KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-425
Issued: June 2005

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 1.2 and 1.16, which were amended, and to Rule 8.3, which was renumbered to Rule 8.4. Rule 2.2 was deleted and Rule 2.4, entitled "Lawyer serving as third-party neutral" was adopted. Rule 8.3 was renumbered to Rule 8.4. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Subject: Participation in the "Collaborative Law Process"

Question I. May a lawyer participate in a collaborative law process that requires the parties to negotiate in good faith and to voluntarily disclose all relevant information?

Answer: Qualified yes. See discussion below.

Questions II. May a lawyer participate in a collaborative law process that encourages the lawyer to withdraw if the client fails to negotiate in good faith or make the agreed upon disclosures?

Answer: Qualified yes. See discussion below.

Question III. May a lawyer participate in a collaborative law process that prohibits the lawyer for either party from continuing to represent their respective clients in the same or substantially related matter if the parties are unable to reach a settlement?

Answer: Qualified yes. See discussion below.

Question IV. May lawyers join together in a collaborative law organization to enhance their professional development and promote the collaborative law process?

Answer: See discussion below.

Primary References: ABA Annotated Model Rules of Professional Conduct (2003); Sheila M. Gutterman, Collaborative Family Law – Part II, 30 Colaw 57 (2001); S.C.R. 3.130 [Kentucky Rules of Professional Conduct] Terminology, Rules 1.1, 1.2, 1.3, 1.4, 1.6, 1.16, 2.1, 2.2, 5.6 and 8.3.

Opinion

Introduction

This opinion is rendered in response to an inquiry from Collaborative Law of Central Kentucky, Inc., a non-profit organization of lawyers. Collaborative law is a relatively new form of alternative dispute resolution, which encourages parties to cooperate in order to reach an agreement, rather than to engage in acrimonious litigation.[1] The collaborative law process has become increasingly popular and the topic has been widely discussed in family law seminars across the country. There are well over a hundred collaborative law groups in more than 25 states from California to New York[2] and Texas has a statute specifically authorizing parties and their lawyers to use collaborative law procedures in divorce proceedings.[3]

Collaborative law is used primarily in family law cases and the collaborative law agreement presented to the Committee by the requestor was limited to family law situations. Although the collaborative law process may be useful in resolving other types of disputes, this opinion will focus on collaborative law in the family law context.

The goal of the collaborative law process is to reach an agreement through a cooperative process. It is based upon a problem-solving model rather than an adversarial model and tends to focus on the future, rather than the past; on relationships rather than facts; and on rebuilding relationships rather than finding fault.[4] As part of the collaborative law process, the lawyers and the parties are normally expected to sign an agreement setting forth the rules of the negotiations and the expectations of the parties. Each party has separate representation. All agree to open, face-to-face negotiations with both lawyers and clients present (four-way negotiations). The formal discovery process is eliminated, but the parties agree to full and timely disclosure of all material information and to act in good faith. If a lawyer learns that his or her client has acted in bad faith or withheld or misrepresented information, the agreement encourages the lawyer to withdraw. If the dispute cannot be resolved through the collaborative process, it is agreed that the lawyers will withdraw and will not participate in subsequent litigation involving the same or substantially related matter.

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[1] "Collaborative law" was conceived by a group of family lawyers in Minneapolis in 1990.

[2] See the web page of the International Academy of Collaborative professionals at www.collabgroup.com.

[3] V.T.C.A., Family Code sec. 6.603 (2004). "Collaborative law" is defined by the statute as a "procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement." See V.T.C.A. Family Code sec. 6.603(c) (2004) for a description of the mandatory provisions in a collaborative law agreement.

[4] Douglas C. Reynolds and Doris F. Tennant, Collaborative Law—An Emerging Practice, 45-DEC B.B.J. 12 (2001).

DISCUSSION

The requestors presented the Committee with extensive materials about the development of collaborative law across the country, as well as a six-page agreement entitled "Collaborative Family Law Participation Agreement." The questions presented focused on four major issues: 1) the requirement of voluntary disclosure by the client; 2) the lawyer's withdrawal if the client fails to negotiate in good faith or make the required disclosures; 3) the prohibition against the lawyers' continued representation if the parties fail to reach a settlement through the collaborative process; and 4) the communication of information about collaborative law. The Committee has reformulated the questions in an attempt to focus the discussion on the broader issues and to increase awareness of some of the ethical issues that may arise in conjunction with this kind of representation. This opinion is not an approval or disapproval of any particular agreement or organization, or an indication that these are the only ethical questions that may arise in this type of representation.

