



# THE COLLABORATOR

Quarterly Newsletter for Colorado Collaborative Law Professionals  
Volume 3, Issue 2 • August 2007

## Ethics Update By Ann Gushurst

As we all know, the ethics opinion is continuing to have repercussions for all of us practicing collaborative law. However, what is fascinating is the form of the repercussions.

Many of us report that clients do not care, and that we continue to pick up collaborative cases. This is not true for all parts of the state and clearly, where the general population is more influenced by other professionals, there has been a definite chilling effect.

Nationally, the IACP has taken two steps to proactively deal with the situation. The first, and possibly the best reaction, is to formulate a request for proposal (RFP) calling for an academic appraisal of the situation.

Additionally, the IACP ethics task force continues to work diligently to address all ethics issues. Ann Gushurst was added as a member of the working task force. A forum will be held on the ethics issue at the October IACP conference in Toronto, Canada.

In the meantime, the debate of what to do locally continues.

It has become apparent that many people who are against collaborative law, have latched onto the ethics opinion as justification for their position, **without having read the opinion**. Clearly, the opinion itself is not all that bad. It is completely

against the use of the “4-way” participation agreement. You will remember that the “4-way” agreement, as first proposed by Pauline Tesler, is a contract which the parties and their attorneys sign, in which the principles of collaboration are set out, one of which is the provision that the parties will dismiss their attorneys should collaboration fail.

While the opinion deems that having attorneys sign such a 4-way agreement is unethical (because the opposing party is also a signatory to the agreement) the opinion also basically endorsed use of a two way agreement between the parties to dismiss their attorneys if the case fails. In essence, this amounts to a difference with a slight distinction. From the clients’ perspective, it is hard to see any practical difference.

In another twist of irony, CRPC 1.7(c) – the “objective attorney” standard, is repealed as of January, 2008, making this whole debate even more fascinating, as that is the lynch pin of the ethical opinion with regards to the disqualification clause being unethical.

A cynical author might conclude, particularly in light of the adamant positions taken by persons who have not read the opinion, that since collaboration involves a fundamentally different role for attorneys, namely that of non-adversarial problem solver, that the conflict is not likely to go away, “fix” or not. A cynical author might conclude that the real problem is one of perception and not facts.

The fundamentally different approach to a

divorce that collaboration relies upon – that of two parties deciding, at the beginning of a process, to find mutually workable solutions that meet both parties’ needs, as opposed to each party seeking only to find resolutions to meet their own needs at the other party’s expense – is still going to cause problems.

This shift from adversarial advocate, to collaborative advocate (referred to as the ‘paradigm shift’) is enormous. Attorneys traditionally take our client’s position, focus in on their wants (not even their needs) and promote those wants. Issues that are important to our clients but which fall outside the purview of the law are routinely ignored. This, in essence, creates a system where the fundamental needs of clients often are deemed irrelevant at law, leaving clients to pummel each other over issues that are frequently irrelevant to them in the long run.

And, as many of us doing post-decree litigation know all too well, this leads to never ending conflict, primarily because the clients can never deal with the sources of the real conflict.

One of the criticisms in the ethics paper that probably deserves more contempla-

**2007 Board &  
Member\* Meetings**  
August 15\*  
September 19\*  
October 17

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## Ethics Update

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tion relates to the concerns relating to referring to other collaboratively trained attorneys. Interestingly, the opinion noted that clients absolutely need to have accurate information about the pitfalls of a case failing, because of the costs and repercussions of the disqualification of their attorneys. Clearly the reason collaborative attorneys insist on cases with other trained attorneys is exactly to promote successful collaboration.

Because collaboration is really different work and because there is no point in trying a collaborative process unless you have a fairly good chance of success, given the downside of failure, we insist on working with attorneys who know what they are doing. Having an attorney on the other side who doesn't understand the paradigm shift and isn't trained is antithetical to a case having a good chance of success. This isn't because the other attorney is mean-spirited, or impolite, it is because collaboration is fundamentally different from the "nice" negotiating to which most competent attorneys may aspire.

