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Colorado Ethics Opinion 115: Next Steps for Colorado's Collaborative Lawyers

by Scott R. Peppet

This article considers the ramifications of the Colorado Bar Association Ethics Committee's recent opinion on the practice of Collaborative Law. It analyzes the opinion and provides suggestions for Collaborative Law practitioners on how to comply with its mandates.

On February 24, 2007, the Colorado Bar Association (CBA) Ethics Committee released Formal Opinion 115, "Ethical Considerations in the Collaborative and Cooperative Law Contexts."¹ The Committee held that the practice of Collaborative Law violates the state's rules of professional conduct because it creates an inherent conflict of interest. It is an understatement to say that Opinion 115 shocked the Collaborative Law, family law, and alternative dispute resolution (ADR) communities. Within hours, bloggers were commenting on the opinion; national dispute resolution experts were convening teleconferences to discuss its ramifications; and family lawyers across the country were considering whether it was the beginning of the end of Collaborative Law, the innovative practice modality that has driven a dramatic decade of change in family practice.²

This article provides an overview and analysis of Opinion 115. It also provides guidance on how collaborative lawyers in Colorado can work within the opinion's constraints going forward. The analysis in this article is that of the author, who was not a member of the Committee and did not testify before it on this matter. The analysis, suggestions, and explanations herein therefore do not reflect the views of the CBA Ethics Committee or the CBA.

Background of Collaborative Law

Collaborative Law originated in the early 1990s in the family law context. The basic idea is simple: in Collaborative Law, both divorcing parties agree to hire self-identified "collaborative lawyers." The lawyers and parties agree that the attorneys will represent their clients only during negotiations; if the parties fail to settle, the attorneys will be disqualified from taking the case to trial and will withdraw. Each lawyer-client pair signs a limited retention agreement (LRA) that limits the scope of the lawyer-client re-

lationship and requires withdrawal if settlement fails. The parties and their lawyers also typically sign a "four-way" process agreement that details the interest-based, problem-solving nature of the Collaborative Law process and requires full, voluntary disclosure of all information material to the divorce.

The Collaborative Law movement has rapidly grown, and there are now more than 150 local Collaborative Law groups around the country, including at least seven in Colorado. The process provides incentives for lawyers and clients to use an interest-based, problem-solving negotiation approach, rather than the adversarial posturing that typically can occur in divorce cases. The disqualification arrangement motivates attorneys to seek settlement, because they cannot collect additional fees by taking the case to court. Mandatory disqualification also makes it costly—although not impossible—for a client to litigate, because he or she will need to hire a new attorney and get that lawyer up to speed on the information material to the divorce.

Most important, each party knows from the start of the case that the other has similarly tied its own hands by making litigation expensive. Thus, by hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to amicably resolve their differences through settlement.³ It is this signal of a willingness to work toward an amicable resolution that explains the success of the Collaborative Law process. The intention is never to use the disqualification provisions—by agreeing to mandatory attorney withdrawal, the parties credibly commit to settlement so that litigation (and attorney withdrawal) becomes less likely.

The evidence to date suggests that Collaborative Law has fulfilled its purpose. One study found that Collaborative Law negotiations were more problem-solving and interest-based, as well as more constructive in spirit than traditional pre-trial divorce nego-

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tiations.⁴ The same study found no evidence that weaker parties fared worse in Collaborative Law than they would have otherwise, and that lawyers and clients were extremely satisfied with the process.

Despite these benefits, however, Collaborative Law has not expanded significantly beyond the confines of family law practice. Although many Collaborative Law practitioners insist that other types of civil litigators soon will adopt the Collaborative Law approach, this often-predicted sea change has yet to materialize. There are various reasons for this. The mandatory attorney disqualification arrangement may be unpalatable for lawyers and clients outside the family law context because of fee structure (how should a disqualified contingent fee lawyer be paid?); the importance of preserving the lawyer-client relationship over time (what corporate law firm with a long-time client would be willing to disqualify itself and therefore allow another firm to handle its client's litigation?); or the lack of a prior lawyer-client relationship (how willing would a lawyer be to agree to disqualification when the likelihood of settlement failure, and thus mandatory withdrawal, may increase because the lawyer and client have no established prior relationship or trust?).

Birth of Cooperative Law

In response to these issues, practitioners have recently developed a related process termed "Cooperative Law." This approach, like Collaborative Law, also involves a four-way process agreement to share information, problem solve, and work together amicably to achieve settlement. Unlike Collaborative Law, however, Cooperative Law does not involve mandatory disqualification in the event of litigation. The negotiating attorneys are free to proceed to trial, if necessary. Thus, although Cooperative Law is different from traditional pre-trial negotiation practice, because of a formalized dispute resolution protocol or "process agreement" that includes full information disclosure provisions, it is a somewhat scaled-back relative of the Collaborative Law process.

