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Citation Information

Scott R. Peppet, *The (New) Ethics of Collaborative Law*, Disp. Resol. Mag., Winter 2008, at 23, available at <http://scholar.law.colorado.edu/articles/456/>.

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Citation: 14 Disp. Resol. Mag. 23 2007-2008

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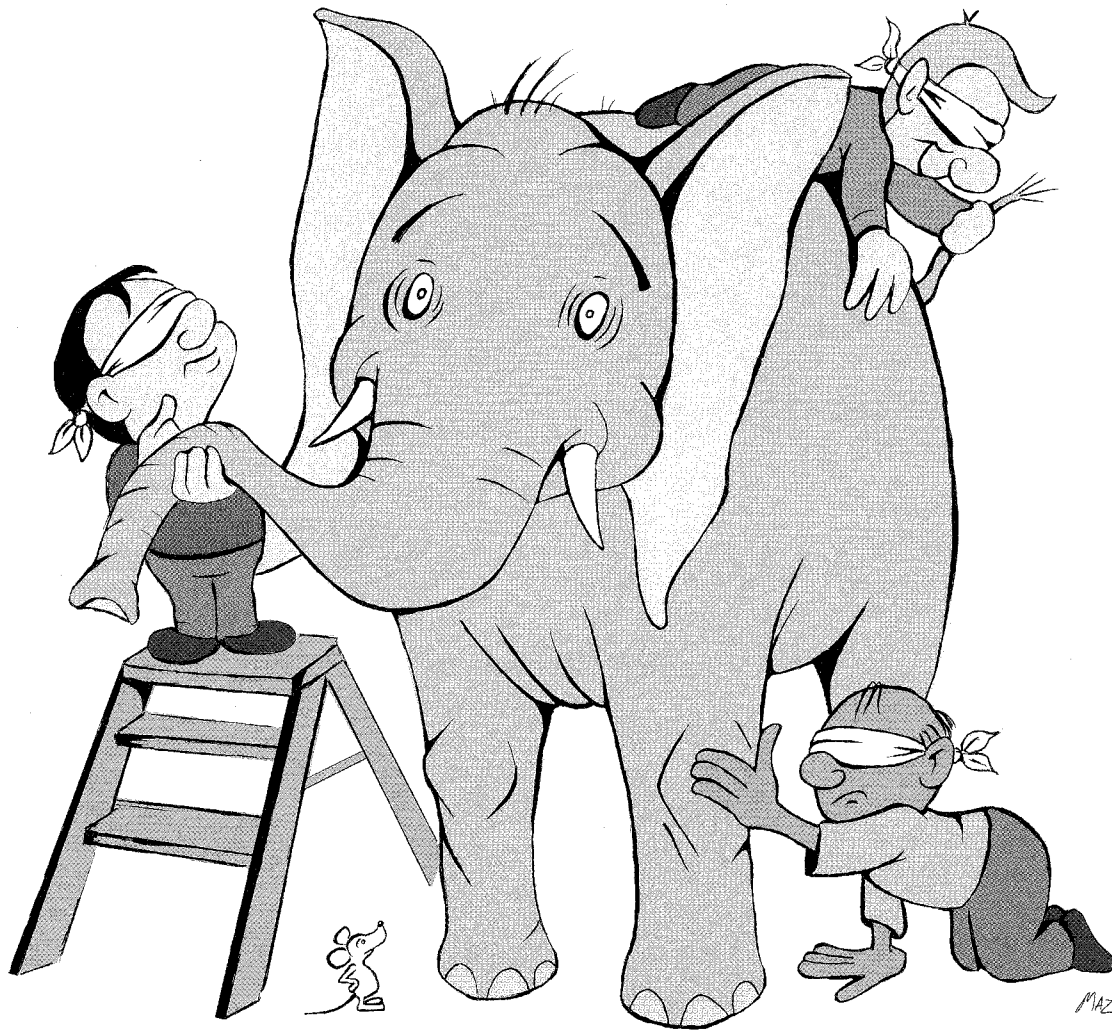


Illustration by Dan Mazanec

The (New) Ethics of Collaborative Law

By Scott R. Peppet

In an ancient parable—sometimes Hindu, sometimes Buddhist, sometimes Sufi—a group of blind men examines an elephant. One touches the trunk and says that an elephant is like a snake. One touches the legs and says that an elephant is like a tree. One touches the tail and says that an elephant is like a rope.