The crux of collaboration is the commitment to problem solve in a non-adversarial framework. Collaboration isn't being nice, and it isn't about being "fair" (even if two people could agree on what that means ...). In looking at the bigger picture of ethics and collaboration, one has to ask how do you reconcile ethical rules for a profession largely defined by partisan advocacy, with a practice that embraces non-adversarial advocacy? For those who cannot imagine a non-adversarial approach to a problem

resulting in a fair solution, collaboration will remain enigmatic and ridiculous. I have to conclude that, in all eventualities, we will need new rules.

I'm not alone in this conclusion. NCCUSAL (National Conference of Commissioners on Uniform State Laws) has commissioned a task force to start drafting those rules. Both Professor Christopher Fairman (who advocates new rules), and Professor John Lande (who is very cautious about introducing new rules), as well as several members of the IACP, are on this task force. Unfortunately for Colorado, this process takes literally years and a new rule is not expected to emerge for up to 5-7 years.

In the meantime, we have to decide how we in Colorado want to proceed. There is no doubt that the current situation is painful and difficult. Some have suggested we try to push for a legislative fix to the situation, in the form of adding Collaboration to the ADR statute. Others have suggested we seek a judicial directive pronouncing that collaboration is ethical. Still others want to modify the ethical rules. Another option is public education. On the theory that the ethics opinion and most of the repercussions are largely driven by fundamental misunderstandings, we are contemplating launching a huge campaign to educate the public and our fellow attorneys – particularly those who think we are part of some scheme to deprive them of divorce work. Our local ethics task force is looking at all options (and if you want to join up, please email me and you will be happily added to the committee).

In the final analysis, perception is everything. Truthfully, the opinion wasn't that bad. That notwithstanding, the fallout has been awful. We've had two or three sections (like real estate, and Trust and Estates) pronouncing the "death" of collaborative law... we've hit the national scene in a big way as the state that condemned collaboration. And in all of this, it has largely been "don't bother me with the facts."

Whatever we decide to do, it must involve reconciliation. To the extent that collaborative practitioners appear on the outside to be an exclusive club whose members consider collaboration to be morally superior to litigators, we need to work to correct that perception. To the extent that others cannot see how a mutual agreement could protect both parties, we need to show them how this is emphatically not the case.

We need to educate, extend olive branches and collaborate on solving the mess created by EO 115. Our work is cut out for us, and I look forward to working with each and every one of you on this project over the next year(s)!!



Ann Gushurst is a divorce attorney and a shareholder at the law firm, Gutterman Griffiths PC.  
[www.ggfamilylaw.com](http://www.ggfamilylaw.com)

## Collaborative Family Law—Facts and Fiction

By Mike Mastracci

Lawyers and prospective clients alike share some common myths about using the collaborative family law approach for resolving divorce and child custody and visitation disputes. However, differentiating between fact and fiction is not too difficult. The bottom line is that collaboration beats the hell out of litigation. Some common myths are addressed here.

1. Myth: Angry clients can't use the collaborative process. Anger is a natural part of the divorce process. Even with intense anger from one or both of the parties, progress toward resolution can be made with the help of collaboratively trained attorneys and other professionals familiar with the underlying emotional issues. Channeling anger into positive solution oriented negotiations takes time and ef-

fort, just like anything else that is worthwhile in life.

2. Myth: The best lawyers are good advocates and advocacy has no place in collaborative law.

Advocacy is a vital element of collaborative law. In collaborative law, advocacy is about "educating" rather than "persuading." One of the biggest differences is that no judge or other third party is making decisions. Advocacy involves educating one's client about all of the

## Collaborative Family Law—Facts and Fiction

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information needed for them to understand a wide range of options, and to assess how the ramifications flowing from each option fulfills (or fails to fulfill) that client's needs, interests and priorities.

3. Myth: Collaborative cases just are not the kind of cases that come to many lawyers.

People come to attorneys because they need a resolution of issues, not because they need a lawsuit. Most often, what they want is a settlement. Most often, that is what lawyers (eventually) help them to achieve, but all too often, settlement comes at the end of an expensive and intrusive "trial preparation process." Collaborative law offers the option to engage in a "settlement preparation process," early on, and many people when offered that alternative approach by someone who has the skills and training to make that work, will gladly choose that option.

