Update of 2009 Summary of Ethics Rules Governing Collaborative Practice

by Lawrence R. Maxwell, Jr.

In October 2009, the Collaborative Law Committee of the American Bar Association Section of Dispute Resolution published a Discussion Draft: Summary of Ethics Rules Governing Collaborative Practice. The paper reviewed the ABA Model Rules of Professional Conduct, state ethics opinions, and addressed ethical issues that the state ethics opinions had considered, including (1) limited scope representation, informed consent, and restriction on practice, (2) conflict of interests, (3) competence and diligence, (4) mandatory withdrawal provisions, including withdrawal due to client behavior and withdrawal requiring the court's permission, (5) zealous representation, (6) confidentiality and disclosure, (7) communications and advertising, and (8) collaborative non-profit organizations.

The ABA paper showed that Collaborative Practice is consistent with the rules of ethics for lawyers, and adds an alternate in the legal system that offers clients and attorneys an efficient, cost-effective procedure to achieve fair settlements without the expense, delay and acrimony that are, unfortunately, all to common when disputes are resolved in the litigation process.

The purpose of this paper is twofold: (1) to review state ethics opinions that have been published since October 2009, and (2) to provide references and links to articles and papers addressing ethics in collaborative practice that have been published since the 2009 Summary of Ethics Rules was published.

When the Summary of Ethics Rules was published in 2009, Ethics Committees of eight states: Minnesota (1997), North Carolina (2002), Pennsylvania and Maryland (2004), Kentucky and New Jersey (2005), Washington (2007), and Missouri (2008) had published ethics opinions supporting collaborative practice and finding that it was consistent with the Model Rules. Only one state, Colorado (2007) had published an opinion concluding that a form of collaborative practice violated the state's Rules of Professional Conduct.

In February 2007, the Ethics Committee of the Colorado Bar Association published an opinion that the practice of Collaborative Law violated the Colorado Rules of Professional Conduct when a lawyer participating in the process enters into an agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful. The Colorado opinion further concluded that the agreement created a conflict of interest that could not be waived by the client.

In response to the Ethics Opinion, collaborative practitioners in Colorado modified the collaborative law agreement (commonly known as a Participation Agreement) to provide that only the parties are signatories to the agreement. The lawyers are not signatories; rather, they acknowledge that they are collaborative lawyers for their respective parties.[1]

In August 2007, in response to the Colorado opinion the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-447 which squarely supports Collaborative Law provided that all parties have been informed about the benefits and risks of participating in the process and given their informed consent. Although ABA Ethics Opinions are not binding on states, it is clear that ABA Formal Opinion 07-477 has been persuasive since several state ethical opinions have been issued since the ABA Opinion was issued supporting collaborative practice: South Carolina (2010), and Alaska (2011), and North Dakota (2012) which opinions quote extensive from the ABA Ethics Opinion.

State Ethics Opinions Published in 2010, 2011 and 2012

South Carolina Bar Ethics Advisory Opinion 10-01, March 2010

The Opinion addresses two issues: (1) Is it permissible for an attorney to limit the scope of his representation to the collaborative law process?; and (2) Is a non-contestable conflict of interest created when an attorney represents a client in the collaborative process because the attorney's representation can be terminated by any other party in the proceeding.

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[1]In July 2009, at its Annual Meeting in Santa Fe, New Mexico, the Uniform Law Commission by a unanimous vote approved the Uniform Collaborative Law Act.

The UCLA provides a comprehensive statutory framework for collaborative practice, and includes a specific requirement that collaborative lawyers obtain informed consent before parties enter into a collaborative law participation agreement. In view of issues raised by the Colorado opinion, the UCLA does not require lawyers to be signatories to a collaborative law agreement; rather, the lawyers acknowledge that they are the collaborative lawyers for their respective parties.

