EYE ON ETHICS by David D. Dodge

Legal Ethics and Collaborative Law Practice

Collaborative law describes a process in which parties and their lawyers contractually commit to work cooperatively to reach a settlement of the dispute at hand. The intent is to create a problem-solving atmosphere instead of the typical contentious tone found in most situations where lawyers are hired to get involved in their clients' disagreements. Somewhat similar to the mediation process, but with some very real differences, collaborative participants and their lawyers identify and focus on the interests of both parties and make sure everyone involved gets sufficient information so the clients can make an informed decision concerning the options presented. A written resolution of all the issues is then drafted and submitted to the tribunal as a final decree or judgment.

Although collaborative law practice has been used mainly in the family law area, it also has been applied in employment, probate, construction and real property disputes. It is also considered beneficial where the parties plan to have a continuing relationship after the current conflict is resolved.[1]

Ethical concerns for lawyers arise in several aspects of the collaborative process, but mainly in the very mechanics by which the process is formalized initially. The collaborative contract, often referred to as a "four-way" agreement, requires the parties and their lawyers to agree to negotiate a settlement without court intervention, engage in honest and open information sharing, and create solutions that satisfy the needs of all the clients. The four-way agreement (and here's the kicker) requires the lawyers to withdraw from the representation if the collaborative process breaks down and to not participate in any subsequent court proceedings.

This is ostensibly intended to ensure the commitment of the lawyers to the collaborative process. But it has caused some ethical concerns.

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org /Ethics

ER 1.7 (Conflicts of Interest: Current Clients)[2] provides, at subsection (a)(2), that a lawyer shall not represent a client if there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to "a third person." The four-way agreement arguably commits the lawyers involved to take actions (withdraw from and terminate the representation) that commit themselves contractually to the other (third) parties and thereby impair their ability to effectively represent their clients. One ethics opinion has so concluded,[3] stating that the practice of collaborative law violates Colorado's version of ER 1.7 insofar as a lawyer participating in the process enters into a contractual obligation to opposing counsel requiring the lawyer to withdraw in the event that the process is unsuccessful. The weight of authority, however, is that the collaborative process is basically a limited-scope representation[4] and is ethically permissible as long as the rules concerning limited-scope representations are followed.[5]

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ER 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), in subsection (c), provides that a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. "Informed consent" is a defined term[6] and requires that the client be given adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action. Comment [6] to ER 1.2 provides that a limited representation may be appropriate where the client has limited objectives for the representation and/or where the client agrees that the representation can exclude specific means that otherwise might be used to accomplish the client's objectives.

A collaborative proceeding where the client simply wants to explore whether a settlement can be reached and specifically wants to avoid having to go to court falls within the Comments' description. And the agreement of the lawyers involved to withdraw if the collaboration fails would not be considered an agreement that impairs their ability to represent the clients but would instead be considered to be consistent with the clients' limited goals for the representation.

The authorities that view collaborative proceedings as limited-scope representations place a great deal of emphasis on the importance of the informed consent given by the client and the information about the process conveyed by the lawyer. Thus, the ethical rules concerning competence (ER 1.1), diligence (ER1.3), and communication (ER 1.4) are of critical importance not only in helping the client determine if the collaborative process is appropriate for the client's objectives, but in assisting the client through to the conclusion of the representation.

endnotes

1. See a very good description of the process, how it works, where it works and it benefits at the International Academy of Collaborative Professionals website, collaborativepractice.com/public/about/about-collaborative-practice/civil-commercial-application-of-collaborative-practice.aspx
2. Rule 42, Ariz.R.S.Ct.
3. Colorado Ethics Op. 115 (February 24, 2007).
4. We looked at this topic in *Limited Representation and Your Engagement Letter*, Ariz. Att'y (Nov. 2007) at 8; *Limited Representation Revisited*, Ariz. Att'y (June 2006) at 8; and *Uncovering Opportunities by Unbundling Services*, Ariz. Att'y (Feb. 2003) at 10.
5. ABA Formal Op. 07-447, Ethical Considerations in Collaborative Law Practice (Aug. 9, 2007); *in accord*, Alaska Ethics Op. 2011-3 (May 3, 2011); Calif. (Orange County) Ethics Op. 2011-01 (undated); Conn. Informal Op. 09-01 (Jan. 21, 2009); Ky. Ethics Op. E-425 (June 2005); Me. Ethics Op. 208 (March 6, 2014); Md. Ethics Op. 2004-23 (undated); Mo. Formal Op. 124 (Aug. 20, 2008); N.J. Ethics Op. 699 (Dec. 12, 2005); N.D. Ethics Op. 12-01 (July 31, 2012); Ohio Formal Op. 2012-02 (June 20, 2012); S.C. Ethics Op. 10-01 (March 31, 2010) and Wash. Informal Op. 2170 (2007).
6. ER 1.0(e).