

The Ethics of the Collaborative Participation Agreement:
A Critique of Colorado's Maverick Ethics Opinion

By the IACP Ethics Task Force¹

During the eighteen years since Minnesota lawyer Stu Webb first developed the idea of Collaborative Law (“CL”) and received encouragement from a justice of the Minnesota Supreme Court to give it a try, ethics committees and legislatures in eight states have weighed in on the subject. Three of those states (California, North Carolina, and Texas) have enacted statutes authorizing the use of CL. Ethics opinions in five states (Kentucky, Minnesota, New Jersey, North Carolina, and Pennsylvania) have also approved the use of CL.²

On February 24, 2007, the Ethics Committee of the Colorado Bar Association (“CBA”) issued an advisory opinion – the first and only such opinion in the U.S. – stating that Colorado attorneys cannot sign a CL participation agreement without violating the Colorado Rules of Professional Conduct.³ In an important footnote, however, the Opinion notes that *clients* could sign such an agreement and could also hire Colorado lawyers who were willing to practice in a manner consistent with the principles of CL.

Footnote 11 states:

[I]t is axiomatic that private parties in Colorado may contract for any lawful purpose. Thus, *parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails*, provided the lawyer is not a party to that contract. Such agreements may promote *the valid purposes of Collaborative Law*, including 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. (Emphasis added.)

This footnote will permit CL practitioners in Colorado to continue their important work. Following the issuance of the opinion, several Colorado judges have opined in meetings and seminars that they would certainly enforce the terms of such a contract between the parties and require their respective lawyers to withdraw if their case went to court.⁴

¹ The IACP Ethics Task Force includes Nancy Cameron, Diane Diel, David Hoffman, Don Royall, Peter Sandmann, and Pauline Tesler

² Copies of the statutes and ethics opinions are available at <http://www.abanet.org/dch/committee.cfm?com=DR035000>.

³ Opinion No. 115 (<http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=CETH>).

⁴ Interview with Ann Gushurst, Esq., Co-chair, Colorado Collaborative Family Law

The potential impact of the Colorado opinion is quite limited because the Opinion applies only in Colorado and relies heavily on a section of the Colorado Rules of Professional Conduct – Rule 1.7(c), describing circumstances in which “a client’s consent cannot be validly obtained” – that is unique to Colorado and is present in neither the ABA Model Rules nor in the disciplinary rules of any other state. Moreover, the Colorado Committee states that its Opinions are “for *advisory purposes only* and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel” (emphasis added). The CBA is a voluntary, private organization, is not mandated by the state, and does not regulate the conduct of lawyers.⁵

The Heart of Collaborative Practice

The key defining element of CP is the written commitment by the parties and their lawyers that neither party will seek a resolution of any disputed issues in court during the collaborative process, and that if either party does so, the CL attorneys for both parties must withdraw from any adversarial proceeding regarding the subject matter of the dispute.

This commitment – sometimes referred to as the Collaborative Commitment – is viewed as essential to the “paradigm shift” that promotes interest-based, problem-solving negotiations rather than negotiations that are position-based. This commitment is memorialized in a written agreement – the Participation Agreement – which the clients and their lawyers execute at the outset of a CP process. The Participation Agreement contains a withdrawal provision, and usually also contains provisions calling for good faith negotiation, the sharing of relevant information, the use of joint experts, client participation in the negotiations, respectful communications, and the confidentiality of the negotiation process.

The Colorado Opinion states that signing such a document results in a conflict of interest for the lawyer, in violation of Rule 1.7(b) of the Colorado Rules of Professional Conduct, 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 another client or to a third person, or by the lawyer’s own interests,” unless the client gives informed consent to such representation. The Colorado Committee concluded that a client could not, *under any circumstances*, give informed consent to having his or her lawyer sign a CL Participation Agreement, because the lawyer would thereby owe a duty to the other party to withdraw from the case if the other party takes the matter to court. That duty, said the opinion, creates a “nonconsentable” conflict of interest for the lawyer.⁶

Professionals.

⁵ Colorado is not among the majority of states that have an “integrated” bar, which is a public organization, integrated with the judiciary. In states like Colorado, membership in the state bar association is optional and one can practice law without joining the bar association.

⁶/ The reasoning in the Opinion is unpersuasive, especially in light of footnote 11. If the Committee’s concern relates to the client’s ability to exercise knowing consent to a disqualification triggered by the other party’s resort to litigation, the Committee’s focus on the

Widespread Acceptance of Collaborative Practice

The Colorado opinion is an aberration among the ethics opinions issued in other states, several legislative enactments approving CP, and local rules in several states authorizing the use of CL Participation Agreements.