To date, a form of the UCLA has been enacted in Nevada, Ohio, Hawaii, Texas, Utah, Washington, Alabama and the District of Columbia. The Collaborative Law Committee of the ABA Section of Dispute Resolution is planning to draft a white paper that will discuss ethics in the collaborative practice in states that have not, and states that have enacted the UCLA.

The Opinion concludes that ". . . it is permissible for an attorney to limit the scope of his representation provided that: the attorneys first obtain each affected client's informed written consent regarding their limited scope of representation pursuant to Rule 1.4(a)(1)[2], the attorney abides by the client's decisions concerning the objectives of the collaborative representation and consults with the client as to the means by which those objectives are to be pursued and the limited scope of representation is reasonable under the circumstances . . .".

Citing South Carolina Rule 1.7, the Opinion further concludes ". . . that a lawyer may represent a client even though the client's interest may be materially limited by the lawyer's responsibilities to a third person, provided that the lawyer reasonably believes he will be able to provide competent and diligent representation and each affected client gives informed consent, confirmed in writing . . .".

The Opinion acknowledges that the withdrawal provision in a collaborative law agreement is designed to foster commitment from the lawyers involved as well as the parties involved; and, that precluding the collaborative lawyers from representing their respective clients in any proceeding other than the collaborative proceeding is designed to encourage open communication and information sharing in order to come to as amicable resolution as possible.

Regarding custodial interference and similar inappropriate conduct, the Opinion cautions that such conduct is the type of risks that lawyers must clearly explain to prospective clients and ensure their understanding in order to obtain informed consent.

The Opinion confirms that a collaborative law agreement with a withdrawal provision is not prohibited; however, it cautions that it is not an agreement that should be entered into without reservation.

Alaska Bar Association Ethics Opinion 2011-3, May 2011

The Alaska Opinion acknowledges that Collaborative Law is a form of alternative dispute resolution which is becoming increasingly common, and addresses the following issue: Does a collaborative law "four-way disqualification agreement" providing for

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[2]Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

mandatory disqualification of counsel in subsequent potential litigation violate the Alaska Rules of Professional Conduct?

The Opinion quotes extensively ABA Formal Opinion 07-477, cites other state ethics opinions and concludes that the Alaska Rules of Professional Conduct permit a lawyer to limit the scope of his representation with the consent of the client. And, so long as the collaborative lawyer has previously obtained the separate written agreement of the client after disclosure of the risks of, and alternatives to the limited representation, the disqualification agreement is permissible.

The Opinion cites the ABA Opinion's reference to Model Rule 1.7 regarding any potential conflict of interest arising out of the collaborative law agreement:

> "Responsibilities to third parties constitute conflicts with one's own client only if there is a significant risk that those responsibilities will materially limit the lawyer's representation of the client. It has been suggested that a lawyer's agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client. We disagree, because we view participation in the collaborative process as a limited scope representation.
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> 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. A client's agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer's representation of the client will be materially limited by the lawyer's obligation to withdraw if settlement cannot be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiations of a settlement."

Regarding disclosure and consent, the Opinion cites the ABA Opinion:

> "Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and

> disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial."

In conclusion, the Opinion admonishes collaborative lawyers to enter into a collaborative law agreement only after separate discussions between the lawyer and client regarding the limited representation, and such agreement and understandings have reduced to a separate written agreement.

State Bar of North Dakota Ethics Committee Opinion No. 12-11, dated July 2012

The North Dakota Ethics Opinion compares ABA Formal Opinion 07-477 and Colorado Formal Ethics Opinion 115, and finds the reasoning of the Colorado Opinion less persuasive and adopts the position of the ABA Opinion with the limitations stated in the reasoning of the ABA Opinion.

In comparing the two Opinions, North Dakota Opinion favors the reasoning of the ABA Opinion regarding limited scope representation as permitted under Model Rule 1.2, with the concomitant duties of competence, diligence and communication:

> "Rule 1.2(c) permits a lawyer to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent. Nothing in the Rule or its Comment suggest that limiting a representation to a collaborative effort to reach a settlement is per se unreasonable. On the contrary, Comment [6] provides that "[a] limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives.
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> Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.
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> Also, Rule 1.4(b), which requires that a lawyer 'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation'."

