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