None is wrong, but none is right.

This article argues that we have subjected collaborative law to a similar process, with a similar result.¹ There are radically different understandings of what collaborative law is, and therefore there remain fundamentally opposed beliefs about whether it can comply with the legal ethics rules. In February 2007, for example, the State of Colorado's legal ethics committee issued Opinion 115, which for the first time held that collaborative law creates a per se impermissible and unwaivable conflict of interest for lawyers. Then, in August, the American Bar Association's ethics committee issued Opinion 447, which attempted to rebut Colorado's understanding and argued that collaborative law creates no ethical problems.

In my view, neither of these opinions has it right—but neither has it entirely wrong either. To understand why, we must examine how these opinions *characterize* the collaborative law process—what part of the elephant they were examining. I argue that these committees understood the process quite differently and thus reached very different conclusions about its ethical implications. To help clean up the mess they've left, I provide a *taxonomy of contractual arrangements* that collaborative lawyers use in effecting their practice and show that these different contractual setups have different ethical consequences.

Most fundamentally, my goal is to warn collaborative law practitioners against rejoicing prematurely about the



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ABA's Opinion 447 or assuming that it completely vindicates their practice and frees them from ethical scrutiny. Just the opposite. Careful analysis of both Opinion 115 and Opinion 447 underscores the need for collaborative law practitioners to deepen their understanding of the ethical complications of collaborative law and to make modifications to lessen the ethical risks. The lesson of 2007 should be that in undertaking this ingenious experiment, we need to be cautious, not careless, in order to prevent more tumult and confusion.

Conflicting Opinions: Colorado's Opinion 115 and the ABA's Opinion 447

Prior to 2007, the ethics committees of five states—Kentucky, Minnesota, New Jersey, North Carolina, and Pennsylvania—had addressed the propriety of collaborative law, and all had found it in compliance with their legal ethics codes. Three states—California, North Carolina, and Texas—had passed statutes codifying the practice.² At the same time, some practitioners and collaborative law scholars—myself included—have expressed reservations about whether the practice complies fully with the existing rules of ethics.³

In February, however, the sense of an emerging permissive consensus came to an abrupt end. The Colorado Bar Association's Ethics Committee issued Opinion 115, holding that collaborative law creates a per se conflict of interest under Colorado's Rule 1.7.⁴ The opinion focused on the "four-way agreement" that is often signed at the start of collaborative law between the two lawyers and the two clients:

[t]he 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.⁵

Because of this contract, the committee found, "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."⁶ This necessarily implicates Colorado's conflict of interest rules, in particular Rule 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.⁷ Opinion 115 then 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.⁸

It therefore found a per se violation of Rule 1.7.

The dispute resolution community erupted in dissent, arguing in print, on the Internet, and in conferences that Opinion 115 was fundamentally misguided. Practitioners feared that this was the beginning of a cascade of such decisions.

Just six months after Opinion 115 was released, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued a response—its own Formal Opinion 447, titled "Ethical Considerations in Collaborative Law Practice." Opinion 447

rejected the Colorado committee's conclusions and held that the practice creates no impermissible conflict.

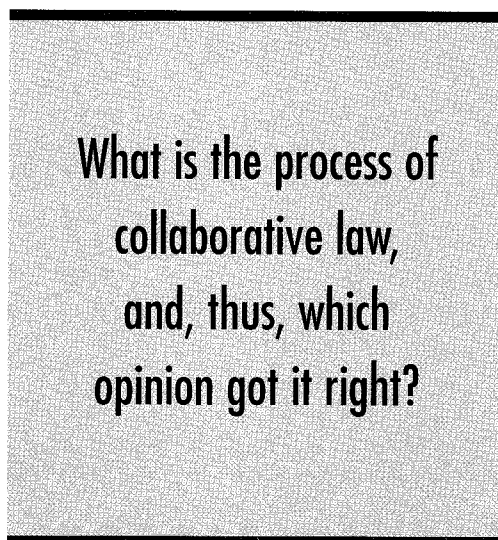
Instead, Opinion 447 argued that although a four-way agreement *does* create obligations to a third person on the part of each lawyer, such obligations create no conflict if they do not "materially limit the lawyer's representation of the client."⁹ It then concluded that a collaborative law four-way agreement disqualifying each lawyer in the event either client proceeds to litigation does not so "materially limit" the lawyers' service because each collaborative lawyer's representation is *already* limited in scope to settlement, and thus the four-

way does not further limit that 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.¹⁰