Ethics Opinion 115

Prior to Opinion 115, the ethics committees of five other states—Kentucky, Minnesota, New Jersey, North Carolina, and Pennsylvania—had addressed the propriety of Collaborative Law, and all found it in compliance with the legal ethics codes. Three states—California, North Carolina, and Texas—had passed statutes codifying the practice.⁵ At the same time, some practitioners and Collaborative Law scholars have expressed reservations about whether the practice fully complies with the existing ethics regime.⁶ For this reason, some of Colorado's collaborative lawyers sought guidance from the CBA Ethics Committee.

Opinion 115 probably was not the guidance these lawyers expected. Instead of accepting Collaborative Law as an innovative—if somewhat unusual—type of practice, the CBA Ethics Committee rejected it as a *per se* violation of the conflict of interest rules.

To understand the opinion, it is important first to attempt to understand the way in which the Committee characterized the process. The opinion focuses on the "four-way" agreement that is signed by both divorcing spouses and their respective lawyers. Such four-way contracts typically include provisions setting out the Collaborative Law process (requiring full disclosure of all relevant, material information; explaining the nature of collaborative, interest-

based negotiations; expressing a preference for four-way meetings as opposed to meetings just between the lawyers). In addition, however, the Committee was presented with examples of four-way agreements that also included the mandatory attorney disqualification provision discussed above.

The opinion states:

The touchstone of Collaborative Law is an advance agreement, often referred to as a "Four-Way Agreement" or "Participation Agreement," entered into by the parties and the lawyers in their individual capacities, which requires the lawyers to terminate their representations in the event the process is unsuccessful and the matter must proceed to litigation.⁷

This is the critical sentence of the opinion. Having found that collaborative lawyers contractually obligate themselves to the other side by agreeing in a four-way contract to withdraw in the event that negotiations are unsuccessful, the Committee then found that:

Collaborative Law, by definition, involves an agreement between the lawyer and a "third person" (*i.e.*, the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client.⁸

This necessarily implicates Colorado's conflict of interest rules, in particular Colo. RPC 1.7(b), which states 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 that the representation will not be adversely affected and the client consents after consultation.⁹

The opinion then held that "a client may not consent to this conflict for several reasons." First, it found that there was a "significant" likelihood of the conflict materializing, because there was a possibility that negotiations would fail. Second, it found that the limitation on the lawyer's ability to go to court

inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that "reasonably should be pursued on behalf of the client," or at least considered, is foreclosed to the lawyer.¹⁰

It therefore found a *per se* violation of Rule 1.7.

The Future of Collaborative Law

Although Opinion 115 states that Collaborative Law creates a *per se* violation of Colo. RPC 1.7, the opinion leaves plenty of room for the practice to continue—albeit in a modified form. Because the Committee found that all Collaborative Law practice involved a four-way agreement including the disqualification provision, it did not address other Collaborative Law structures or arrangements. The opinion does contain hints, however, that suggest ways for Colorado's collaborative lawyers to continue their practice.

First, the opinion discusses and approves of the practice of Cooperative Law. The Committee characterized Cooperative Law as "identical to Collaborative Law in all material respects with the exception of the disqualification agreement. . . ." ¹¹ It is important for Collaborative Law practitioners to note that the Committee found that a four-way process agreement

that merely obligates the lawyer to ensure full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation, is not necessarily antithetical to Rule

1.7(b) because those obligations do not materially limit or interfere with the lawyer's ability to represent the client.¹²

In other words, the four-way agreements that are being used by many Collaborative Law attorneys are acceptable, as long as they do not include a disqualification provision.

Second, in note 11, the Committee stated that clients are free to sign a contract with each other—without their lawyers—committing to terminate their respective lawyers in the event that the collaborative process fails.¹³ According to the opinion, this would promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.¹⁴

This suggests a new method for Collaborative Law parties to signal their respective commitments to the disqualification of their lawyers should negotiations terminate. Given these two aspects of Opinion 115, the following suggestions should help practitioners in Colorado to restructure Collaborative Law in a way that complies with the opinion's requirements.

