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Alaska Alaska Ethics Opinion

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ALASKA BAR ASSOCIATION

ETHICS OPINION 2011-3

ETHICAL CONSIDERATIONS IN COLLABORATIVE LAW PRACTICE

Question Presented

Does a collaborative law "four-way disqualification agreement " providing for the mandatory disqualification of counsel in subsequent potential litigation violate the Alaska Rules of Profession Conduct?

Conclusion

No. ARPC 1.2(c) permits a lawyer to limit the scope of his representation with the consent of the client. So long as the collaborative law practitioner has previously obtained the separate written agreement of the client after full disclosure of the risks of, and alternatives to the limited representation, the disqualification agreement is permissible.

Discussion

Collaborative law is a form of alternative dispute resolution in which lawyers serve as both advocates and counselors during structured, pre-litigation negotiations. Often used in family law, collaborative law is becoming increasingly common.^(fn1) Neither the Alaska Rules of Professional Conduct nor the previous opinions of this Committee have expressly addressed ethics issues in the context of collaborative law.

In collaborative law, the parties, as well as the parties' lawyers, may execute written agreements, generally referred to as "four-way agreements," which provide that, if negotiations are unsuccessful, the lawyers will not further represent the parties in litigation.^(fn2) Commentators have characterized this disqualification element of the four-way agreement as the "irreducible minimum condition"^(fn3) or the "fundamental defining characteristic"^(fn4) of collaborative law. The goal of the four-way agreement is to encourage open communication, voluntary sharing of information, and a commitment to negotiate rather than litigate, but some people have questioned the ethics of the provision requiring the lawyers to disqualify themselves if negotiations fail.

Multiple state bar associations have considered, and approved, collaborative law arrangements, including the four-way agreement's disqualification provision.^(fn5) Of these, in 2007, the American Bar Association issued Formal Opinion 07-447 concluding that any potential conflict of interest arising out of a collaborative law agreement under Model Rule of Professional Conduct 1.7 was addressed by Model Rule of Professional Conduct 1.2(c) permitting a lawyer, with the client's informed consent, to reasonably limit the scope of representation. The ABA Opinion stated: 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. We disagree, because we view participation in the collaborative process as a limited scope representation.

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 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 negotiations of a settlement.(fn6)

Colorado appears to be the only jurisdiction to reach a conclusion different from the ABA Opinion.(fn7)

Having considered both of the foregoing points of view on this question, this Committee agrees with the ABA Formal Opinion 07-447 that the disqualification provision of a collaborative law four-way agreement does not per se violate Alaska's Rules of Professional Conduct. This is consistent with the previous recognition that a lawyer may limit the scope of representation, provided the client is fully advised and agrees.(fn8) Once the lawyer has fully advised the client of the limits of representation, and the client has agreed, the lawyer's being bound contractually to third parties to honor the agreed-on limits is ethically permissible.

The Committee is cognizant, however, that the limitation on representation contained in the four-way agreement has potential future consequences. Not only do lawyer and client agree to a particular limitation on representation, this agreement may be irrevocable. For example, the four-way agreement might provide that, even if both clients and one lawyer agreed to a continued representation, the opposing lawyer, standing alone, has the right to block the representation. Because of possibilities like this, we believe it is critical that clients consenting to this limited representation be fully informed of the consequences.

The ABA Opinion described the disclosure and consent process as follows:

[O]btaining 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. 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.(fn9)

This process should take place in a meeting between the client and lawyer with the limitation of

representation memorialized in a separate written agreement before the four-way agreement, itself, is executed.(fn10) As one commentator noted:

If that conversation occurs in a four-way meeting with the lawyer and client from the other side, it is unlikely that a client will have the freedom to discuss the issue fully. That discussion would not be confidential (because of the presence of the other side), nor would the client likely feel able to raise concerns about the process with her lawyer. If the client is concerned that her divorcing husband will not fully disclose information, for example, she may not express that reservation as freely with the husband sitting across from her.

[T]hus...it [is] a very bad idea for lawyers to rely on their four-way documents and discussions to effect their collaborative law limited retention agreements. Doing so creates unnecessary ethical risk for little gain.(fn11)

In conclusion, although a collaborative law disqualification agreement does not, per se, violate Alaska's Rules of Professional Conduct, the agreement should only be entered after separate discussions between the lawyer and client regarding the limited representation reduced to a separate written agreement.(fn12)

In memory of our colleague Keith Allen Sanders.

Approved by the Alaska Bar Association Ethics Committee on April 7, 2011.

Adopted by the Board of Governors on May 3, 2011.

Footnotes:

1. John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007); Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84.N.C.L. REV. 979 (2006); Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Gay G. Cox andamp; Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004); Sherri Goren Slovin, *The Basics of Collaborative Family Law: A Divorce Paradigm Shift*, 18 AM. J. FAM. L. 74 (2004); see also, Michelle Conlin, *Good Divorce, Good Business: Why More Husband-and-Wife Teams Keep Working Together After They Split*, BUS. WK., Oct. 31, 2005, at 90;Katti Gray, *Collaborative Divorce: There's a Kinder, Simplerandmdash;And Less Expensiveandmdash;Way to Untie the Knot*, NEWSDAY (Long Island), Aug. 15, 2005, at B10; Carla Fried, *Getting a Divorce? Why it Pays to Play Nice: Collaborative Divorce Offers Splitting Spouses a Kinder, Less Expensive Way to Say "I Don't,"* MONEY, July 2005, at 48.
2. Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J.DISP. RESOL. 131, 132-33 (2008)
3. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L.J. 1315, 1324 (2003).
4. Uniform Collaborative Law Act, Nat'l Conf. of Commissioners on Unfair State Laws, at p. 54 (2009).

5. See e.g., Ky. Bar Ass'n Ethics Comm., Op. E-425, 3 (2005); N.J. S.C. Advisory Comm. on Prof'l Ethics, Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055 (2005); N.C. St. Bar, Formal Op. 1 (2002); Pa. Bar Ass'n Comm. Leg. Ethics and Prof'l Resp., Informal Op. 2004-24 (2004)
6. *Id.* at 4.
7. According to the Colorado Bar Association Opinion, no lawyer could reasonably believe that representation of a client would not be adversely affected by an agreement exposing the lawyer to a direct lawsuit by the opposing party (or even the opposing party's lawyer) if the agreement was breached.
8. Alaska Bar Ass'n Ethics Op. 93-1 (1991) (permitting lawyer to limit the scope of his or her representation of pro se clients to the preparation of legal pleadings to be filed by the client).
9. ABA Formal Op. 07-447, *supra* n.7, at p. 3.
10. The requirement of a separate writing is consistent with ARPC 1.5 which requires a writing for all fee agreements, and ARPC 1.2(c)(1) which requires a writing for limitations on the scope of representation "[i]f a written fee agreement is required by Rule 1.5."
11. Peppet, *supra* n.2, at p. 158.
12. Collaborative law arrangements can raise other ethical issues for the participants not addressed in this opinion, including confidentiality concerns and concerns involving procedures for termination and withdrawal. See e.g. Colorado Bar Ass'n Eth. Comm., Formal Op. 115 at 2-3.