4. Myth: If a collaborative case is terminated, the parties must start all over with new counsel (and that is not good).

If a case terminates without settlement, it is true that both collaborative attorneys are out of the case. That is not the same as

"starting over." From the start, the collaborative method involves a cooperative and open information-gathering process, and also focuses on settlement options based on understanding each client's interests, goals, and priorities. This approach results in a huge "jump start" that can save a great deal of time and effort even if the collaborative process is terminated before a final resolution is reached. Also, if the collaborative process is terminated, experience shows that the parties often choose to keep many interim agreements that were reached. Moreover, often the parties appreciate how helpful both their collaborative attorneys and the collaborative process are, and this often prevents people from giving up when the negotiations get difficult, as they often do in divorce work. Collaborative attorneys say: "when things get difficult, we just roll up our sleeves and help our clients keep their focus."

5. Myth: Unless the case is a fully-signed collaborative case there is no opportunity to use the skills developed in collaborative training. Collaborative training helps professionals to hone their listening skills, and learn to ask questions to which they don't already know the answer! They also learn to help their clients express their needs and concerns in ways that can be heard and accepted by

the other spouse. When these skills are deployed in a litigated case, they can change the entire tone of the case, and help with resolution even in the midst of litigation. In fact, collaborative skills are valuable in all interpersonal communications, including those with our own families.

6. Myth: Attorneys who use collaborate law must be afraid of going to court or not very good at litigation.

Most attorneys using collaborative law have long had successful practices. Fear of court is not the motivator for this type of work. The motivator is the drive to provide the type of professional service that is truly helpful to clients who are going through divorce. Many have observed that settlement work is not easier than litigation. In fact, it can be far more draining. But, while it is demanding work, it is unquestionably worthwhile and satisfying.

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## The Art of Divorce Coaching In and Out of Collaborative Divorce

By Barbara Shindell

The "coach" is a role that has developed within collaborative divorce. For those professionals who have made the paradigm shift, attorneys, mental health professionals, and financial professionals, the coach has become an invaluable asset to the team to assist families in moving towards deep resolutions in their divorce and fashioning sustainable agreements.

So what does these mysterious coaches do, how is it different from therapy and life coaching, and how does the coach work with the other divorce professionals?

**Definition:** Coaching, in the context of collaborative divorce, is an intervention that is short term, possibilities oriented, present and future focused, and limited in scope to

divorce issues.

### What a Coach May Do

- Support, encourage and educate clients
- Is possibilities oriented and process focused
- Assist parties in defining their needs and interests and the needs an interests of the whole family
- Assist parties in crafting a mission statement for their collaborative divorce
- Prepare the parties to negotiate from

their highest selves.

- Assists the parties in transforming the relationship from an intimate one to a post divorce relationship.
- Assist their client in identifying "hot buttons" and developing strategies to self soothe.
- Communicate the "hot buttons," challenges, and strengths to the core team.
- Communicate the underlying system dynamics to the core team.
- Assist in the development of a post-separation parenting plan if there is

## Coaching

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not a child specialist on the team.

- Maintains strong boundaries in the process and model it to the clients.
- Hold clients accountable for making decisions from their highest selves, behaving from their highest selves and keeping good enough agreement.
- Support the preservation of the non-material assets
- Participate in meetings with the clients and other core team members to support the process.