Before discussing the specific questions posed, three very important observations must be made. The first is that the collaborative law agreement between a lawyer and the client cannot alter the lawyer's ethical obligations under the Rules of Professional Conduct. The second is that the lawyer has a duty to represent his or her client competently and to exercise independent professional judgment and give candid advice. SCR 3.130-1.1 and 2.1. A lawyer cannot advise a client to use the collaborative process without assessing whether it is truly in the client's best interest. Finally, because the relationship between the lawyer and the client is different from what would normally be expected, the lawyer has a heightened obligation to communicate with the client regarding the representation and the special implications of collaborative law process.

The Rules of Professional Conduct provide that the client has the right to make certain decisions regarding the representation and that the lawyer has a responsibility to provide information to the client so that the client's decisionmaking is informed. Specifically, Rule 1.2 provides "[a] lawyer shall abide by a client's decision concerning the objectives of representation … and shall consult with the client as to the means by which they are pursued." SCR 3.130-1.2. In some cases, the objectives of the representation may be limited by the lawyer, but "only if the client consents after consultation." SCR 3-130-1.2. As to the duty to communicate, the rules provides that the "lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." SCR 3.130-1.4. Comment [1] of Rule 1.4 provides that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued…."[5] The "Terminology" section of SCR 3.130 provides that the term "'consult'

[5] SCR 3.130.1.2 Comment [1] emphasizes the joint nature of the attorney-client relationship, and provides "[b]oth the lawyer and client have authority and responsibility in the objectives and means of representation." The client has ultimate authority to determine the purposes to be served by legal representation, with the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives."

or 'consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Read together, these rules require the lawyer to fully explain the collaborative law process so that the client can make an informed decision about the representation.

The duty to communicate is particularly important because the collaborative process is dramatically different from the adversarial process, with which most clients are familiar. The decision as to whether to use the collaborative process is a critical one for the client – it involves both the objectives of the representation and the means by which they are to be accomplished and it affects the relationship between the lawyer and the client.

The kind of information and explanation that is essential to informed decisionmaking includes the differences between the collaborative process and the adversarial process, the advantages and risks of each, reasonably available alternatives and the consequences should the collaborative process fail to produce a settlement agreement. Although the collaborative law agreement may touch on these matters, it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decisionmaking. The agreement may serve as a starting point, but it should be amplified by a fuller explanation and an opportunity for the client to ask questions and discuss the matter. Those conversations must be tailored to the specific needs of the client and the circumstances of the particular representation. The Committee recommends that before having the client sign the collaborative agreement, the lawyer confirm in writing the lawyer's explanation of the collaborative process and the client's consent to its use.

Question I.

Question I asks whether a lawyer may enter into a collaborative law agreement that requires both sides to reveal all material facts and circumstances? One possible objection to the full-disclosure requirement is that it runs contrary to certain understandings of the adversarial process, where neither party is obligated to voluntarily disclose adverse facts. However, the civil discovery rules provide for compelled disclosure of relevant facts and the standing orders in many family courts require the exchange of extensive financial data. There is nothing to prevent parties from voluntarily agreeing to full disclosure, as long as the client fully appreciates the implications of such an agreement.

Some commentators have suggested that the lawyer's participation in the collaborative process may be inconsistent with the duty of zealous representation.[6] This so-called "duty" has its roots in Canon 7 of the former Code of Professional Responsibility,[7] and was most often associated with the tough lawyer involved in litigation (the hired gun). Today's Rules of Professional Conduct, adopted in Kentucky in 1990, no longer impose a duty of zeal, but rather impose duties of competence[8] and diligence.[9]

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[6] *See*, Larry R. Spain, Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law, 56 Baylor L. Rev. 141 (2004).
[7] ABA Model Code of Prof'l Responsibility Canon 7.
[8] SCR 3.130-1.1.

Although many of the current rules focus on the litigation aspects of lawyering, and even mention "zeal" in a comment to Rule 1.3 on diligence,[10] the rules should not be read to preclude non-adversarial representations. Rule 2.1, for example, describes the lawyer as an advisor and states "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. SCR 3.130-2.1. And Rule 2.2 provides that a lawyer may act as an intermediary between two clients in certain transactional settings. SCR 3.130-2.2. In whatever capacity the lawyer serves, one of his or her primary obligations is to help the client define the objectives of the representation and decide upon the appropriate means of achieving them. If one of the client's objectives is to obtain a divorce in the most amicable way possible, then it is incumbent upon the lawyer to help the client find the means to accomplish that goal.

In a recent article on collaborative family law, Sheila M. Gutterman addresses some of the ethical issues alluded to above and stresses that the lawyer engaging in collaborative representation has the same ethical obligations to the client as any other lawyer.