CL has been used to resolve thousands of cases throughout the U.S., Canada, and other parts of the world. Workshops on CL have become a staple at conferences of the ABA, which recently formed a CL Committee in the Section of Dispute Resolution. The ABA has also published a leading text on CL (*Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, by Pauline Tesler), and the ABA awarded Pauline Tesler and Stuart Webb its first annual “Lawyer as Problem Solver Award.”

IACP has grown to nearly 3,000 members, and there are more than 200 local and regional CP groups, with several thousand additional members. IACP estimates that more than 10,000 lawyers and other professionals that have received CL training.

Perhaps the most important indication of the establishment of CL as an important feature of the legal landscape in the U.S. is the creation of a Drafting Committee on CL by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which is responsible for drafting such uniform laws as the Uniform Commercial Code and Uniform Arbitration Act. The NCCUSL Committee has begun drafting a model statute authorizing the use of CL.

Limited Scope Representation

As a matter of professional ethics, it is difficult to reconcile the Colorado Opinion with the fundamental principle that clients have the right to control the role of their lawyers (including requiring them to withdraw), the scope of the lawyer’s work, and the resolution of their own disputes. This core principle is embodied in both the ABA Model Rules and the Colorado Rules. Rule 1.2 of the Colorado Rules states that a lawyer “may limit the scope or objectives, or both, of the representation if the client consents after consultation.”

Well-accepted norms of legal practice include numerous examples of such client control. For example, clients in criminal cases are permitted to waive their constitutional right to counsel, even in capital cases. Clients in civil cases can waive their right to trial, their right to a jury, their right to appeal, and their right to have their dispute heard by a judge, simply by agreeing – long before the dispute arises and entirely without the advice of counsel – to have any future dispute decided by an arbitrator.

Lawyers are also permitted to enter into agreements with their clients which have the effect of giving the opposing party or a co-client the power to end the lawyer’s

fact that the Participation Agreement is signed by both lawyers and both clients is a highly technical and mechanical approach to the question. It is entirely consistent with the Colorado Opinion for a client to enter into a binding agreement with the other party regarding disqualification and also for a client to enter into a binding agreement with his/her own lawyer to the effect that the lawyer must resign if either party seeks redress from the court on any issue. How clients’ interests are protected by such a hairsplitting view of ethics is not clear.

involvement in the case. For example, a lawyer who represents a client in a business deal can agree to represent the client in a dispute involving that transaction even though the lawyer might have to withdraw (or be disqualified) if the case goes to trial and s/he becomes a necessary witness; in such an event, the opposing counsel could insist on the lawyer's withdrawal or disqualification. Likewise, two or more clients can also enter into joint representation agreements with a lawyer, even with an explicit provision that compels the lawyer to withdraw from representing one or more of the clients if the clients' interests diverge during negotiations or at trial.

Critique of the Colorado Opinion

The Opinion's analysis begins with the principle, set forth in Rule 1.7, that lawyers may not represent clients where their representation "may be materially limited by the lawyer's responsibilities to . . . a third person." The premise of the Committee's Opinion is that the Participation Agreement creates contractual "responsibilities" to the opposing party – in particular, the obligation to withdraw from representation if the opposing party chooses to litigate. An exception to Rule 1.7 arises where "(a) the lawyer reasonably believes the representation will not be adversely affected, *and* (b) the client consents after consultation" (emphasis added).

One of the major flaws in the Committee's Opinion is the conclusion that, by signing the Participation Agreement, a lawyer has "impaired" his or her loyalty to the client. This conclusion is based on Comment 8 to Rule 1.7, which states that "Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." In our view, the Committee's reliance on this Comment is misplaced.

First of all, experienced CL attorneys take exception to the notion that their representation of a client is in any way "impaired" by the collaborative commitment. On the contrary, they have seen how the intentional focus on problem-solving and interest-based negotiation in the CL process opens up creative opportunities for settlement that the parties and counsel often fail to see or explore when they are distracted by preparations for a court battle.

Second, the Colorado Opinion errs in its overly literal interpretation of the phrase "the lawyer's *other* responsibilities or interests" (emphasis added). In a CL case, the lawyer's responsibility and loyalty lie entirely with his or her client, and the *client* has made the choice that s/he wants the lawyer involved solely for purposes of negotiation. Thus, lawyers in CL cases are carrying out their responsibility *to the client* by signing a Participation Agreement. It is only in the most technical sense that the lawyer's signature on a Participation Agreement could be considered to create a legal "responsibility" to the other party and, since the other party must sign the same agreement, the clients are giving each other reciprocal power. Of course, serving the client's interest in achieving an amicable settlement requires consideration of the other party's interests and needs, and by signing a Participation Agreement, a lawyer acknowledges responsibility for the process. However, the responsibility for caring about the other party's interests and faithfully observing the ground rules of the CL process arises from the lawyer's loyalty to the *client* and the *client's* objectives.