### What a Coach May Not Do

- Therapy
- Overly Identify or Align with the client
- Primarily focus on the challenges of the other client and the past
- Move towards solutions without the participation of other team members
- Keep the process and content confidential from the team

**It is not therapy and it is not “life-coaching.”** Some professionals argue that they are already doing coaching and that their orientation is short term, possibilities focused. Most mental health professionals use many of the techniques of the cognitive behavioral and solution focused orientations. While this may be true, it is important that a coach in the context of collaborative divorce understand both the techniques and orientation of coaching, and the role they serve as a supportive neutral to both the client(s) and the team and the paradigm shift from litigation to collaborative divorce, AND IT IS HUGE. With the client, the coach role is a supportive one and to keep the focus tuned to the needs of the client going through a collaborative

divorce by assisting the client:

- to reach a deep and sustainable resolution to the family’s divorce
- to operative from their highest selves
- to focus on their needs and interest rather than their position
- to identify personal and systemic impasses to deep resolution and assist the client in developing strategies to reach deep resolution
- to hold the client accountable for their good enough agreements

With the team, the coach also has a neutral role in within the team.

- reports system and individual dynamics to the team
- alerts the team to “hot” buttons” and productive strategies to move through the impasses towards deep resolution.
- Consults to the team regarding team dynamics and suggests strategies to break through impasses.

A question often arises regarding confidentiality. In the spirit of collaboration there is transparency, not confidentiality, within the team. The coach uses good professional judgment as to what, when, and how to be transparent with the team. This is one of the big differences between coaching in the collaborative process, and therapy, and IT IS VERY IMPORTANT THAT THIS DIFFERENCE IS DISCLOSED TO AND UNDERSTOOD BY THE CLIENT.

Because of this difference, it is never appropriate for a client’s current therapist to serve as a member of the collaborative core team. The role of the coach in the collaborative process is a neutral, not as an advocate for the client, and the coach does not have the same privilege of confidentiality; therefore mixing the roles can be a conflict of interest and damaging to the client.

There is a body of knowledge that a coach should possess to be optimally effective in collaborative divorce coaching. We believe that the coach should be knowledgeable in the following areas:

- Family systems theory
- Child and Adult development
- Impact of divorce on children
- Post divorce parenting
- Collaborative Communications
- Divorce Research and Literature
- The Grief Process
- Short term, possibilities oriented interventions
- Alternative Dispute Resolution Techniques
- Domestic Violence and Addiction

The role of the coach within collaborative divorce is an exciting development in the field of collaborative divorce. It has begun to spill over into what is being called cooperative divorce, when clients want to follow the principals of collaborative divorce but don’t want to sign an “official” collaborative agreement.

As a state organization we feel so strongly about the advantages of coaching, we are developing training for both attorneys and mental health professionals on coaching. Watch for the announcements for a COACH TRAINING COMING SOON!



### **About the Author** Barbara Shindell,

LCSW is a Licensed Clinical Social Worker who has been in private practice as a family, couples, and individual therapist in California and Colorado for 25 years. Barbara was introduced to Collaborative Law in 1996, when it was just an idea coming into being in California while going through my own divorce. My first response was, “great, we have to do it better for families and children.” I took the first training with Pauline Tesler, when I arrived in Colorado in 2001 and have been a champion for Collaborative Law ever since. I have participated in about 10 collaborative cases as either a Coach or Child Specialist. I have been transforming my litigation practice with the paradigm shift, and it works! In addition, I have been training collaborative coaches.

**The Value of Silence**  
By Ann Gushurst &  
Cynthia Brewster

As divorce lawyers, we have seen this scenario over and over; one spouse does something awful to the other spouse, who is your client. You react, calling the other attorney, telling them what a terrible thing their client has done. The two attorneys immediately jump to discussions to address this crisis, both knowing you have been charged with “figuring it out” for the clients. The discussions can be productive brainstorming sessions, or full threats of court intervention. Either way, it is the lawyer’s job to intercede. This happens all the time in litigation.

Enter the Collaborative Law process. Lawyers somehow hope that collaborating spouses will be magically different. The pain of separation

and the grief of loss for the spouses will not show itself in bad behavior, since these parties are trying to do it the right way and collaborate. But this is where disappointment sets in pretty quickly for collaborative counsel. Clients still act badly. Clients still expect the lawyer to “fix” it for them. Lawyers must particularly be aware of this in Collaborative Cases, where the lawyers are committed to working together to help problem solve. The lure to do so without input from the clients is very strong.