> Attorneys have an ethical obligation to competently and diligently represent the client. Collaborative family law does not change that. The collaborative family law process does necessitate consideration of the financial and emotional needs of both spouses, the children, and the family as a whole in working toward settlement, but the collaborative lawyer is expected to represent his or her client with the same due diligence owed in any proceeding. Due diligence includes considering with the client what is in the client's best interests, which includes the well being of children, family peace, and economic stability. If the collaborative family law process is not in the client's best interests, the attorney is charged to advise the client to choose a different system, tailored to his or her needs.[11] *[Footnotes omitted]*.

Question II.

The second question relates to the fact that the lawyer is encouraged to withdraw from the collaborative process if his or her client fails to comply with the provisions of the agreement by withholding or misrepresenting information or otherwise acting in bad faith.

We begin by looking at Rule 1.16, which outlines the circumstances and procedures for withdrawal. SCR 3.130-1.16. This rule sets forth a number of situations, which either require or permit withdrawal. For example, the rule <u>permits</u> withdrawal if the "client

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[9] SCR 3.130-1.3.

[10] SCR 3.130-1.2 Comment [1] states "[t]he lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

[11] Sheila M. Gutterman, Collaborative Family Law – Part II, 30 Colaw 57 (2001).

insists upon pursuing an objective that the lawyer considers repugnant or imprudent;" or if the "client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning;[12]" or if "other good cause for withdrawal exists." If the client is violating one of the core provisions of the collaborative agreement, which both the lawyer and the client have signed, it would appear that the lawyer has the right to withdraw under one of the above provisions. It must be emphasized, however, that even if the lawyer has the right to withdraw, he or she still must still comply with the protective provisions of Rule 1.16, and with any court imposed requirements relative to withdrawal. Thus,"[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned." SCR 3.130-1.16d. In addition, if the lawyer has appeared in court on behalf of the client, he or she must comply with local rules and obtain the court's permission to withdraw.

Although some collaborative agreements give the lawyer discretion to withdraw when the client fails to comply with the agreement they both signed, it must be emphasized that Rule 1.16 may require withdrawal in certain cases. Specifically, Rule 1.16(a) provides that the lawyer must withdraw if "[t]he representation will result in violation of the Rules of Professional Conduct or other law." Rule 1.2(d) provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer know is criminal or fraudulent." SCR 3.130-1.2. In addition, a comment to Rule 1.6 states that "[i]f the lawyer's services will be used by the client in materially furthering a course of … fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1)." As to the definition of fraud, the terminology section of the Rules of Professional Conduct provides that term "'fraud' or 'fraudulent' denotes conduct having a purpose to deceive.…" Both the lawyer and the client are normally expected to sign the collaborative law agreement and the lawyer's continued representation may, in some cases, rise to the level of assisting the client in a fraud, which would require the lawyer to withdraw. Moreover, the continued representation could engage the lawyer in "conduct involving dishonesty, fraud, deceit or misrepresentation," in violation of Rule 8.3. SCR 3.130-8.3. In either case, the lawyer would be required to withdraw under Rule 1.16. This opinion should not be read to suggest that the collaborative agreement, which provides for discretionary withdrawal, in any way alters the lawyer's mandatory obligation to withdraw under the Rules of Professional Conduct.

A second issue, under some collaborative agreements, is whether a lawyer who withdraws because his or her client is not honoring the agreement may do so "silently" -- without explaining the reason for the withdrawal. As a general rule, silence is required because Rule 1.6 prohibits a lawyer from revealing confidential information. SCR 3.130-1.6. Comment [16] reinforces the general principle by providing "[a]fter withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as

[12] *See also,* SCR 3.1130-1.16 Comment [8] , which provides that "a] lawyer may withdraw if the client fails to abide by the terms of an agreement relating to the representation …."

otherwise provided in Rule 1.6." The Comment goes on to observe that "[n]either this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and upon withdrawal the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like." This "noisy" withdrawal is most often used in cases where the lawyer's services have been used to perpetrate a fraud and there is some kind of continuing reliance upon the lawyer's representation or work product. The Comment permits, but does not require, the lawyer to exercise his or her discretion and withdraw "noisily." The Comment's inclusion under Rule 1.6 implies that the normal procedure is to withdraw "silently." Nevertheless, a silent withdrawal may be problematic in this setting. If the collaborative law agreement, signed by the parties and lawyers, requires full disclosure by all, the withdrawal without explanation may violate the spirit of the agreement, unless the agreement also makes clear that the withdrawal may be "silent" and that there will not be full disclosure on this point. In addition, Rule 4.1 provides that [i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.". The withdrawing lawyer must be careful not to misrepresent the reason for withdrawal.

Question III.