Third, lawyers who sign a CL Participation Agreement are not precluded from

considering or recommending litigation in their discussions with their clients. The only prohibition is in “carrying out” that advice. However, even if conducting litigation is precluded, this is not a *per se* violation of the lawyer’s ethical duties, since transactional lawyers typically draw the same line. The only difference is that they draw that line in an agreement solely with the client (i.e., an engagement letter) and not in a four-way agreement; the result, however, is the same.

‘Consentability’

In the end, the logic of the Committee’s Opinion stands or falls on its contention that a client’s consent to his/her lawyer signing a Participation Agreement is invalid. In our view, the reasons given by the Committee are flawed.

First, the Committee states that, in a CL case, the issue of withdrawal/disqualification is significant and “materializes whenever the process is unsuccessful because, in that instance, the lawyer’s contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client.” The error here is that many CL practitioners have begun limiting their practices to non-court representation –in much the way solicitors do in England. Thus, in the event of an impasse in a CL case, such a lawyer is not constrained by a duty to the other party; withdrawal is required by the limited scope of the lawyer’s engagement. Moreover, for other CL lawyers, there still is no disabling conflict because such lawyers can, and do, recommend litigation in appropriate cases. As to the requirement that a lawyer be prepared to “carry out” such recommendations, this cannot be (for reasons noted above) grounds for an ethical conflict in all cases since transactional lawyers face the same limitation, and no one questions the ethics of their advising clients on courses of action that they are not trained to “carry out.”

Second, the Committee states that client consent cannot be given because “the potential conflict *inevitably* interferes with the lawyer’s independent judgment in considering the alternative of litigation in a material way” and this potential conflict “*invariably* interferes with the lawyer’s independent professional judgment” (emphasis added). It is not clear whether the implication here is that a CL lawyer’s judgment would be influenced by his or her financial interest. If so, that cannot be a sound basis for the Committee’s Opinion since, for example, it is frequently the case that (a) litigation counsel have a vested interest in avoiding settlement if they are paid on an hourly basis, and (b) counsel retained on a regular basis by the same insurer could be perceived as having a vested interest in satisfying the insurer when the lawyer’s sole duty must be to the insured. These and many other examples point to the fact that our legal system requires us to place enormous trust in the fiduciary responsibility of workaday lawyers whose financial interests are often in tension with those of their clients.⁷

If the Committee’s implication is that, wholly apart from financial interest, CL

⁷ For an excellent discussion of many ways in which the interests of lawyers and client diverge, see R. Mnookin, S. Peppet & A. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2001).

attorneys are emotionally or ideologically committed to collaboration at the expense of the client's true interests, the empirical evidence suggests otherwise, for there are many thousands of CL attorneys whose practices are a hybrid – i.e., they take some cases to court and they handle other cases on a CL basis. In short, there is nothing “inevitable” or “invariable” about the potential conflicts that the Committee seeks to describe and no reason to believe that CL attorneys are unable to exercise independent judgment on behalf of their clients.

Third, the Committee states that client consent cannot be given because a lawyer cannot delegate to another attorney his or her ethical duty. In other words, if a lawyer has to be able to consider *and carry out* all appropriate options for a client, that duty is not satisfied if another lawyer is doing the “carrying out.” Again, the logic is difficult to discern. What if a general practitioner handling a negotiation in an ordinary commercial dispute reaches an impasse and believes that he or she would be committing malpractice if s/he took the case to court rather than referring the case to experienced trial counsel? Does the fact that the general practitioner could, technically speaking, file the case in court mean that the representation is ethical, whereas a lawyer who signs a CL Participation Agreement and makes the same referral is practicing unethically? Our entire legal system relies on specialization for the handling of specialized cases.

Fourth, the Committee notes that the CP is “particularly susceptible to abuse” because the withdrawal/disqualification provisions of the Participation Agreement apply even if the other party has not participated in the CL process in good faith. Again, there is no empirical basis for the alleged susceptibility to abuse, and the reports of CL attorneys throughout the United States and Canada are markedly to the contrary. Similar concerns have been expressed about mediation – in other words, that the parties or counsel might use the mediation process as a ‘fishing expedition’ for discovery or to delay the proceedings. Even in the rare instances where this might have occurred, no one suggests that it was unethical for the lawyers to recommend mediation or participate in it. The likelihood of abuse is far less in the CL setting because unlike mediation, where the parties wishing to abuse the trust of the opposing party can continue with the lawyer they initially retained and educated about the case, such a party in a CL case incurs the expense associated with hiring and educating new counsel.

