promised in the CL Stipulation and Principles, but everything else you would owe any other client, even if the CL Stipulation and Principles do not expressly say so: competence, diligence, confidentiality, and loyalty. This creates a fatal ethical problem. The two spouses have adverse interests. You may represent the two spouses only if you reasonably believe the representation will not adversely affect your relationship with either spouse, and both spouses consent to dual representation after consultation.[28] You cannot meet either of these requirements.

First, "a lawyer cannot reasonably believe that the representation will not be adversely affected . . . where the lawyer is representing opposing parties in negotiating a contract for the sale of property or in negotiating the settlement of a law suit"[29] – representation indistinguishable from that of both spouses in CD.

Second, because you cannot reasonably believe that representation will not adversely affect the spouses, you may not even *request* their consent.[30] Spousal consent, even if informed, cannot cure dual representation's conflict of interest. Moreover, spousal consent to dual representation cannot be informed.

A spouse's general, open-ended consent to CD is ineffective

Consent to dual representation means consent to the CD lawyer's four duties to the other spouse. The duties of disqualification and withdrawal limit the scope of representation and so requires the spouse's consent after consultation.[31] The duties to disclose and to correct errors also require consent after consultation.[32] "Consultation" is the "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."[33]

But the CD lawyer cannot disclose information reasonably sufficient to permit the retaining spouse to appreciate the significance of the duties to the other spouse. CD requires the retaining spouse to consent at the start of the engagement, when the lawyer can provide only vague, general, open-ended descriptions of what is at stake.

The ABA Ethics 2000 Commission has addressed the similar problem of antecedent blanket waivers of conflicts of interest under Model Rule 1.7. The Commission concluded: "If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved."[34] Similarly, the Restatement concludes: "Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. *A client's open-ended agreement to consent to all conflicts normally should be ineffective* unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent."[35] The same reasoning shows that spousal consent to CD is ineffective.

Suppose you have a retention agreement with the wife in a CD. She tells you that after she gets divorced from the husband, she is going to marry her high school boyfriend. Her husband does not know of her plan to remarry. You tell her this information is relevant to the issues the CD negotiations will address, so she must disclose it to the husband and the other lawyer. She refuses. You remind her that she has waived confidentiality, that she gave her written consent to disclosure of all information. She replies that you never told her she was giving up her right to make confidential plans about what she would do after the divorce, and if you *had* told her, she would have refused. Is her consent effective?

According to the CD agreements, the wife has waived confidentiality with respect to information that you determine is "appropriate" to disclose to the other side, information that you in "your discretion" determine must be provided to the other spouse and other attorney, and all "relevant" information. These vacuous descriptions are not reasonably sufficient to permit her to appreciate that she will have to disclose her plan to remarry. They provide no basis for "consent after consultation" to disclosure of her plan.

Perhaps you could add more language to the CD documents, so they unmistakably require the wife to disclose her plans to remarry. Imagine that you could even tell her completely and unambiguously all the information she might ever need to disclose, under any conceivable circumstances. Even on this unlikely assumption, the wife's antecedent blanket consent to disclosure would not be effective. You still would not know what information she in fact has to disclose, the specific circumstances under which she would need to disclose this information, or the risks disclosure and nondisclosure would create for her in those circumstances. You might acquire this knowledge later in the engagement, but you would not have it at the start, when you need it. Without this knowledge, you cannot adequately explain, and the wife cannot understand, the material risks involved. Her consent is not effective.[36] Spousal consent to dual representation cannot be informed.

The CD lawyer therefore faces two obstacles to dual representation: First, spousal consent to dual representation, no matter how informed, cannot cure the CD lawyer's conflict of interest. Second, spousal consent to dual representation cannot be informed. "Dual representation would be improper even when both spouses appear to be in agreement as to a pending dissolution action, because the duties, rights and responsibilities of marriage are such that the probabilities of genuine and unrevealed 'differing interests' remain high."[37]

Under current Wisconsin law, it is doubtful that your client's malpractice counsel or expert legal witness may cite to the SCR provisions that underlie this reasoning.[38] But the expert witness may testify in accord with those provisions, and that testimony is enough to show that you failed to comply with the standard of care.

