AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 07-447 **August 9, 2007**

Ethical Considerations in Collaborative Law Practice

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.[1]

In this opinion, we analyze the implications of the Model Rules on collaborative law practice.[2] Collaborative law is a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement. It had its roots in, and shares many attributes of, the mediation process. Participants focus on the interests of both clients, gather sufficient information to insure that decisions are made with full knowledge, develop a full range of options, and then choose options that best meet the needs of the parties. The parties structure a mutually acceptable written resolution of all issues without court involvement. The product of the process is then submitted to the court as a final decree. The structure creates a problem-solving atmosphere with a focus on interest-based negotiation and client empowerment.[3]

Since its creation in Minnesota in 1990,[4] collaborative practice[5] has spread

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1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. We do not discuss the ethical considerations that arise in connection with a lawyer's participation in a collaborative law group or organization. *See* Maryland Bar Ass'n Eth. Op. 2004-23 (2004) (discussing ethical propriety of "collaborative dispute resolution non-profit organization.")

3. *See generally* Sherri Goren Slovin, "The Basics of Collaborative Family Law: A Divorce Paradigm Shift," 18 Amer. J. of Family Law 74 (Summer 2004), available at http://www.mediate.com/pfriendly.cfm?id=1684.

4. Minnesota Collaborative Family Law FAQs, available at http://www.divorcenet.com/states/minnesota/mnfaq01.

5. The terms "collaborative law," "collaborative process," and "collaborative resolution process" are used interchangeably with "collaborative practice." Although col-

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rapidly throughout the United States and into Canada, Australia, and Western Europe. Numerous established collaborative law organizations develop local practice protocols, train practitioners, reach out to the public, and build referral networks. On its website, the International Academy of Collaborative Professionals describes its mission as fostering professional excellence in conflict resolution by protecting the essentials of collaborative practice, expanding collaborative practice worldwide, and providing a central resource for education, networking, and standards of practice.[6]

Although there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a "four-way" agreement). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the four-way agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.

Several state bar opinions have analyzed collaborative practice and, with one exception, have concluded that it is not inherently inconsistent with the Model Rules.[7] Most authorities treat collaborative law practice as a species of limited scope representation and discuss the duties of lawyers in those situa-

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laborative practice currently is utilized almost exclusively by family law practitioners, its concepts have been applied to employment, probate, construction, real property, and other civil law disputes where the parties are likely to have continuing relationships after the current conflict has been resolved.

6. *See* http://www.collaborativepractice.com/t2.asp?T=Mission.

7. Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007), "Ethical Considerations in the Collaborative and Cooperative Law Contexts," available at http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth, is the only opinion to conclude that a non-consentable conflict arises in collaborative practice. Other state authorities analyze the disqualification obligation under Rules 1.2, 1.16, or 5.6. *See e.g.*, Kentucky Bar Ass'n Op. E-425 (June 2005), "Participation in the 'Collaborative Law' Process," available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; New Jersey Adv. Comm. on Prof'l Eth. Op. 699 (Dec. 12, 2005), "Collaborative Law," available at http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; North Carolina State Bar Ass'n 2002 Formal Eth. Op. 1 (Apr. 19, 2002), "Participation in Collaborative Resolution Process Requiring Lawyer to Agree to Limit Future Court Representation," available at http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/ 2002&to=4/2002; Pennsylvania Bar Ass'n Comm. on Legal Eth. & Prof'l Resp. Inf. Op. 2004-24 (May 11, 2004), available at http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf. Several states have special rules for collaborative law practice. *See, e.g.*, CAL. FAM § 2013 (West 2007); N.C. GEN. STAT. § 50-70 to 50-79 (2006); TEX. FAM. CODE ANN. §§ 6.603 & 153.0072 (Vernon 2005).

tions, including communication, competence, diligence, and confidentiality. However, even those opinions are guarded, and caution that collaborative practice carries with it a potential for significant ethical difficulties.[8]

As explained herein, we agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication. We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).

Rule 1.2(c) permits a lawyer to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent. Nothing in the Rule or its Comment suggest that limiting a representation to a collaborative effort to reach a settlement is per se unreasonable. On the contrary, Comment [6] provides that "[a] limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives."

Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation.[9] The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.[10]

The one opinion that expressed the view[11] that collaborative practice is impermissible did so on the theory that the "four-way agreement" creates a non-waivable conflict of interest under Rule 1.7(a)(2). We disagree with that result because we conclude that it turns on a faulty premise. As we stated earlier, the four-way agreement that is at the heart of collaborative practice includes the promise that both lawyers will withdraw from representing their respective clients if the collaboration fails and that they will not assist their clients in ensuing litigation. We do not disagree with the proposition that this contractual obligation to withdraw creates on the part of each lawyer a "responsibility to a third party" within the meaning of Rule 1.7(a)(2). We do disagree with the view that such a responsibility creates a conflict of interest under that Rule.

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8. *Supra* note 6.

9. Rule 1.0(e).

10. *See also* Rule 1.4(b), which requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

11. Colorado Bar Ass'n Eth. Op.115, *supra* note 7.

A conflict exists between a lawyer and her own client under Rule 1.7(a)(2) "if there is a significant risk that the representation [of the client] will be materially limited by the lawyer's responsibilities to … a third person or by a personal interest of the lawyer." A self-interest conflict can be resolved if the client gives informed consent, confirmed in writing,[12] but a lawyer may not seek the client's informed consent unless the lawyer "reasonably believes that [she] will be able to provide competent and diligent representation" to the client.[13] According to Comment [1] to Rule 1.7, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." As explained more fully in Comment [8] to that Rule, "a conflict exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer's other responsibilities or interests…. The conflict in effect forecloses alternatives that would otherwise be available to the client."

On the issue of consentability, Rule 1.7 Comment [15] is instructive. It provides that "[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."

Responsibilities to third parties constitute conflicts with one's own client only if there is a significant risk that those responsibilities will materially limit the lawyer's representation of the client. It has been suggested that a lawyer's agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client.[14] We disagree, because we view participation in the collaborative process as a limited scope representation.[15]

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation. A client's agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer's representation of the client will be materially limited by the lawyer's obligation to withdraw if settlement cannot

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12. Ru1e 1.7(b)(4).

13. Rule 1.7(b)(1).

14. Colorado Bar Ass'n Eth. Op.115, *supra* note 7 (practice of collaborative law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful).

be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement.[16]

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15. See *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*, 2003 A.B.A. SECTION OF LITIGATION, at 27-29, available at http://www.abanet.org/litigation/taskforces/modest/report.pdf.

16. *See* Lerner v. Laufer, 819 A.2d 471, 482 (N.J. Super. Ct. App. Div.), *cert. denied*, 827 A.2d 290 (N.J. 2003) (stating that "the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them," court rejected malpractice claim against lawyer who used carefully drafted limited scope retainer agreement); Alaska Bar Ass'n Eth. Op. No. 93-1 (May 25, 1993) (lawyer may ethically limit scope of representation but must notify client clearly of limitations on representation and potential risks client is taking by not having full representation); Arizona State Bar Ass'n Eth. Op. 91-03 (Jan. 15, 1991) (lawyer may agree to represent client on limited basis as long as client consents after consultation and representation is not so limited in scope as to violate ethics rules); Colo. Bar Ass'n Ethics Comm. Formal Op. 101 (Jan. 17, 1998) (noting examples of "commonplace and traditional" arrangements under which clients ask their lawyers "to provide discrete legal services, rather than handle all aspects of the total project").