Be Clear About the Collaborative Lawyer's Role

Since the start of Collaborative Law, practitioners have exhibited some confusion over what, exactly, a collaborative lawyer's role is and who, exactly, that lawyer represents. Fervor for collaboration has led some practitioners to sound like collaborators. Collaborative Law scholar John Lande has noted, for example, that some collaborative lawyers seem to view themselves as representing the divorcing spouse 51 percent and representing the family 49 percent.¹⁵ Perhaps most troubling, the interviews of collaborative lawyers conducted by Professor Julie Macfarlane turned up some degree of role confusion among practitioners. Some clearly saw themselves as partisan advocates for their clients who merely had agreed to a problem-solving process. Others, however, expressed sentiments suggesting personal or moral commitments to acting as a "team player"—loyal more to the process itself than to their individual clients. For example, one attorney said "I don't really care about whether the outcome is optimal in terms of dollars and cents, but that [my client] and I live up to our collaborative principles."¹⁶ Although her report emphasizes that few, if any, interviewed lawyers expressed extreme versions of this "team player" sentiment, the interviews led Macfarlane to suggest "[i]t may . . . be that lawyers favouring this [team player] approach see their primary relationship to be with the lawyer on the other side, rather than with their own client."¹⁷

Other state ethics committees have noted the potential for conflict of interest. Minnesota's opinion on Collaborative Law mentioned that:

Great care must be taken to clarify the nature of the relationship between the attorney and the opposing party so that there is no misunderstanding. It must be made very clear that the attorney does not represent the opposing party and cannot provide that person with legal advice.¹⁸

Similarly, Pennsylvania's Informal Opinion 2004-24 stressed that if a collaborative lawyer took on any obligations to the other side, he or she might run afoul of Rule 1.7.¹⁹

In keeping with these opinions, and with Opinion 115, collaborative lawyers must remember that they have the same duties to their clients as any other attorney, and that the Collaborative Law

process in no way diminishes those obligations. A collaborative lawyer must remain partisan and serve as the client's advocate 100 percent, albeit in a modified context or process.²⁰ A collaborative lawyer must recite this partisan loyalty to the client, the client's spouse, and the spouse's lawyer, and must live up to that loyalty by acting as the client's advocate.

The Collaborative Law process is a cooperative, interest-based, problem-solving, creative, respectful process. A collaborative lawyer should strive to act in accord with these ideals or principles. However, the lawyer should not forget that at the most fundamental level, the client is involved in a legal matter, and that the lawyer is that client's legal representative. If the Collaborative Law process is not best serving the client's interests, the lawyer must put aside his or her personal commitment to the collaborative goals and advocate that the client go to trial. Furthermore, a collaborative lawyer must do so with diligence and care. If litigation is warranted, the lawyer must recommend that course of action, help the client find litigation counsel, transfer needed information to that trial counsel, and then withdraw. Throughout, the collaborative lawyer must carefully defend the client's overarching best interests.

Revise Contracts

As discussed above, Collaborative Law practice typically involves two types of agreements—the LRA signed only by each client and his or her respective lawyer, and a separate four-way process agreement signed by both lawyers and both parties. Opinion 115 focused on the formal conflict of interest created by the four-way's inclusion of the disqualification language. To comply with Opinion 115, therefore, Colorado's collaborative lawyers must excise any disqualification language from the four-way agreement. In addition, they should carefully review their four-way contracts to ensure that they do not create any obligations that could be construed as a violation of Rule 1.7. Practitioners should also consider adding language clarifying that the four-way agreement creates no obligations between the lawyers or between a lawyer and the opposing party.

Opinion 115 does not, however, seem to require total abandonment of the mandatory disqualification arrangement. As noted, the Committee expressly suggested (in note 11) that collaborative lawyers could use a client-to-client contract committing to attorney disqualification in the event of no settlement. This would create a third type of Collaborative Law contract, but would apparently avoid any conflict of interest concerns.

In addition, Opinion 115 did not discuss whether the disqualification provision can be placed in a lawyer-client LRA (rather than the four-way agreement). According to the logic of the opinion, however, structuring the agreements in this manner should eliminate the potential Rule 1.7 violation, because the lawyers would not take on withdrawal obligations in a contract signed with the other party or other party's lawyer. This is, in fact, the way that many Collaborative Law practitioners already structure their contracts. It is also the way in which the process seems to have been understood by the five other state committees who have considered Collaborative Law. None of the other state committees appears to have been presented with or focused on four-way agreements that included the disqualification provision. As a result, none had squarely faced the conflict of interest question that the CBA Ethics Committee addressed—and each had found that Collaborative Law practiced in this way did not create a conflict of interest.

Collaborative Law practitioners therefore should consider placing the disqualification language in their lawyer-client LRAs. They should also review their LRAs to ensure that the contracts do not limit the client's ability to terminate the lawyer or the client's right to decide on settlement. The LRA simply should include the disqualification language terminating the lawyer's representation if litigation is needed. It also might be worthwhile to include language clarifying that the lawyer will: (1) be diligent about recommending litigation if the lawyer feels it is in the client's best interest; (2) assist the client in seeking other counsel if withdrawal becomes necessary; and (3) cooperate in transferring information to that new counsel in a timely fashion. These safeguards should help to demonstrate that the lawyer is committed to sending his or her client to litigation if that is in the client's best interests.

