Connecticut Bar Association

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Informal Opinion 09 - 01

Collaborative Divorce

You have sought membership in a "Collaborative Divorce Process" group. You state that this procedure is presented to potential clients as an alternative to the "adversarial divorce process" and that the lawyers and the parties commit in writing "to work together to reach a divorce settlement out of Court...." You state further that "[a]s a mandatory part of the Collaborative Divorce Process the parties and their attorneys pledge in writing not to go to Court. If the Collaborative Process fails then each party must select another 'non-collaborative' attorney to represent them in Court."

It is on this last point that you have sought our opinion. You ask about the ethical implications of the Disqualification Agreement, which the two parties and their attorneys sign. Specifically, you ask whether the Disqualification Agreement conflicts with Rule 1.7(a)(2) of the Rules of Professional Conduct because it requires the attorney to withdraw from the case if the Collaborative Process is unsuccessful. You state that "the adverse party acquires an absolute right to disqualify his or her spouse's attorney (even in the exercise of bad faith), which can be accomplished merely by withdrawal from the Collaborative Process."

Although this Committee has previously opined on the subject of a proposed divorce mediation model, see Formal Opinion 35, this is our first request to consider the collaborative divorce model. We are aware of several conflicting opinions issued by other bar ethics committees, particularly one from the Colorado Bar Association's Ethics Committee and one issued by the American Bar Association Standing Committee on Ethics and Professional Responsibility. In addition, three states (California, North Carolina, and Texas), as of September 2008, have statutes regulating collaborative practice, and on August 20, 2008, an Advisory Committee of the Supreme Court of Missouri issued Formal Opinion 124, finding the practice of collaborative law ethical in that state.

On February 24, 2007, the Colorado Bar Association's Ethics Committee adopted Formal Opinion 115, which held that the Collaborative Divorce process violates Rule 1.7(b)[1] of the Colorado Rules of Professional Conduct "insofar as a lawyer participating

[1] Rule 1.7(b) of the Colorado Rules of Professional Conduct provides in part:

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. The Committee further concludes that pursuant to Colo. RPC 1.7(c)[2], the client's consent to waive this conflict cannot be validly obtained." Formal Opinion 115, at 1.

The Colorado Bar Association concluded that "the conflict materializes whenever the process is unsuccessful because...the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligation the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way."[3]

More recently, the American Bar Association Standing Committee on Ethics and Professional Responsibility opined to the contrary in Formal Opinion 07-447 (August 9, 2007) (reviewing the Collaborative Divorce process' "four-way agreement...[that] 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"). In focusing on Model Rule 1.2, the ABA opinion concludes that "the four-way agreement represent[s] a permissible limited scope representation". According to the ABA opinion, Model 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.

> 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. 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

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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:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation.

[2] Rule 1.7(c) of the Colorado Rules of Professional Conduct provides in part that the client's consent to a conflict "cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation."

[3] The Colorado Bar Association's Ethics Committee noted that several other state bar ethics committees concluded to the contrary that a lawyer is ethically permitted to enter into the Collaborative Divorce process' disqualification agreement. These include New Jersey Advisory Comm. on Prof'l Ethics Op. 699 (Dec. 12, 25); Kentucky Bar Ass'n Ethics Op. KBA E-425 (June 2005); Hodor and Roth, The Florida Bar Handbook Supplement (2006), Ch. 24, "Collaborative Law". However, none of these focused on Model Rule of Professional Conduct 1.7(b) or any similar state rule. Colorado Bar Association Formal Op. 115, n 2.

Turning its attention to Colorado Bar Association's Ethics Committee Formal Opinion 115, the ABA opinion does not dispute that the "four-way agreement" "creates on the part of each lawyer a 'responsibility to a third party' within the meaning of Rule 1.7(a)(2), [but it] disagree[s] with the view that such a responsibility creates a conflict of interest under that Rule." ABA Formal Op. 07-447 at 3. The opinion states:

> A conflict exists between a lawyer and [the lawyer's] 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 a lawyer.' A self-interest conflict can be resolved if the client gives informed consent, confirmed in writing, but a lawyer may not seek the client's informed consent unless the lawyer reasonably 'believes that [the lawyer] will be able to provide competent and diligent representation' to the client.

ABA Formal Op. 07-447 at 3 (footnotes omitted).