Finally, the Opinion is weakened by its reliance on Rule 1.7(c), which states that “For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.” As noted above, no other state has such a rule, though a few have Comments that are similar. The CBA Ethics Committee states that this Rule was added “in order to provide more protection for a client whose consent is sought as a way of resolving a conflict of interest *between the lawyer and client*” (emphasis added).⁸ In a CL case the interests

⁸ For example, if the lawyer owned shares in a company that the client was suing, the client's consent to this conflict of interest would be invalid if the hypothetical “disinterested lawyer” would advise against such representation.

of the lawyer and client are not in conflict; they are seeking the same objective – namely, an amicable resolution of the case.

The bottom line is that informed consent *can* be given, as recognized by the ethics committees in all of the other states that have looked at the issue. Rule 1.0(e) of the Colorado Rules of Professional Conduct, like the ABA Model Rules, defines “informed consent” as follows: “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” It is a routine part of CP to explain such risks and alternatives, and, as noted above, CL attorneys often have hybrid practices which include the use of mediation as well as litigation in appropriate cases.

By way of comparison, one might consider what form of “informed consent,” if any, is obtained by lawyers who embark on litigation for their clients. No one questions whether clients can validly consent to having their counsel take a case to court. And yet clients often cannot anticipate the enormous cost and delay, the imposition on their time and their privacy, and the uncertainty with regard to outcome that litigation entails. What disclosures, if any, do litigating attorneys make about how their interests in pursuing the case might conflict with those of the client? One of the fundamental purposes of the CL Participation Agreement is to align the interests of the CL attorney and the client who wants a settlement, and in that respect there should be less concern about conflicting interests in the CL arena than in the arena of litigation. To be sure, there might be some misguided or unethical lawyers whose advice to continue litigating, or to continue collaborating, might be colored by their desire to continue representing the client. But we can see no basis for concluding that such a risk is so much graver in the CL arena than in the litigation arena as to warrant a blanket prohibition of the former and permit what amounts to a free ride for the latter.

Unbundling Legal Services

CL is, in one sense, an example, of “unbundling,” which has become a well-accepted feature of the U.S. legal landscape. Clients who use unbundled legal services may be seeking only one or more of the following: advice, research, drafting, negotiation, review of contracts or agreements, or a limited court appearance.

Seven years ago, the ABA published a book on the subject, *Unbundling Legal Services* by Forrest Mosten, and since that time, ethics opinions and court rules in Colorado and at least eight other states (California, Florida, Maine, Massachusetts, Nevada, New York, Washington, and Wyoming) have explicitly approved the use of unbundled legal services.⁹ It is, of course, completely normal for lawyers in transactional work to provide “unbundled” services that are limited to negotiation. What is newer, however, is the use of “unbundling” in divorce cases and other cases involving the resolution of conflict. In such cases, the use of “settlement counsel” is widely

⁹ For a state-by-state summary of developments with regard to unbundling, see <http://www.unbundledlaw.org/States/states.htm>.

accepted and analogous to the use of CL.¹⁰

Conclusion

Although the Colorado opinion gives rise to concern about whether other states might follow suit, all of the states – other than Colorado – that have considered the issue have approved the use of CL. Moreover, the Colorado opinion is inconsistent with the fundamental principle of legal ethics that clients are entitled to make informed decisions about the scope of their representation. Examples of such limited-scope representation, including arrangements for the “unbundling” of legal services, abound in the legal system of the United States. CL, an example of such unbundling, is well established throughout the U.S. and elsewhere and will continue to provide an important method for people to obtain non-adversarial representation. Even in Colorado, footnote 11 of the Opinion, regarding client agreements, will permit individuals to hire collaboratively trained lawyers and to sign agreements that those lawyers will be retained solely for purposes of non-adversarial negotiation. We believe that, in the end, the logic of the ethics opinions issued in Kentucky, Minnesota, New Jersey, North Carolina, and Pennsylvania will prove to be more persuasive than the Colorado opinion, and that the sound ethics of CP will continue to receive wide acceptance with the public and in the legal community.

¹⁰ See D. Hoffman & P. Tesler, "Collaborative Law and the Use of Settlement Counsel," chapter 41 in *The Alternative Dispute Resolution Practice Guide* (B. Roth, ed. 2002).