In other words, "no conflict arises" under Rule 1.7: "there is no foreclosing of alternatives . . . otherwise available to the client *because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement.*"¹¹

This is a very different understanding of the process from that of the Colorado committee. Colorado's Opinion 115 is premised on one understanding of the collaborative law process—that the process is effected by a four-way contract, signed by both lawyers and both clients, that includes disqualification; that the lawyers enter that contract in their "individual capacities" (that they are, in short, in privacy); and that this four-way contract is the



only effecting document. In other words, what the Colorado opinion found suspect was a situation in which the *only* agreement in play was a four-way contract.

The ABA, on the other hand, describes a different elephant. Its analysis turns on the assumption that *in addition* to the four-way agreement, there is a separate limited retention or limited scope agreement in place between each lawyer and his or her client. As understood by the ABA, in other words, collaborative lawyers get informed consent from their clients to limit the scope of their representation to settlement, and *then* sign a four-way document that simply reaffirms that preexisting commitment. It thus found no ethical problem—because it was looking at a very different contractual scenario from that considered by Colorado’s committee.

A Taxonomy of Contractual Arrangements

So, which is it? What is the process of collaborative law, and, thus, which opinion got it right? The answer to this question is surprisingly complicated. Although many scholars and practitioners have long assumed that we understood the elephant accurately, I am now convinced that we have all been recognizing only parts of the whole.

As the collaborative law process has evolved, collaborative lawyers have created a disparate array of contractual arrangements to give it force. To understand the conflict between these competing ethics opinions—and to bring clarity to how collaborative lawyers should practice going forward—I believe we must begin to see these very different arrangements distinctly. Here I lay out three fundamentally different scenarios, some with multiple variations, which are all currently called “collaborative law.”

First, in a *Retention Agreements Only* scenario, the two lawyer-client pairs reach limited retention agreements that include a provision making attorney withdrawal mandatory in the event that *either* party proceeds to court. They do not sign a four-way agreement, however. Thus, if one party litigates, both lawyers can (and should) withdraw. Note, however, that if Lawyer B and Client B decide to go to court together anyway, there is nothing that Lawyer A or Client A can do. They have reached only “behind the table” lawyer-client agreements; there is no enforceable “across the table” contract that the “A” side could use to enforce the collaborative law commitment to withdrawal.

Second, in a *Retention Agreements Plus Four-Way* scenario, the lawyers and clients create limited retention agreements similar to those in a Retention Agreements

Only situation, but they also sign a four-way document. There are, however, several variations in practice of this four-way:

- It may be a *process* four-way, containing only process terms such as commitments to disclosure, honesty, communication norms, etc., or a *disqualification* four-way, containing the mandatory attorney withdrawal language.
- It may be *contractual*, clearly intended as a binding set of contractual obligations giving rise to the possibility of liability or injunction, or *hortative*, intended instead as a statement of non-binding principle or belief, rather than legal obligation.
- If and only if it is contractual in nature, it may represent an intent to bind the *clients only*, where only the clients and not their lawyers are contracting parties, or to include *lawyers in privity*, where the attorneys are in privity either with each other or with the opposing client, or both, and thus contractually bound by the agreement.

These three variables give rise to very different documents, with very different consequences. Many collabora-

tive lawyers, for example, seem to practice in a “Retention Agreements Plus Hortative Disqualification Four-Way” arrangement. They sign limited retention agreements with their respective clients and then a four-way with the other side, but the four-way does not use contractual language. These four-ways are often titled “Principles and Guidelines for the Practice of Collaborative Law” and are phrased as such rather than as contracts.¹² These hortative four-ways do not contain various terms one would expect in a contract—such as choice of law, jurisdiction-

al, damages, or dispute resolution provisions—nor do they *sound* like contracts.

Neither the ABA’s nor Colorado’s analysis applies squarely to this form of collaborative law practice. If the parties sign a *hortative* four-way, then no formal contractual conflict of interest arises—the lawyers have not taken on contractual obligations to the other side. Instead, the process rests entirely on the limited retention agreements. The relevant ethical question is whether those limited retention agreements have complied with Model Rule 1.2’s requirements for scope reduction agreements—whether, in short, there is true informed consent. Conflicts of interest are not the salient issue. Unfortunately, neither Colorado’s Opinion 115 nor the ABA’s Opinion 447 discussed compliance with Rule 1.2 in detail.