The CD lawyer walks a tightrope

If you fail to disclose the wife's plan to remarry, you have breached your contractual promise to the husband. If you do disclose, you have breached your duty of confidentiality to the wife – unless the wife's supposed blanket antecedent consent is informed *and* informed consent can cure your conflict of interest, assumptions no risk-averse lawyer should make. You're damned if you do and damned if you don't. You've stepped onto the tightrope, and found you cannot balance your conflicting duties to the spouses. Whatever you do -- disclose or not -- one spouse or the other will feel aggrieved. If enough is at stake, the aggrieved spouse will sue you and report you to the disciplinary board. Attempting to avoid an adversary court proceeding, CD imports the adversary relation into your own professional obligations, committing you to serve two adverse masters at once.

One of the accompanying sidebars suggests that when you find yourself in this dilemma, you should simply withdraw from representation, and that will cure your ethical problem. SCR 20:1.16, relating to Declining and Terminating Representation, does not permit you to withdraw whenever you wish, however, and the sidebar does not explain why you may back out now.

In any event, withdrawal would come too late. Before you quit, you knew you had information that the CD agreements obligated you to disclose to the other spouse. Hoping to duck that obligation, you decided not to disclose, but instead to quit. Your refusal to disclose is a breach

of your obligation, and quitting will not undo or excuse that breach. You should not have stepped onto the tightrope to begin with.

Conclusion

The malpractice risks and dilemmas described in this article arise from the four duties the CD lawyer owes the other spouse and other lawyer. To rid ourselves of those risks and dilemmas, we must eliminate those duties. Then each lawyer will have one client, and owe that client, and no one else, the ordinary ethical and common law obligations of an attorney.

Those ordinary obligations still permit divorce lawyers to cooperate in formal and informal discovery, plan and participate in four-way meetings with both spouses to arrive at settlement, encourage clients to engage in interest-based negotiations, and in general adopt methods to help the spouses resolve their differences without a contested trial. Responsible divorce lawyers already use these methods to the extent the rules of professional conduct (and clients) permit. These methods arguably work at least as well in ordinary divorce practice as in CD (though CD's proponents say otherwise[39]), and in any event their use does not presuppose the ethically fatal commitments a CD lawyer must make to the other spouse and lawyer.

There is no citable evidence yet that CD's malpractice risks have materialized. A search for "collaborative divorce" in Allcases on Westlaw in March, 2002, failed to disclose any citations. But CD is practiced in few states, is just over a decade old, and in Wisconsin is two years old. It's still early days for CD.

The goals of collaborative divorce are admirable; no wonder CD appeals to lawyers disgusted with incivility and destructive combat. Perhaps before it is too late, proponents of CD will find some way to remove the malpractice risks CD's methods create. But if the foregoing reasoning has any

merit, this will not be an easy task, and a cautious lawyer will think twice before engaging in CD. When you step onto the tightrope, you are asking for trouble.

1. Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 Psychol. Pub. Pol'y & L. 967 (1999) ("*New Paradigm*").

2. The conclusions in this article rely specifically upon Wisconsin law. This article does not address the question whether these conclusions apply in any other jurisdiction.

3. CD has no canonical literature. Closest to canonical are the writings of Attorney Pauline Tesler, an articulate, informed, spirited advocate of CD, and this article draws upon her descriptions of CD and model CD agreements. In addition to *New Paradigm*, see: Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (Chicago: American Bar Association, 2001) ("*Collaborative Law*"); *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 Am. J. Fam. L. 215 (1999); and *The Believing Game, the Doubting Game, and Collaborative Law: A Reply to Penelope Bryan*, 5 Psychol. Pub. Pol'y & L. 1018 (1999). Statements by Wisconsin proponents of CD agree in all essentials with the views set forth in Attorney Tesler's writings. See, for example, the materials at <http://www.collabdivorce.com>, the website of the Collaborative Family Law Council of Wisconsin, Inc.

4. "Collaborative Law Retainer Agreement," *Collaborative Law*, at 137-42.

5. "Stipulation for Participation in Collaborative Law Process" ("CL Stipulation"), *Collaborative Law*, at 146-151. See also Appendix A to *New Paradigm*.

6. "Principles and Guidelines for the Practice of Collaborative Law" ("CL Principles"), *Collaborative Law*, at 143-145.

7. CL Principles, "I. Goals," *Collaborative Law*, at 143.

8. *Collaborative Law*, at 138.

9. CL Principles, "X. Disqualification by Court Intervention," *Collaborative Law*, at 145. See also the sections of the CL Stipulation entitled "Lawyer Representation" and "Collaborative Law Matter," *Collaborative Law*, at 146, 147.

10. *New Paradigm*, at 976.

11. *Collaborative Law*, at 4.

