Informed Consent and Avoiding Liability by Accepting Responsibility

— Jack H. Emmott III
and
— Larry J. Doherty

In June 2012, I had the pleasure of moderating a panel discussion at the Collaborative Law Section's Annual Meeting at the State Bar Annual Meeting at the George R. Brown Convention Center in Houston. The panelists were Harry Tindall, Larry Doherty, and Professor Leslie C. Griffin of the University of Houston Law Center.

Because Larry is a very successful malpractice attorney, he is one of the most admired and feared attorneys in Texas. Part of Larry's legacy with his wife, Joanne, is the establishment of a Chair in Legal Ethics at the University of Houston Law Center. Professor Griffin held that Chair. Larry's work has involved asking juries whether Larry's client's former lawyers have lived up to an acceptable standard of care in their representation of their clients. Part of that standard of care includes whether the lawyer has obtained informed consent from the client before proceeding down a legal path.

Texas collaborative law professionals are proud to state that in 2001 Texas became the first jurisdiction in the world to pass a collaborative law act as part of the state's legislative laws. In 2009, the Uniform Law Commission approved the Uniform Collaborative Law Act. As of the date of the panel discussion, that Act had been enacted in Utah, Nevada, Texas, Washington, D.C. and Hawaii. In 2007, the State of Colorado issued Ethics Opinion 115 that struck fear through the hearts of all collaborative professionals. That Opinion decreed that the practice of collaborative law requiring lawyers to withdraw if settlement could not be reached was unethical. Fortunately for the collaborative law movement in America, that concern was put to rest in subsequent Opinion 07-447 of the American Bar Association. ABA Opinion 07-447 permits a lawyer to be engaged for a limited scope of representation (i.e., the collaborative process) so long as the limitation is reasonable under the circumstances. As Harry Tindall noted, "What we collaborative professionals do is limit our representation and serve as dedicated expert settlement professionals." ABA Opinion 07-447 clearly rejects the notion in Colorado's Ethics Opinion 115 that collaborative law sets up a non-waivable conflict under the ABA Model Rules of Professional Conduct, namely Rule 1.7. The UCLA permits lawyers to have the freedom to limit the scope of representation to the collaborative process, so long as the limitation is reasonable under the circumstances. Knowing this, I asked Larry Doherty the following questions. I am certain you will find his answers and advice entertaining, insightful and instructive.

Questions for Larry

Q: With all of your talents and intellect as an attorney, why did you choose malpractice litigation to be your career?

A: It started with a case. The first case of legal malpractice I had ever heard about came to me for an interview. I was the youngest lawyer on the firm's totem pole. The firm policy was that s _ _ _ cases rolled downhill. The client had been cheated by another personal injury lawyer. So the "proof" was easy to see for even a rookie lawyer examining settlement division papers. BUT, the firm's senior partner said, "No. We would get a bad reputation. Other lawyers would quit referring us cases." Then he told me to go send the guy away, anywhere. That was a miserable experience that flew in the face of tort professor John Cox's rule: "For every wrong, there is a remedy." Not when it came to lawyers. We have no right to be exempt from the same legal system of accountability that we employ against all other professions, manufacturers and tort-feasors. At least, I did not think so, and it sure did not feel like "justice" to send him away with no place to go for financial relief. Plus, the State Bar offers no financial solution to victims of the "Rich White Men'" Rule. As he left, grumbling about the Bar and our system, I swore then

that if I ever got to be my own boss, I would never refuse a good case just because the defendant was a lawyer. As fiduciaries, lawyers cannot serve an elitist agenda.

Q: What is the benefit to a society of having a body of law which allows clients to sue their lawyers?

A: It helps re-enforce the reality of the self-evident truth that all are and should be treated equally since they are created that way. It subjects the liability of lawyers to the same process that we apply to all others (except for doctors). The common law derives from cases. The cases must be real and not hypothetical. The most common comment I get from potential new clients is the statement that "I didn't think you could sue a lawyer." We created that illusion notwithstanding the fact that most lawyers and judges detest bad (mal) lawyering (practice). Nonetheless, we are less respected than a used car salesman.

Q: Now that you have become acquainted with collaborative law, as a civil litigator, how do you view the collaborative law dispute resolution process and the fact that it has become a world-wide phenomenon?

A: Advising clients timely about the existence of collaborative law and differences in its procedure is A STANDARD OF CARE THAT PROSPECTIVE TRIAL LAWYERS SHOULD KNOW AND EXPLAIN BEFORE GETTING A WRITTEN WAIVER OF CONFLICT, IF THE CLIENT DECIDES NOT TO PURSUE IT. Ultimately, collaborative law will become available to all civil trial causes of action as its popularity grows and expands. Public policy of Texas supports "settlement" even in the face of the emotional hysteria of divorce. Why not in professional malpractice cases? Why not in boundary disputes? Patent infringement?, etc.

