



# Collaborative Divorce

## Collaborative Law:

### Ethics in Colorado By David L. Walther

*Editors Note: In February, the Colorado Bar Association's ethics committee declared that collaborative law, a process by which lawyers agree to withdraw if settlement talks collapse, is per se unethical. The opinion is significant because it is the first time that this form of ADR has been declared in violation of a state's rules of professional conduct. The response of our own David L. Walther appears below.*

*More about the opinion can be found in the ABA Journal eReport at <http://www.abanet.org/journal/ereport/my4ncolab.html>. A complete discussion of collaborative divorce appeared in the April 2007 New Mexico Lawyer (see the April 2, 2007, issue of the Bar Bulletin.)*

The opinion of the Colorado Bar Association's ethics committee concerning collaborative divorce is the first opinion that has found that process to be in violation of the rules of professional responsibility. The opinion itself cited other authorities that had issued opinions supporting the ethical validity of collaborative divorce.<sup>1</sup> However, the Colorado opinion based its interpretation on a reading of Colorado's Rule 1.7(b) and (c) governing conflicts of interests and the waiver of such conflicts.

Colorado Rule 1.7(b) is taken from the American Bar Association Rules of Professional Responsibility adopted by the ABA in 1983, Rule 1.07(b). New Mexico has adopted the same rule in Rule 16-1.07B (1) and (2). Colorado Rule 1.7(c) is unique to Colorado and prohibits a client's consent to a conflict if a disinterested lawyer would conclude that the client should not agree to the dual representation. Although the Colorado language is unique to its Rule 1.7, the concept seems consistent with the comments to Rule 2.2 to be discussed below.

These rules had not been used by other authorities to find collaborative divorce ethically unacceptable. The defect in the collaborative process found by the Colorado committee arose out of the disqualification provision—the agreement by the lawyers with both clients to withdraw from the representation if the collaborative process breaks down and the parties resort to litigation.

The reasoning of the Colorado committee is as follows. Rule 1.7(b) provides 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 the representation will not be adversely affected and the client consents after consultation. The committee found that the collaborative

disqualification agreement gives the lawyer an obligation to a third person—the other party to the divorce—to withdraw from representing the lawyer's client, and that this obligation to a third party materially limits the lawyer's responsibilities to the lawyer's own client.

The committee then determined that this conflict cannot be waived by the client because waiver is only permitted if the lawyer reasonably believes the representation will not be adversely affected by the responsibilities to the third party. The committee concluded that the obligation the lawyer has to the opposite party to withdraw interferes with the lawyer's ability to consider the alternative of litigation, if such should be reasonably pursued on behalf of the client.

In all material respects the language relied upon by the Colorado committee is identical or similar to the language of the 1983 ABA Model Rules and the New Mexico rules 16-1.07 B (1) and (2), and 16-202. These rules could have been interpreted by the Colorado committee differently. Lawyers practicing collaborative law are convinced that the best interests of their clients are served by obtaining the disqualification agreement of the opposite party and counsel. Certainly collaborative lawyers believe that they better serve their clients by resolving their disputes in the non-adversarial collaborative process. However, the greater weakness of the Colorado opinion is that it did not fully consider other of its own rules that appear more applicable.



The 1983 version of the ABA Rules of Professional Responsibility contained Rule 2.2, titled *Intermediation*. That rule has been adopted in New Mexico as Rule 16-202 and in Colorado as Colorado Ethics Rule 2.2. That rule provides that a lawyer may act as intermediary between clients if the lawyer obtains each client's written consent to the common representation, after full disclosure.

It requires that the lawyer reasonably believes the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful. It also requires that the lawyer reasonably believe that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients. That rule also provides that a lawyer shall withdraw if any of the clients so request or if any of the above conditions are no longer satisfied. Upon withdrawal, the lawyer may not continue

to represent any of the clients in the matter that was the subject of the intermediation. This rule is particularly applicable to the practice of collaborative divorce, and although that rule had been adopted in Colorado, it was not considered in the Colorado opinion.

In addition, the ABA Ethics 2000 Commission has gone further to affirm the concept of mutual representation. It has moved the concept and the language of common representation under Rule 2.2 to its newly revised Rule 1.7, comments 28 through 33. Comment 28 to the newly recommended Rule 1.7 repeats language in the former Rule 2.2 and gives examples of where conflicts between clients are consentable. One of the examples is where a lawyer seeks "... to establish or adjust a relationship between clients on an amicable and mutually advantageous basis." Another example of where a conflict is consentable is where "The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests..." and thereby avoid the clients incurring additional cost, complication, "or even litigation." Comment 29 to the newly revised rule goes on to say that the lawyer should be mindful in engaging in common representation and that if the representation fails, the result can be additional cost. Common representation also cannot be done where contentious litigation or negotiations between them are imminent or contemplated. Comment 31 cautions that common representation will be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other. This, of course, is the same transparency requirement of collaborative practice. The comments warn that at the outset, as part of the process of obtaining each client's informed consent, each client must be advised of this transparency "... and

that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." This language could have been drafted with the disqualification provision of collaborative practice in mind.

This language is found for the most part in the comments to the Colorado Rule 2.2 and the New Mexico Rule 16-202. The Colorado committee made no mention of this language in rendering its opinion. It's hard to understand this failure of the Colorado committee to not only refer to recent concepts of professional responsibility in divorce, but the very language of its own rules. The Colorado opinion cannot be considered a serious obstacle to the practice of collaborative divorce.

*Endnote*

<sup>1</sup>These were New Jersey Advisory Committee on Professional Ethics, Collaborative Law, Op. 699, 12/12/05; Kentucky Bar Ass'n Ethics Comm., Op. E-425, 6/05; Judith Hodor & Rosemarie S. Roth, The Florida Bar Handbook Supplement (2006), Ch. 24, Collaborative Law.



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