

[Skip First Level Navigation](#) | [Skip All Navigation](#)

[Maine Board of Bar Overseers](#)

[Site Map](#)

Search Site:

Go

[Home](#) | [Contact Us](#) | [Jobs](#)

[Home](#) > [Ethics Opinions](#) > Opinion #208. Practice of Collaborative Law in Family Law Matters

BOARD INFORMATION

- [About the Board](#)
- [Attorney Directory](#)
- [Attorney Services](#)
 - [Attorney Login](#)
 - [Registration](#)
 - [Mandatory Continuing Legal Education \(MCLE\)](#)
 - [Ethics Opinions](#)
 - [Bar Counsel Notes](#)
 - [Legal Resources](#)
 - [Update Contact Information](#)
- [How to File a Complaint](#)
- [Attorney Regulation](#)
- [Decisions, Orders and Hearing Schedule](#)

Opinion #208. Practice of Collaborative Law in Family Law Matters

Issued by the Professional Ethics Commission

Date Issued: March 6, 2014

The Commission has been asked to advise whether attorneys may enter into a “collaborative participation agreement” to resolve legal disputes involving family relationships. For purposes of this opinion, the term “collaborative participation agreement” means a written contract (a) in which the clients and their respective lawyers are parties; (b) that specifies the issues to be resolved by cooperative means; (c) that outlines a dispute-resolution process, usually multi-disciplinary, that entails minimal judicial involvement without recourse to formal discovery; and (d) that is consistent with this Opinion.

Opinion

It is the opinion of the Commission that the Maine Rules of Professional Conduct do not prohibit attorneys from participating in or becoming parties to a collaborative participation agreement, subject to the following caveats:

1. Scope of Representation

A collaborative participation agreement should clearly specify the scope of representation by the respective attorneys and the goals to be achieved. M.R. Prof. Conduct 1.2(a) and (c). The agreement should state whether the lawyers may continue to represent their respective clients

during contested adjudicative proceedings after termination of the agreement.¹ The agreement may not compromise the duty of the lawyers to represent the interests of their respective clients under the Maine Rules of Professional Conduct. The lawyer's role under a collaborative law agreement should not be confused with the role of a lawyer serving as a third-party neutral under M.R. Prof. Conduct 2.4.

2. Confidentiality

The agreement should state whether or the extent to which (1) the clients waive the attorney/client privilege and the extent to which information may be revealed among the parties, their counsel, and to the court or (2) that the attorney/client privilege is not waived and the attorneys shall preserve the confidentiality of information, subject to M.R. Prof. Conduct 1.6. Clients must be made aware that, absent an agreement that preserves the privilege or an agreement in which the parties exclude from evidence information revealed during the collaborative process, all disclosed information may be shared with the opposing party and their counsel and admitted as evidence in any contested adjudicative proceeding. Each client should be clearly informed that absent legislation or court rule, rules imposing confidentiality, such as those that govern mediation under M.R. Evid. 514, are not applicable to collaborative law agreements.

3. Competence

Lawyers must furnish competent representation to their clients. M.R. Prof. Conduct 1.1. The Commission recommends that, before entering into a collaborative participation agreement, lawyers should be knowledgeable about the prefatory note and comments that accompany the Uniform Collaborative Law Act, guidelines and recommendations promulgated by the International Academy of Collaborative Practitioners (<https://www.collaborativepractice.com>), and similar professional resources.

4. Fees and Costs

The agreement should specify the respective client's responsibility for payment of legal fees and costs, consistent with M.R. Prof. Conduct 1.5.

5. Unrepresented Parties

Particular care is required when a party to the agreement is not represented by counsel. A lawyer may not represent multiple parties under a collaborative participation agreement. It is a lawyer's responsibility to ensure that an unrepresented party understands that the opposing lawyer does not represent him or her. See M. R. Prof. Conduct 4.3. Because the subject of the agreement inevitably invokes the lawyer's duty to exercise independent judgment to consider, recommend or carry out an appropriate course of action for the client, it is not likely that the parties can waive the conflict of interest as otherwise permitted by M.R. Prof. Conduct. 1.7(b). A lawyer should be very hesitant to enter into a collaborative participation agreement involving pro se parties.

6. Termination of the Agreement

A client may revoke the authority of the attorney at any time. M.R. Prof. Conduct 1.2, Comment 3. Furthermore, the right of access to the courts in divorce proceedings is a fundamental right guaranteed under the Due Process Clause. *Boddie v. Connecticut*, 401 U.S. 371, 384-85 (1971). Accordingly, the agreement should contain a provision permitting any client to terminate the process at any time and for any reason.

7. Clients' Informed Consent

A lawyer must fully explain the collaborative participation process to the client, including the content of the agreement, its benefits, risks, rights and obligations, and obtain the client's informed consent before the collaborative participation process is initiated. M.R. Prof. Conduct 1.4.

Discussion

This opinion should not be viewed as an exhaustive catalog of the ethical implications of the collaborative family law process. While the process may be intended to resolve family legal issues amicably and efficiently while reducing antagonisms inherent in the adversarial system of litigation, the Maine Rules of Professional Conduct governing the ethical obligations of lawyers remain applicable, whether or not cited and discussed above.

¹A traditional collaborative participation agreement requires

the attorneys to terminate representation of their clients if the process should be unsuccessful. See, e.g., Uniform Collaborative Law Act, Section 9. The Act has not been adopted in Maine but may serve as a useful model. The term “cooperative law process” is often applied to a similar process that does not require mandatory withdrawal. The Ethics Committee of the Colorado Bar Association has explained the distinction in its Ethics Opinion 115. This Opinion makes no distinction between the two processes; both are governed by the same Maine Rules of Professional Conduct.

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