2008

The (New) Ethics of Collaborative Law

Scott R. Peppet

University of Colorado Law School

Follow this and additional works at: http://scholar.law.colorado.edu/articles

Part of the Dispute Resolution and Arbitration Commons, and the Legal Ethics and Professional Responsibility Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
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. 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

Scott R. Peppet is an associate professor at the University of Colorado Law School. He can be reached at scott.peppet@colorado.edu.
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. 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.

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. 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:

[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.]

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." 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. 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.

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." 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.

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."

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 privity); 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 collaborative 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." These hortative four-ways do not contain various terms one would expect in a contract—such as choice of law, jurisdictional, damages, or dispute resolution provisions—nor do they sound like contracts.

Neither the ABAs 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 these 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 ABAs 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
Here, no separate limited retention agreements exist—laborative law, which I call a clients' informed consent to the process. Should be disclosing to their clients as part of getting their privity four-way document—and one that those lawyers possibility if collaborative lawyers use a contractual, lawyer-power independent of her client is unsettling, it is a real possibility if Lawyer B and Client B decided "B" side. Although the notion of a lawyer having such contractual four-way disqualification agreement, that suggests lawyer-client limited retention agreement or in a four-way, 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. It thus acknowledged that the issue is attorneys binding 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 pronounced 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

Neither Colorado nor the ABA considered the ethics of a "retention agreements only" structure. Instead, both focused on four-way agreements.
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-privity 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