The ABA Standing Committee on Ethics and Professional Responsibility further disagrees with the premise of the Colorado Bar's opinion that that the lawyer's agreement to withdraw impairs the lawyer's ability to represent the client. According to the ABA Standing Committee, participation in the collaborative process is viewed as a limited scope representation. *Id*, at 4. Therefore so long as the "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 [the lawyer's] ability to represent the client, but rather is consistent with the client's limited goals for the representation." *Id.*

With these opinions as our background, we now look to Connecticut's Rules of Professional Conduct. Rule 1.7 of Connecticut's Rules of Professional Conduct states as follows:

(a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. **A concurrent conflict of interest exists if:**

(1) the representation of one client will be directly adverse to another client; or

(2) **there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to** another client, a former client or a third person or by a personal interest of the lawyer.

(b) **Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:**

(1) **the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;**

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and

(4) **each affected client gives informed consent, confirmed in writing.**

Rule 1.7 (emphasis added).

The relevant Commentary to Rule 1.7 states, in part:

> [U]nder subsection (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation....
>
> **Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved....**
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> **The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.** Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Emphasis added.

We stated in Formal Opinion 33 that "lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests, citing *Monroe v. Monroe*, 177 Conn. 173, 183 (1979)." This responsibility, therefore, requires particularly strict attention to ethical considerations in marital matters.

In Formal Opinion 35 we opined on a "'divorce mediation' model, [which] involves an interdisciplinary team approach to divorce mediation with the team consisting of a mental health professional and an attorney, plus an accountant in appropriate cases." We agreed there that

> It was inconceivable to us that the Code [of Professional Responsibility] would deny the public the availability of non-adversary legal assistance in the resolution of divorce disputes. ... The adversary approach to divorce in the United States has contributed to so much acrimony in divorce proceedings and such extensive post-divorce misunderstanding and contention that other approaches should be encouraged in appropriate cases if there is reasonable likelihood they can more satisfactorily accomplish the task of marital dissolution.

We further stated in Formal Opinion 35 that full disclosure at the outset of the mediation was crucial:

> Precautions that should be stressed as conditions precedent to attorneys acting as divorce mediators are full disclosure to both parties at the inception of the process concerning the nature and risks of mediation, including that in any subsequent litigation communications by or to the attorney during mediation may not be protected by the attorney-client privilege; that either party may at any time seek independent legal advice; and that the mediating attorney may not represent either party in a suit for divorce between the parties or in any subsequent legal proceeding related to the divorce. Implicit in this disqualification is that all attorneys in the mediating attorney's firm are likewise disqualified.

See also, Informal Opinion 97-12.

Rule 1.2(a) of Connecticut's Rules of Professional Conduct states in relevant part that "a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Rule 1.2(c) states that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." As the Commentary to Rule 1.2 states, in part:

> Agreements Limiting Scope of Representation. The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. ... 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. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Nothing in Rule 1.2 shall be construed

to authorize limited appearances before any tribunal unless otherwise authorized by law or rule.

Although this Rule affords the lawyer and client substantial latitude to limit the scope of representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Rule 1.4 (b) states, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

It is our opinion that the more persuasive of the two opinions discussed above is ABA Formal Op. 07-447. Except in certain situations to be discussed further below, the four-way agreement that you describe represents a permissible limited-scope representation, in accordance with Rule 1.2(c) of Connecticut's Rules of Professional Conduct. What is paramount, however, is that the lawyer at the outset of representing the client must satisfy Rule 1.4 (b) and fully disclose the ramifications of participating in the Collaborative Divorce model that you describe. This includes the potential breakdown of the "Collaborative Divorce" process, both due to good faith disputes, as well as bad faith disputes from the other spouse. The client must understand that in the event of a breakdown in the process, the client's "Collaborative Divorce" attorney will not be permitted to represent the client in the divorce proceedings in court, and this will result in additional attorney's fees being incurred. The lawyer must explain the risks and alternatives of the "Collaborative Divorce" process and the client must then give informed consent, confirmed in writing, in accordance with Rule 1.7(b)(4). If during the initial consultation with the client regarding the issue of divorce, the attorney determines that the client has been the victim of spousal abuse, whether physical or psychological, or if it appears to the attorney that the parties to the divorce are not on equal footing financially so that the attorney's client is under the financial control of the other spouse, then the attorney must consider whether a "Collaborative Divorce" would be appropriate under the circumstances and also whether the client has the capacity to give an informed consent.

Having determined that the "Collaborative Divorce" model that you describe in your request is permissible under the Rules of Professional Conduct, as described above, we do not offer our opinion as to whether the specific language set forth in the Collaborative Divorce Agreement that you forwarded is sufficient to substantiate that the client gave "informed consent".

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R Chambers

Wick R. Chambers, Chair