Other collaborative lawyers, however, *do* seem to intend their four-way agreements as contractual, and some may even intend for both the lawyers and clients to be in privity to those contracts. The Collaborative Law

Are the attorneys truly contractual parties in privity? This is an intriguing, and vexing, question.

Alliance of New Hampshire's model four-way form, for example, is titled "Agreement to the Principles and Guidelines of Collaborative Law," and it contains more contractual language than the four-ways discussed above.¹³ The Cincinnati Academy of Collaborative Professionals uses a form titled "Collaboration Contract," which states that "[t]he Participants agree to be bound by the terms of this Contract."¹⁴ Although I have not completed my search, I have also found other agreements that seem clearly intended to be contractual rather than hortative.

What difference does it make? First, a contractual four-way gives rise to the ability for Lawyer A or Client A to *force* Lawyer B and Client B to live up to their collaborative commitments. If Lawyer B and Client B decide to revise their understanding and go to court together, the "A" side can sue on the four-way contract. Gaining this feature, however, comes with increased ethical risk—by signing an agreement with the other side, the lawyers create the possibility of a formal conflict of interest *if* the lawyers are in privity.

Are the attorneys truly contractual parties in privity? This is an intriguing, and vexing, question. I have found only one collaborative law four-way agreement that explicitly discusses lawyer privity, and it states that "[t]his Collaboration Contract does not create any legal rights or privity of contract between the non-client Participant and the other attorney."¹⁵ Note, however, that this does not disclaim the possibility of privity between the lawyers—just that there is no privity between a lawyer and the client on the other side. Most four-way agreements appear to be silent on this question.¹⁶

To the extent that the lawyers *are* in privity to a contractual four-way disqualification agreement, that suggests the somewhat bizarre possibility that a lawyer could sue on the contract—even *without his or her client's support*—to disqualify the other lawyer. If Lawyer B and Client B decided to break the four-way agreement and go to court together, and even if Client A found this acceptable, Lawyer A would have an independent contractual right against the "B" side. Although the notion of a lawyer having such power independent of her client is unsettling, it is a real possibility if collaborative lawyers use a contractual, lawyer-privity four-way document—and one that those lawyers should be disclosing to their clients as part of getting their clients' informed consent to the process.

This brings us to a third distinct understanding of collaborative law, which I call a *Four-Way Only* scenario. Here, no separate limited retention agreements exist—

the parties *only* sign a four-way. Again, that four-way may concern only process or also disqualification, may be hortative or contractual, and may be clients-only or include lawyers in privity. These distinctions matter a great deal for the ethical analysis. As already stated, the Colorado committee characterized the collaborative law process as involving *only* a four-way document, and it assumed both that such an agreement was *contractual* and that the lawyers would be parties to it. It found this a per se conflict of interest. At the same time, Colorado's Opinion 115 also stated clearly that a *process*—rather than disqualification—four-way only scenario, otherwise known as "Cooperative Law," complies with the ethics rules. It also stated that a client-only (no lawyers) agreement for disqualification also raises no ethical problem.¹⁷ It thus acknowledged that the issue is attorneys bind-

ing themselves to disqualification four-ways—not the remainder of these contractual structures.

Neither Colorado nor the ABA considered the ethics of a "retention agreements only" structure. Instead, both focused on four-way agreements. Collaborative law certainly can be practiced in this form, however, and with less ethical risk than with a contractual four-way.

What's Next?

This taxonomy of contractual arrangements—all commonly understood as "collaborative law"—reveals the source of our confusion about the ethics of this process. Both the Colorado ethics committee and the American Bar Association looked at one *type* of contractual arrangement and pro-

nounced it acceptable or unacceptable. Each, however, missed the complex reality that exists in practice. Neither opinion therefore provides complete guidance for collaborative lawyers, nor should either be considered the "last word" on the ethics of this dispute resolution process.

One can glean certain things from the two opinions taken together, however, that should help collaborative lawyers going forward.