Q: Effective as of September 2011, the Texas Legislature enacted the Texas Collaborative Family Law Act for family cases, titled 1A of the Texas Family Code. This Act, inter alia, requires certain standards of professional responsibilities (Section 15.111) namely that, "Before a prospective party signs a collaborative family law participation agreement, a prospective collaborative lawyer must (1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative family law process is appropriate for the prospective party's matter." Further, it requires the attorney to "provide the prospective party with information that the lawyer reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative family law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, including litigation, mediation, arbitration, or expert evaluation." Independent of the duty imposed on a collaborative practitioner under the Texas Collaborative Family Law Act, how do you view "informed consent?"

A: Consent must not only come from having the client fully informed, it must also be "effective" to be "informed." Put it in writing. Collaborative law lawyers should start developing the relevant, effective points to be discussed with a potential new client before their "trial" colleagues start doing it. And, they can add to it as our collaborative law adds to our new global civilization. The growth of alternative dispute resolution techniques is an inevitable effort of our societies' need to peacefully resolve disputes. The criticism that we have created a "litigious society" is a cynical claim by the self-interested who want to be able to do harm to others without liability. Collaborative law is another civilized response that should replace "gunplay" as a remedy. Fee charging trial lawyers have a fundamental personal conflict of interest with collaborative law lawyers and ultimately their clients. The reason arises from the fact that both cannot be paid first. Full, informed, effective consent to employment requires an honest explanation of the benefits of collaborative law. That is the current standard of care in Texas. Why so? Answer: Because an expert witness in ethics will say so. Testing the value of that testimony on appeal will only memorialize it. It will not make it go away.

Q: How do you view, historically and at present, alternative dispute resolution?

A: Historically, I can remember when civil trial lawyers seldom discussed settlement before they were about to pick a jury. Then the availability of mediated settlement rather than a hallway discussion took hold. Then, the courts began to require efforts at settlement and that effort with a disinterested

third party became so popular that it was included in pre-trial orders. I see collaborative law as another alternative that grew out of the process of inequity at least in family law cases. Collaborative law is a natural outgrowth of our public policy. It will grow to fit the challenges that address the adversarial system used in causes of action other than just family law. It should not take a crystal ball to see it. The need for change has accelerated in all areas of society, not just our legal system. We have a duty to refine our legal system and preserve concepts of fundamental fairness. Old sayings did not get to be old sayings without having a lot of truth in them. When the need for change accelerates and our legal system cannot keep up, we have "justice delayed," which is, "justice denied."

Q: What is the liability of a collaborative lawyer failing to adequately inform a prospective client of the risks and benefits of the other forms of resolving a dispute?

A: Fee forfeiture and provable consequential damages flowing from the trial lawyer's failure to inform or mis-informing clients should be obvious. The potential for punitive damage is available to the victims of the malpractice where the lawyer charged with a duty to inform the client intentionally or maliciously dupes the client into the trial first. The liability for potential causes of action for collaborative law lawyers is the same for erroneous consent as for the trial lawyers. One of the benefits of common law is its ability to flesh out unique facts about conduct, make it known to others and serve as a warning as well as establishing standards of care.

Q: What is your opinion as to whether the Texas Collaborative Family Law Act imposes a higher standard of care or duty on the family lawyer who practices collaborative law as opposed to a family lawyer who only engages in litigation?

A: Simply put, a lawyer's standard of care to his prospective client is the same for trial family law lawyers as for collaborative law lawyers. It is the highest legal duty we have. It is a fiduciary duty. That fiduciary duty requires us to put the client's interests above our own. We must be conscious of conflicts of interests between our clients and ourselves. Our alternatives are relatively simple. Either a written waiver containing enough information to constitute full, informed, effective consent must be obtained or the lawyer must cease representation of that client and/or conflicted clients.

Q: What is your opinion on the liability of a family lawyer who solely engages in adversarial divorce and child custody litigation and that lawyer fails to provide adequate information on alternative dispute litigation alternatives, including the collaborative process?

A: I would change the word "adequate" to "effective" and say that the duty exists as a current standard of care. Violating it would subject that lawyer to liability for loss of fees charged and any other gain ill-gotten by their failure.

Q: What kinds of damages are recoverable in behalf of a client who has not been given informed consent?

A: Fee forfeiture, out-of-pocket losses and costs incurred to the client, DTPA damages, punitive or exemplary damages and even mental anguish when appropriate. All of these damages are fact driven by the differences in each case.

Q: Could you give the reader a scenario between a family law attorney and a client in a case where such informed consent is not obtained before proceeding with litigation?

A: (1) Assume a bitter divorce trial has occurred without collaborative law intervention. Assume both clients would have benefitted from a collaborative effort to resolve the dispute first, e.g., the divorce is only about property and financial issues.