In these scenarios, where one client (or both, or one and then the other, or...) behaves like a divorcing lunatic, we must remember that they are, in fact, divorcing lunatics. Divorce brings out the worst, and occasionally, the best, in our clients. This doesn’t change all that much when it happens in a collaborative context.

In these situations, our training and our nature is to try to fix whatever has broken. This is so despite the fact that in collaboration we commit to only addressing agenda items, to no surprises, and to the clients being responsible for all solutions.

In a case a few years ago, I received a distraught call from an opposing counsel, informing me that my client had done something unthinkable (in the context of collaboration). The attorney was very upset. She wondered what we should do – and suggested termination and immediate court intervention. Upon advice from a wiser colleague, we put the item on the next meeting agenda (which meeting was two excruciating weeks away) and, when the issue came up, we both said nothing.

Eventually, the facts came out,

the needs (and the anger) were expressed **by the clients**, and the problem was solved.

This, however, only happened after 3 minutes and 10 seconds of fairly uncomfortable and poignant silence. I confess that it took every fiber of my being not to fill the void (and had it not been my client who was the immediate problem...). I wanted to ask why? I wanted to probe what the needs were. I wanted to suggest fixes. Instead, I said nothing.

It was amazing. Because the attorneys refused to ‘rescue’ the clients, the clients were forced to rescue themselves. And they did.



## STATEWIDE PRACTICE GROUPS

Name	Contact
Academy for Collaborative Legal Practice	Sheila Gutterman 303-858-8090
Collaborative Divorce Professionals of Boulder	C. Bert Dempsey 303-554-1415 Todd McMillen 303-665-5575
Denver Collaborative Divorce	Peggy Walker 303-299-9484
Mile Hi Collaborative Law Group	Tom Toxby 303-231-1030
Peak to Peak Collaborative Divorce (Western Slope)	303-299-9484
Pikes Peak Collaborative Law Association	Lisa M. Dailey 719-473-0884 David M. Johnson 719-471-1650
Rocky Mountain Collaborative Law Professionals	Alexis Namasté 303-884-1372 or <a href="http://www.rmclp.com">www.rmclp.com</a>
South Metro Denver Collaborative Law Professionals	Barbara Shindell 303-344-2425 Mary C. Baker 303-730-0067

## UPCOMING BOARD AND MEMBER MEETINGS 2007

Check [www.cclawp.org](http://www.cclawp.org) for up-to-date information.

Meeting location: Karen Best’s office ▪ 5445 DTC Parkway ▪ Suite 800 ▪ Greenwood Village

Board meetings start at 8:30 AM ▪ Member meetings start at 10:30 AM



[www.cclawp.org](http://www.cclawp.org)

## Synopsis of Colorado Conference - This October!!

### By Dori DeJong

The Colorado Collaborative Law Professionals Board of Directors is excited to announce the 1<sup>st</sup> Annual Colorado Collaborative Law Networking and Educational Conference to be held in Frisco, Colorado on October 5-6, 2007.

Mark your calendars and take advantage of this great opportunity to get advanced level training and network with some of the most cutting-edge attorneys and family law professionals in Colorado. Over 100 attorneys, mental health professionals and financial professionals are expected to attend this conference from a multi-state region. Several prominent family law firms have already committed to attend and support this event.

This advanced training in a retreat setting will foster the true spirit of Collaborative Law. Pioneers

of Collaborative Law in Colorado will be recognized during the conference.

#### Conference topics include:

- The Past, Present and Future of Collaborative Law in Colorado
- Non-adversarial communication
- Use of the “Team” in Collaborative Cases
- Engaging the Financial Neutral
- Ethics of Collaborative Law
- The Power of Practice Groups
- Practice Group Team Building

We look forward to seeing you on October 5, 2007!

## National List Serv

**Did you know there is a collaborative list serve? Your president wants you to know! (and join)...**



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The national list serve is an important sounding block for collaborators all across the United States. It is a place to listen and see what is going on in the collaborative community. In fact, it is so influential; it has been cited at least once in a scholarly article on collaboration as to how certain controversial situations have been handled in a collaborative setting. You will meet, electronically, all the movers and shakers in the field. ~, (Stu Webb and Pauline Tesler are frequent contributors.) In short, it is an invaluable resource.