One of the key features of the collaborative law agreement is the disqualification provision. If the parties cannot reach a settlement, then the process ends and both parties must obtain new counsel for that and related matters. In effect, the collaborative lawyers agree that they will not represent the parties in litigation. This "disqualification agreement" implicates several ethical issues.

The requestors asked whether such a provision violates Rule 5.6, which provides:

> A lawyer shall not participate in offering or making:
>
> (a) A partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) An agreement in which a restriction on the lawyer's right to practice is part of a settlement of a controversy between private parties. SCR 3.130-5.6.

Rule 5.6 applies to agreements between lawyers practicing together and settlement agreements between parties to litigation. While the collaborative law agreement may prevent a lawyer from continuing to represent a single client in a court proceeding, it is not the kind of restrictive covenant contemplated by Rule 5.6.

The inquiry does not end with Rule 5.6. Under the collaborative law agreement, the parties agree to a limited representation. Rule 1.2 recognizes limited representations by providing that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." SCR 3.130-1.2(c). The terms of the lawyer's engagement are limited by the collaborative law agreement. The lawyer is retained to counsel and

assist the client in a discrete activity – settlement negotiations. If the collaborative process fails to produce a settlement, then the representation ends. The client must consent to the limited representation, which means he or she must be advised of the limited nature of the relationship and the implications of the arrangement. For example, obtaining new counsel will entail additional time and cost; the client may feel pressured to settle in order to avoid having to obtain new counsel; and the failure to reach a settlement, necessitating new counsel, is not within the exclusive control of the client – the opponent can effectively disqualify both counsel. The client may be willing to assume these and other risks of the collaborative process but, as previously discussed, the lawyer must communicate sufficient information so that the client has an adequate basis upon which to base such a decision.

Question IV.

The final questions relate to the formation of collaborative law groups, solicitation and advertising. The requestors have cited both Rule 6.3 dealing with" legal services organizations," and Rule 7.01 et seq. dealing with "information about legal services" (what we normally refer to as advertising and solicitation). Lawyers are free to join law-related organizations designed to advance their professional development, as long as their activities do not violate the Rules of Professional Conduct. Without knowing what the organization plans to do, it is impossible to assess whether its activities are permissible. However, two points should be made. First, Rule 6.3, which was cited by the requestors, talks about organizations that provide legal services. Although Rule 6.3 does not define "legal services organization," it appears under the heading "Public Service" and it is generally understood that this rule applies to public or charitable organizations serving the poor, such as Legal Aid and the Public Defender.[13] Second, the advertising and solicitation rules are cited, suggesting that the group plans to communicate with the public regarding the organization or its members. The Committee will not speculate as to the type of communications that might be contemplated by the organization or its members, other than to note that Rules 7.01 – 7.50 govern communications regarding a lawyer's services. SCR 3.130-7.01-7.05. Moreover, the Advertising Commission is better suited to evaluate the specific content and method of dissemination.

Conclusion

Collaborative law is an evolving concept and it is impossible at this stage to anticipate all of the ethical issues that might arise in the course of a collaborative representation. Nevertheless, the Committee has attempted to address those issues raised by the requestor, but it cautions lawyers who engage in this type of practice to be on the lookout for other ethical issues. By way of summary, lawyers who engage in the collaborative-type resolution process are reminded that they are still bound by the Rules of Professional Conduct and cannot circumvent those rules through the collaborative agreement. More specifically, the lawyer has a duty of competence and independence, including the duty to

[13] For a discussion of this point, see the ABA Annotated Model Rules of Professional Conduct (2003) at 519.

evaluate whether the collaborative process will serve the client's best interests. In addition, the lawyer has a duty to adequately inform the client about the process, including the advantages, disadvantages and alternatives, and to obtain the client's informed consent to its use. Where it is contemplated that the lawyer will be prohibited from continued representation, either because the client does make disclosures required by the substantive provisions of the collaborative law agreement or because the parties are unable to reach a settlement, the lawyer must fully advise the client of the limitations on continued representation and of the consequences of withdrawal. The lawyer also must be prepared to comply with the applicable rules on mandatory withdrawal and confidentiality. Finally, as in any representation, the lawyer cannot counsel or assist the client in conduct that the lawyer knows is criminal or fraudulent and cannot engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The collaborative lawyer must consider the implications of these rules in those situations where his or her client is acting in bad faith or failing to make the required disclosures under the collaborative agreement. In the final analysis, there may be situations where the collaborative process will serve the interests of the client and will not create ethical dilemmas for the lawyer. However, the lawyer must be ever mindful of the potential ethical challenges and be fully prepared to address them. Any lawyer who engages in the collaborative process must proceed with the utmost caution in order to avoid all potential ethical pitfalls. No doubt, if the collaborative process continues to gain support, other ethical issues will come to light.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.