(2) Assume that the trial lawyer's conduct caused a reversal on appeal or caused a mistrial. Assume that there was no discussion of collaborative law and no informed consent waiver from the client. Assume that the client became outraged at the amount being charged and found a collaborative law lawyer who sorted out the issues that were preventing settlement. Assume that the collaborative law effort would have produced a settlement before all the trial expenses were incurred had the trial lawyer advised the client about retaining a collaborative law lawyer.

(3) Assume that the client who had to pay all the costs and expenses, including attorney fees is the financial victim.

(4) In this scenario, an expert could establish a causal connection between the lawyer's failure to inform and actual damages.

Q: What are the reasons, historically and at present, why some lawyers may not have spent or may not be spending adequate time reviewing alternative dispute resolution alternatives with their prospective clients?

A: The Bar calls lawyers "attorneys and counselors at law." Counseling a client requires a different skill set and perhaps even intervention of a different profession, psychiatry and psychology. The attorney who specializes in trial work is usually the last resort for a client. However, if the client does not know about collaborative law or other alternative dispute resolutions before employing the trial lawyer, he will not have received adequate and/or effective counseling. The collaborative law lawyer's efforts are predominantly counseling rather than litigating. So, lawyers who are in the trial business would lose clients if the collaborative process is allowed to work. Therein lies the vice of self-interest. The trial lawyer has to be aware of collaborative law and must explain its function in order to show care for the best interest of the client.

Q: Let us assume that a family lawyer becomes aware that he has not given a client informed consent and the client calls the lawyer. The agitated client starts to complain about the problem. What advice would you give to that lawyer?

A: (1) Listen to the client without interruption or defensive posturing until the client has had the opportunity to fully express himself. Confirm that the client has gotten it all off his/her chest.

(2) If the client is justifiably aggrieved and you know it, then affirm his concern and explain your conduct. An agitated client does not want to hear that they are wrong. If they are wrong, they probably do not want to hear it from you. If they are right and you are hearing from them rather than their malpractice lawyer, use the opportunity to explain what you did and why you did it. Lying to the client is never an option.

(3) If they have employed another lawyer, and you have not turned it over to your errors and omissions carrier, you will only have one opportunity to be honest. Don't blow it. Once they have gotten to opposing counsel, you will not get another opportunity to candidly assess the legitimacy of the client's complaint without other interests affecting your response. The "cover up" can be worse than the offense of failing to effectively advise.

(4) My personal experience is that the best way to avoid financial liability is to acknowledge your responsibility for errors in handling the client's case. That responsibility requires a candid consultation with the client at every point in the case where they need to make a choice.

(5) If you do not have the opportunity to have a one on one explanation session with the client, you should consult an ethics specialist for help. Your insurance carrier, if you have insurance, will provide trial counsel. Your independent personal lawyer in this process should give you the guidance that you cannot give yourself.

Q: At the panel discussion you stated that in order to avoid liability, the lawyer should accept responsibility. What do you mean by that?

A: See above. The absolute truth is the only thing that you have to counter a claim of wrongdoing. If you lie, you will be caught. If you tell the truth, you can be forgiven. But, the truth has many depths. You must get to the absolute truth about what you did and what the client thinks you did. If you are honest and complete in your candid discussion with the client, the client will not have a lie to use against you. If you lie, you cannot get back to absolute honesty. You will have destroyed the client's willingness to believe you. You never get a second chance to win the client's confidence. Breathe "radical honesty." You don't need rules to understand honesty, devoid of any deception, no matter how slight. If just complying with Rules of Professional Conduct is your only concern, you probably need another profession. Being dishonest on top of having committed malpractice is the surest way to get sued. And, it

becomes good evidence of intent to deceive, which will support a claim for punitive damages. A fully informed client who wants an honest explanation requires your trust and faith in the truth, full truth, nothing but the truth. That is an arduous standard to uphold when you are concerned about becoming a defendant. If you do not know the truth, don't make something up. If you cannot muster such candor, you will destroy the client's willingness to forgive. If you do not trust your client, it is usually a reflection of your inability to trust yourself. As Obi-Wan Kenobi, the "Negotiator" in Star Wars, who always kept a cool head in the thick of combat, said to Luke, "trust the force." Trust is the product of the power of truth.

Jack H. Emmott III is currently Chair-Elect of the State Bar Collaborative Law Section and Past Chair of the Collaborative Law Section of the Houston Bar Association. Jack is a Director of the Collaborative Law Institute of Texas and a Member of Looper, Reed & McGraw, P.C. in Houston, Texas.

Larry Joe Doherty is Board Certified in Personal Injury Trial Law, specializes in representing plaintiffs with legal malpractice cases, serves as Manager of Lone Star, a 270-acre wildlife habitat in Washington County, is Past President-Washington County Wildlife Society, hosted over 600 episodes of the court TV show "Texas Justice" as "Judge Larry Joe", served as Past Chair of State Bar Grievance Committee 4-C and is a strong advocate of alternative dispute resolution, including collaborative law.

TX website.