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Collaborative Law Ethics Redux

DAVID L. WALTHER

In February 2007 the Colorado Bar Association ethics committee issued an opinion that found the practice of collaborative divorce to be per se unethical. That opinion understandably distressed those lawyers who had found collaborative divorce to be a method that can reduce rancor in divorces. The Colorado committee is the only body that has opined collaborative divorce to be unethical. The Colorado opinion based its interpretation on a reading of Colorado's Rule 1.7 (b) and (c). These rules were taken from the 1983 version of the American Bar Association Rules of Professional Responsibility.

The Colorado committee found the defect in the collaborative process arose out of the disqualification provision, which is the hallmark of collaborative practice. That provision requires the agreement by the lawyers to withdraw from the representation if the collaborative process breaks down, and the parties resort to litigation.

The Colorado committee reasoned that rule 1.7 (b) provides that a lawyer shall not represent a client, if the representation of that client may be materially limited by the lawyer's responsibilities to a third person, unless the lawyer reasonably believes the representation will not be adversely affected, and the client consents after consultation. The committee found that the collaborative disqualification agreement gives the lawyer an obligation to a third person, that is, the other party to that divorce, to withdraw from representing the lawyer's client, and that this obligation to a third party materially limits the lawyer's responsibilities to the lawyer's own client.

The committee then determined that this conflict cannot be waived by the client because waiver is only permitted if the lawyer reasonably believes the representation will not be adversely affected by the responsibilities to the third party. The committee concluded that the obligation the lawyer has to the opposite party to withdraw interferes with the lawyer's ability to consider the alternative of litigation, if such should be reasonably pursued on behalf of the client.

ABA POSITION

That Colorado opinion has now been countered by Formal Opinion 07-447 of the American Bar Association. That opinion has stated:

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.

That opinion was based on the Model Rules of Professional Conduct as developed by the American Bar Association Ethics 2000 Commission. The opinion carefully notes, "The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling." Thus, the Colorado opinion is relevant to Colorado lawyers, however, the ABA opinion squarely engages, and contradicts, the issues raised by the Colorado opinion.

The ABA opinion reasoned that collaborative law practice, and the four way disqualification agreement, represents a permissible limited scope representation under Rule 1.2. The opinion also rejected the Colorado argument that collaborative practice sets

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up a non-waivable conflict under Rule 1.7 (a)2.

With respect to rule 1.2, Scope of Representation, the opinion found that with informed consent, the client could limit either objectives, or the means to accomplish those objectives. This reasoning would apply under either the 1983 version of the rules, or as those rules were modified by the Ethics 2000 Commission.

As to Rule 1.7, the opinion found that the Colorado opinion turned on the "faulty premise" that a non-waivable conflict is created by the four way agreement, which agreement requires the collaborative lawyers to withdraw if the collaboration fails. Although the American Bar opinion acknowledged that this disqualification provision created a "responsibility to a third party" under Rule 1.7, the opinion reasoned that such "responsibility" does not create a non-waivable conflict of interest, because the collaborative process is a limited scope representation, consistent with the client's limited goals for the representation. There is no foreclosing of alternatives, such as litigation by the client, limiting the scope of the collaborative lawyers' representation. This reasoning is also applicable under either the 1983 version of the rules, or as those rules were modified by the Ethics 2000 Commission.

AN ALTERNATIVE INTERPRETATION

The Colorado opinion to such extent must control the conduct of Colorado lawyers, the Colorado opinion is not superseded by the American Bar opinion. However, the 1983 version of the rules could have been interpreted by the Colorado committee differently. The Colorado opinion did not fully consider other of its own 1983 version of the rules that appear more applicable. Lawyers practicing collaborative law are convinced that the best interests of their clients are served by obtaining the disqualification agreement of the opposite party and counsel. And certainly collaborative lawyers believe they better serve their clients by resolving their disputes in a non-adversarial collaborative process.

The collaborative process is a limited scope representation.

The 1983 version of the ABA Rules of Professional Responsibility contained Rule 2.2, titled Intermediation. That rule was adopted in Colorado as Colorado Ethics Rule 2.2. That Rule provides that a lawyer may act as intermediary between clients if the lawyer obtains each client's written consent to the common representation, after full disclosure. It requires that the lawyer reasonably believes the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful. It also requires that the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients. That Rule provides that a lawyer shall withdraw if any of the clients so request, or if any of the above conditions are no longer satisfied. Upon withdrawal, the lawyer may not continue to represent any of the clients in the matter that was the subject of the intermediation. This rule sounds particularly applicable to the practice of collaborative divorce. Although that rule had been adopted in Colorado, it was not considered in the Colorado opinion.

The ABA Ethics opinion could have gone even further to affirm the concept of mutual representation. The Ethics 2000 Commission moved the concepts and the language of common representation under Rule 2.2 of the 1983 version to its newly revised Rule 1.7, comments 28 through 33. Comment 28 to the newly recommended Rule 1.7 repeats language in the former Rule 2.2, and gives examples of where conflicts between clients are consentable. One of the examples is where a lawyers seeks "...to establish or adjust a relationship between clients on an amicable and mutually advantageous basis." Another example of where a conflict is consentable is where, "The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests..." and thereby avoid the new clients incurring additional cost, complication, "or even litigation." The comment 29 to the newly revised rule goes on to say that the lawyer should be mindful in engaging in common representation that if the representation fails the result can be additional cost. Common representation also cannot be done where contentious litigation or negotiations between them are imminent or contemplated. Comment 31 cautions that common representation will be inadequate if one client attempts to keep something in confidence between the

lawyer and that client, which is not to be disclosed to the other. This, of course, is that same transparency requirement of collaborative practice. The comments warn that at the outset, as part of the process of obtaining each client's informed consent, each client must be advised of this transparency "...and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." This language could have been drafted with the disqualification provision of collaborative practice in mind.

This language is also found for the most part in the comments to the Colorado 1983 Rule 2.2. The Colorado committee, however, made no mention of this language in rendering its opinion.

In any event, the ethical propriety of collaborative divorce has now been authoritatively established, and collaborative lawyers, outside Colorado, have now been given protection to continue with this non-adversarial practice.