12. CL Principles, "IX. Abuse of the Collaborative Process," *Collaborative Law*, at 145 (emphasis added).

13. *New Paradigm*, at 979 (emphasis added); see also *Collaborative Law*, at 138.

14. *New Paradigm*, at 976.

15. SCR 20:1.6(a); Wis. Stat. § 905.11.

16. *Collaborative Law*, at 138.

17. *Id.*

18. CL Principles, "II. No Court or Other Intervention," *Collaborative Law*, at 143. See also the CL Stipulation, "Disclosure and Discovery," *Collaborative Law*, at 149.

19. CL Principles, "V. Participation with Integrity," *Collaborative Law*, at 144; see also 78 (on "transparency") and 99.

20. This privity requirement has an exception, inapplicable here: In the estate planning context, lawyers may be liable for negligence to non-client intended beneficiaries. For the privity requirement and this exception, see *Auric v. Continental Casualty Company*, 111 Wis. 2d 507, 331 N.W.2d 325 (1983); *Anderson v. McBurne*y, 160 Wis. 2d 866, 467 N.W.2d 158 (Ct. App. 1991); *Beauchamp v. Kemmeter*, 2001 WI App 5, 240 Wis.2d 733, 625 N.W.2d 297. The exception is permissible because it does not create any conflict between interests of the non-

client and those of the client (the client intends to benefit the non-client). *Auric*, 111 Wis. 2d at 513.

21. CL Principles, "IV. Lawyer's [sic] Fees and Costs," *Collaborative Law*, at 144 (italics added).

22. *Durand West, Inc. v. Milwaukee Western Bank*, 61 Wis.2d 454, 460, 213 N.W.2d 20 (1973) ("Generally speaking, if consideration is sufficient for a contract in other respects, it does not matter from or to whom it moves. The consideration may move to the promisor or a third person, and may be given by the promisee or a third person. . . .").

23. Wis. Stat. § 905.03(1)(a).

24. "VIII. Negotiation in Good Faith," *Collaborative Law*, at 144.

25. "Lawyer Representation," *Collaborative Law*, at 146.

26. For these rules of construction, see Richard J. Sankovitz, *Contract Interpretation and the Parol Evidence Rule*, chapter 5 in Michael B. Apfeld et al., Contract Law in Wisconsin (2d ed. 2000).

27. *Thiery v. Bye*, 228 Wis.2d 231, 241, 597 N.W.2d 449 (Ct.App. 1999).

28. SCR 20:1.7(a).

29. SCR 20:1.7, Comment, "Loyalty to a Client"; *Gustafson v. Physicians Ins. Co.*, 223 Wis.2d 164, 177, 588 N.W.2d 363 (Ct.App. 1998) (attorney representing medical malpractice plaintiff denied he also represented plaintiff's subrogated health insurer in post-trial settlement negotiations; the court of appeals held he represented both and therefore had a conflict of interest under SCR 20:1.7).

30. SCR 20:1.7, Comment, "Consultation and Consent."

31. SCR 20:1.2(c).

32. SCR 20:1.6.

33. SCR 20, Preamble.

34. Ethics 2000 - February 2002 Report 401 (As passed by the ABA House of Delegates February 5, 2002), Rule 1.7, Comment [22], "Consent to Future Conflict." This comment is available at <http://www.abanet.org/cpr/e2k-202report_passed.html>. For further discussion of blanket waivers of conflicts, see Dean R. Dietrich, *Waivers of Future Conflicts of Interest May Be Valid*, Wis. Law., May 2001, at 24-25.

35. Restatement (Third) of Law Governing Lawyers § 122, comment d (1998) (emphasis added).

36. *Collaborative Law* addresses this issue at 189, but begs the question by assuming that "you have done a good job of explaining the collaborative law process at the front end."

37. State Bar Committee on Professional Ethics, Formal Op. E-84-3 (1984) (opining that "it would be improper for an attorney to represent both spouses in a divorce proceeding"). No formal opinion has addressed this issue since January 1, 1988, when the Rules of Professional Conduct replaced the Code of Professional Ethics. The "genuine differing interests" in Formal Op. E-84-3 appear as "adverse interests" in SCR 20:1.7 and its Comments.

38. *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 673, 457 N.W.2d 538 (Ct. App. 1990).

39. *E.g.*, *Collaborative Law*, at 83-84 ("conventional civil litigators, steeped in the dance of Mediterranean marketplace bargaining, rarely engage in" interest-based bargaining) and 229 ("traditional lawyers generally" are "dedicated to getting the largest possible piece of the pie for their own client, no matter the human or financial cost").