Clarify Screening and Client Consent Processes

Beyond revising their Collaborative Law contracts, collaborative practitioners must be careful not to become overly zealous about the process or become blinded by optimism about its transformational powers. Not all cases are right for Collaborative Law. When clients seem excessively adversarial, when their relationship is severely damaged by past or current conflict, or when one or both parties seem unstable or unable to engage in reasoned decision making, a lawyer should not represent that client in the Collaborative Law process.

A lawyer must be confident that Collaborative Law is in the client's best interests. Moreover, the lawyer should be able to docu-

ment that confidence, and should keep records of the initial interviews conducted with the client. These records should include documentation of what was discussed, how extensively the lawyer understood the client's situation and history, what the client was told about Collaborative Law (including copies of any information sheets or explanations provided to the client), and what questions the client asked. The lawyer should provide the client with easy-to-understand written explanations of the pros and cons of the process, and ensure that the client has sufficient time to review those documents. In short, lawyers must be cautious about their screening and client consent procedures and do everything possible to make sure that a given client will be best served by the Collaborative Law process and that he or she understands its advantages and disadvantages.

Consider Cooperative Law

Collaborative lawyers also should consider the practice of Cooperative Law, which is similar to collaborative practice but does not include the mandatory disqualification provision. Cooperative Law offers advantages over traditional pre-litigation negotiation. In particular, by having a clear negotiation protocol that defines the process and includes commitments for information sharing, limiting discovery, and interest-based negotiating, cooperative lawyers set guidelines that make it less likely that an adversarial mindset or negotiation process will take hold. Particularly where the clients have a reasonable working relationship or the lawyers have worked together before, the Collaborative Law disqualification provision

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may be an unnecessary burden. By simply agreeing to cooperate, lawyers and clients may reap most of the benefits of Collaborative Law while avoiding its most difficult ethical issue.

Advocate for Statutory or Rule-Based Reform

Finally, Colorado's Collaborative Law community may wish to consider statutory and rule-based reform efforts. As mentioned, some states have enacted Collaborative Law statutes.²¹ In addition, the national Conference of Commissioners of Uniform State Laws (NCCUSL) has appointed a committee to begin drafting a Uniform Collaborative Law Act. This drafting is not yet underway, but eventually may change the practice significantly by statute. Finally, some Collaborative Law scholars have argued for either a new Collaborative Law rule in the Rules of Professional Conduct²² or a series of amendments to the existing rules—particularly Rule 4.1, which governs negotiations—to explicitly permit the practice.²³ Colorado's collaborative lawyers should get involved in these efforts if they seek more clarity post-Opinion 115.

Conclusion

Although Opinion 115 certainly created tremors in the Collaborative Law community, it is not the end of collaborative lawyering. Collaborative Law practitioners in Colorado must carefully review and clarify their role and should be able to continue with their collaborative representation of divorcing clients.

Notes

1. CBA Formal Ethics Comm. Op. 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts (adopted Feb. 24, 2007), 36 *The Colorado Lawyer* 15 (May 2007), available at <http://www.cobar.org/tcl>.

2. See, e.g., Lande, "Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Association Ethics Opinion 115," available at <http://www.mediate.com>.

3. For an extensive discussion of how Collaborative Law serves as a signaling device, see 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).

4. Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases" (2005), available at <http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1>. See also Macfarlane, "Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project," 1 *J. of Disp. Resol.* 179 (2004).

5. For a list of these opinions and statutes, see <http://www.abanet.org/dch/committee.cfm?com=DR035000>.

6. See Peppet, *supra* note 3 at 489 ("I have my doubts about whether mandatory mutual withdrawal provisions can be squared with Rule 1.2"). See also 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, 1375-78 (2003); Yarn, "The Attorney as Duellist's Friend: Lessons from the Code Duello," 51 *Case W. Res. L.Rev.* 69, 79 (2000).

7. Op. 115, *supra* note 1 at 1.

8. *Id.* at 4.

9. Colo. RPC 1.7(b).

10. Op. 115, *supra* note 1 at 4.

11. *Id.* at 5.

12. *Id.*

13. Op. 115, *supra* note 1 at 5, n.11.

14. *Id.*

15. See Lande, *supra* note 6.

16. Macfarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases," *supra* note 4 at § 1(E)(iii).

17. *Id.*

18. Minnesota Office of Lawyers Professional Responsibility, Advisory Opinion (March 12, 1997).

19. Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association, Informal Opinion 2004-24 (May 11, 2004).

20. Gutterman, "Collaborative Family Law—Part II," 30 *The Colorado Lawyer* 57 (Dec. 2001).

21. See 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).

22. See Fairman, "A Proposed Model Rule for Collaborative Law," 21 *Ohio St. J. on Disp. Resol.* 73 (2005); Fairman, "Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?" 18 *Ohio St. J. on Disp. Resol.* 505, 522 (2003).

23. See Peppet, *supra* note 3 (advocating for amendments rather than a new rule). ■

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