Interested in knowing more about Collaborative law? You should check out Carl Michael Rossi's website. Michael is a Collaborative Divorce Coach and has been a licensed Professional Counselor in Illinois for over 4 years. He is also a licensed attorney in New York and Illinois, a trained mediator and has more than ten years of trail experience. Michael is also on the Board of Directors of the International Academy of Collaborative Professionals [www.collabgroup.com](http://www.collabgroup.com) and of the Collaborative Law Institute of Illinois [www.collablawil.org](http://www.collablawil.org).

On his website, <http://www.lhdragon.net/>, you will find information on: CollabLaw, Collaborative Law Divorce, Communication Skills for Lawyers and several helpful links on these subjects.

To join the National Collaborative Law List Serv go to [www.yahoo.com](http://www.yahoo.com) click on “groups” from the left hand column, search for “collablaw”, and click on it when it comes up, and then click on join. This group does announce when people join, so... join!

## WANTED: NEWSLETTER CONTRIBUTIONS

Please consider contributing an article you have written or found, website or other helpful resource, musings on collaborative practice, what your practice group is doing, tips for the collaborative practitioner or client and even inspirational quotes and humor.



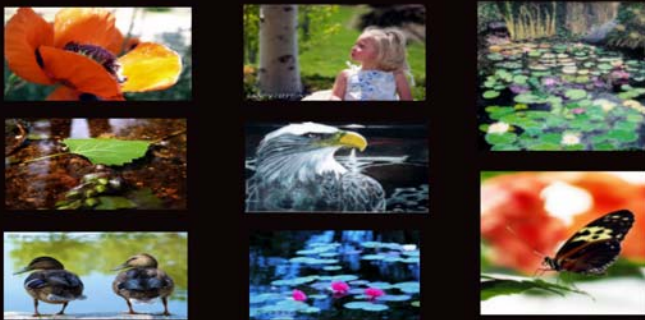
Deadline is the 10th of the month prior to publication. **Next due date: October 10, 2007**

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Contact Editor

## What is Collaboration

**Collaboration** is a process defined by the recursive interaction of knowledge and mutual learning between two or more people who are working together, in an intellectual endeavor, toward a common goal which is typically creative in nature. Collaboration does not necessarily require leadership and can even bring better results through decentralization and egalitarianism. Source- Wikipedia, the free encyclopedia



Editor

Sandy Clifton

[sclifton@ggfamilylaw.com](mailto:sclifton@ggfamilylaw.com)**MEMBER BENEFIT**

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Conference

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Toronto, October 24-28, 2007

**ASSOCIATION OF CONFLICT RESOLUTION ANNUAL CONFERENCE**

ACR 7th Annual Conference in  
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October 24-27, 2007

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<b>Rose-Anne Landau</b>	303-221-4748	<a href="mailto:landaulaw@comcast.net">landaulaw@comcast.net</a>
<b>Cynthia Brewster</b>	303-831-0808	<a href="mailto:cb@hbc-law.net">cb@hbc-law.net</a>
<b>Anita Cowley</b>	303-462-4500	<a href="mailto:anitacowleyesq@msn.com">anitacowleyesq@msn.com</a>
<b>Pat Skinner</b>	303-333-5596	<a href="mailto:pat-step@att.net">pat-step@att.net</a>
<b>Dori DeJong</b>	303-573-5655	<a href="mailto:dejong@dejongfamilylaw.com">dejong@dejongfamilylaw.com</a>
<b>Joshua Wohl</b>	303-832-4200	<a href="mailto:jswohl@aol.com">jswohl@aol.com</a>
<b>Dedre Mills</b>	303-488-0458	<a href="mailto:dedre.mills@ctxmort.com">dedre.mills@ctxmort.com</a>

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Terri Harrington	Past President	303-831-0808	<a href="mailto:th@hbc-law.net">th@hbc-law.net</a>
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