

Ethics Opinions

Lawyer-Client Relationship

ABA Ethics Opinion Sees No Inherent Flaw That Precludes 'Collaborative Law Practice'

Collaborative law practice does not violate the Model Rules of Professional Conduct, provided that a lawyer engaging in such practice first obtains informed consent from the client, the ABA ethics committee concluded in an opinion dated Aug. 9 (American Bar Ass'n Standing Comm. on Ethics and Professional Responsibility, Formal Op. 07-447, 8/9/07).

According to the committee, collaborative law practice constitutes a permissible type of limited representation. A lawyer's agreement to withdraw from representing the client if settlement cannot be reached merely reflects that the representation is limited to collaborative negotiation of a settlement, and it does not present a conflict of interest, the committee decided.

"We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2)," the opinion states.

Four-Way Agreement. The opinion explains that collaborative law is a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement.

All models of collaborative practice, the committee said, share the same core elements that are set out in a contract, often called a "four-way" agreement, among the clients and the lawyers. In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, engaging in open communication and information-sharing, and creating shared solutions that meet the needs of both parties.

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 litigation arising from the dispute.

Limited Representation. The committee found that, with a single exception, ethics opinions on the subject have concluded that collaborative law practice is not inherently inconsistent with professional conduct rules.

In a footnote, the committee cited opinions from Kentucky, New Jersey, North Carolina, and Pennsylvania. Most authorities treat collaborative law practice as a species of limited-scope representation, the committee said.

The opinion endorses that approach. "[C]ollaborative 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," the opinion states.

Rule 1.2 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 suggests that limiting a representation to a collaborative effort to reach a settlement is per se unreasonable, the committee said.

No Inherent Conflict. The committee rejected the view expressed in Colorado Ethics Op. 115 (2007), that collaborative practice entails a nonwaivable conflict of interest under Model Rule 1.7.

Although the committee found that a lawyer's agreement to withdraw if settlement cannot be reached creates a "responsibility to a third party" under Rule 1.7, it concluded that this responsibility simply does not present a conflict of interest.

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ABA FORMAL ETHICS OP. 07-447

A lawyer's responsibility to a third party constitutes a conflict of interest if there is a significant risk that the responsibility will materially limit the lawyer's representation of the client, the committee said. In collaborative practice, however, the agreement to withdraw does not impair the lawyer's ability to represent her client, "but rather is consistent with the client's limited goals for the representation," the committee said.

Because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement, the representation is not impaired by the lawyer's promise to withdraw if a settlement cannot be reached, the committee reasoned.

Informed Client Consent. With regard to informed consent, the committee explained that the lawyer must provide adequate information to the client about several matters:

- the rules or contractual terms governing the collaborative process;
- the advantages and disadvantages of the process; and
- alternatives to the collaborative process.

Moreover, the lawyer must ensure that the client understands that if the collaborative law process does not culminate in settlement, the lawyer must withdraw and the client will have to retain other counsel.

The committee emphasized that a lawyer who engages in collaborative dispute resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.