First, collaborative lawyers need to reconsider which contractual structure they have employed and whether it best suits their goals and their clients' needs. Many collaborative lawyers seem not to have thought about whether their disqualification or withdrawal provision is in a robust lawyer-client limited retention agreement or in a four-way, and why. Few seem to have consciously chosen a hortative or contractual four-way, or dealt explicitly with the issue of lawyer privity. *These differences matter.* Until the collaborative law community addresses these variations head-on and practitioners decide which arrangements they really *need* in

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order to effect their goals, they run the risk of landing in ethical trouble unnecessarily.

Second, I believe that Opinion 115 and Opinion 447 each had it partly right. Colorado's committee was clearly correct in saying that a client-to-client agreement (with separate lawyer-client limited retention agreements) presents fewer ethical risks than a "four-way only" scenario in which the four-way is a disqualification, contractual, lawyer-privivity document. The latter is, in my view, a terrible structure, and one that I would avoid. Why the Colorado committee focused on that structure exclusively, I cannot say, but it doesn't much matter: some collaborative lawyers *are* practicing using a "four-way only" arrangement, and that is unwise.

The ABA's Opinion 447 also provides useful hints of the way forward. The opinion clarifies that the ABA believes even a contractual four-way document is permissible so long as the disqualification language within it parallels identical language already agreed upon by each lawyer and her client in a limited retention contract. In short, a limited retention document can moot the conflict of interest problems presented by the "four-way only" arrangement considered by the Colorado committee.

Unfortunately, the ABA's Opinion 447 is unnecessarily confusing about just what is required for this "solution" to work properly. It does not discuss limited retention agreements in any detail and leaves unanswered such basic questions as (1) whether agreements must be in writing in the collaborative law context; (2) whether a four-way document can *itself* constitute the limited retention agreement, or whether separate documents are needed; and (3) whether a disqualifying limited retention agreement must be in place *prior* to the signing of a contractual four-way in order to ameliorate conflict of interest concerns. I cannot address all of these shortcomings here. It must suffice to say that while I agree with Opinion 447's general argument, I would urge collaborative law practitioners to carefully review their limited retention agreements and to focus on whether they have *documented* informed consent to those important lawyer-client arrangements. If nothing else, the conflict between Opinion 115 and Opinion 447 teaches us that collaborative law is a creature of contract, and that it is ultimately dependent on the validity of these limited retention agreements.

Third, and finally, 2007 teaches us that collaborative law is neither dead nor completely in the ethical clear. The practice is innovative and ingenious, and provides great benefits. It is also complex, and in some instances I believe that its practitioners have "let the car outrun the headlights." As shown, some of the contractual structures in use should be reconsidered and revised to make the practice more consistent, and more clearly compliant, with the legal ethics rules. ♦

Endnotes

1. This article is a shortened version of a more complete analysis in law review form. See Scott R. Peppet, *The (New) Ethics of Collaborative Law*, J. DISP. RESOL. (forthcoming 2008).

2. For a convenient listing of these opinions and statutes, see www.abanet.org/dch/committee.cfm?com=DR035000.

3. See 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, 489 (2005) ("I have my doubts about whether mandatory mutual withdrawal provisions can be squared with Rule 1.2"). See also 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, 1375-78 (2003).

4. I was not on the Colorado committee, nor did I testify before it or have anything to do with its result.

5. Colorado Bar Association Ethics Committee, Ethics Opinion 115, p.1 (Feb. 24, 2007).

6. *Id.* at 4.

7. COLO. RULES OF PROF'L CONDUCT, Rule 1.7(b). This rule is essentially identical to MODEL RULE OF PROFESSIONAL CONDUCT RULE 1.7.

8. Opinion 115, p.4.

9. American Bar Association, Comm on Ethics and Prof'l Resp., Formal Opinion 07-447 (Aug. 9, 2007), at p.4.

10. *Id.*

11. *Id.* at 5 (emphasis added).

12. See, for example, the sample forms in SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 390-393 (2004); PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 137-145 (2001).

13. Collaborative Law Alliance of New Hampshire, Agreement to the Principles and Guidelines of Collaborative Law, available at www.collaborativelawnh.org/agreement.pdf.

14. Cincinnati Academy of Collaborative Professionals, Collaborative Contract, available at www.collaborativelaw.com/4-1_Participation-Agreements.cfm.

15. See *Id.*

16. I continue to search for evidence of collaborative documents that do address this question, and would be grateful to any who have additional examples.

17. See Opinion 115, footnote 11.

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