The North Dakota Opinion further agrees with the ABA Opinion that rejects the suggestion that collaborative law practice sets up a non-waivable conflict of interest under Rule 1.7(a)(2), as concluded in the Colorado Opinion:

> "A conflict exists between a lawyer and her own client under Rule 1.7(a)(2) "if there is a significant risk that the representation [of the client] will be materially limited by the lawyer's responsibilities to … a third person or by a personal interest of the lawyer." A self-interest conflict can be resolved if the client gives informed consent, confirmed in writing, but a lawyer may not seek the client's informed consent unless the lawyer "reasonably believes that [she] will be able to provide competent and diligent representation" to the client. According to Comment [1] to Rule 1.7, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." As explained more fully in Comment [8] to that Rule, "a conflict exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer's other responsibilities or interests…. The conflict in effect forecloses alternatives that would otherwise be available to the client."

Regarding the issue of consentability, the North Dakota Opinion rejects the reasoning of the Colorado Opinion, and adopts the reasoning of the ABA Opinion in applying Model Rule 1.7:

> "On the issue of consentability, Rule 1.7 Comment [15] is instructive. It provides that "[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."
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> Responsibilities to third parties constitute conflicts with one's own client only if there is a significant risk that those responsibilities will materially limit the lawyer's representation of the client. It has been suggested that a lawyer's agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client. We disagree, because we view participation in the collaborative process as a limited scope representation.
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> "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. A client's agreement to a

> limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer's representation of the client will be materially limited by the lawyer's obligation to withdraw if settlement cannot be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, 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."

The Opinion concludes by pointing out that some states have specific rules for the practice of collaborative law, and noting that the Colorado Bar Association has established a Task Force that is drafting a proposed "Protected Negotiations Act."

References and Links to Articles and Papers Addressing Ethics in Collaborative Practice and Limited Scope Representation

The 2009 Summary of Ethics Rules Governing Collaborative Practice cited several articles and papers concerning Collaborative Practice. Since the 2009 Summary of Ethical Rules was published, several excellent articles and papers have been published on Limited Scope Representation and Collaborative Law, specifically addressing ethical considerations.

In February 2013, the ABA House of Delegates adopted a Report of the Standing Committee on the Delivery of Legal Services on Limited Scope Representation and Unbundled Legal Services. The Resolution of the House of Delegates encourages and supports efforts to increase public awareness of the availability of limited scope representation, and encourages practitioners, when appropriate and with full understanding of their professional obligations, to consider limiting the scope of their representation as a means of increasing access to legal services.

Selected Articles Published in Journals:

Sherrie R. Abney (Texas), John Lande (Missouri), Lawrence R. Maxwell, Jr. (Texas) *ex officio*, David A. Hoffman (Massachusetts) *ex officio,* Draft: Suggested Protocol to Obtain Clients' Informed Consent to Use a Collaborative Process, published by the ABA Section of Dispute Resolution Collaborative Law Committee, October 2009.

John Lande and Forrest S. Mosten, The Uniform Collaborative Law Act's Contribution To Informed Client Decision Making In Choosing A Dispute Resolution Process, Published in Hofstra Law Review, 2009, Volume 38.

Robert F. Cochran, Jr., Legal Ethics and Collaborative Practice Ethics, published in *The Collaborative Review*, Volume 11, Issue 3: Winter 2010, a publication of the International Academy of Collaborative Professionals, and 38 Hofstra Law Review 537, 2009.

International Academy of Collaborative Professionals, IACP Ethical Standards for Collaborative Practitioners, published in *The Collaborative Review,* Volume 11, Issue 3, Winter 2010-2011.

John Lande and Forrest S. Mosten**,** Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law, published in *Ohio State Journal on Dispute Resolution*, Vol. 25, p. 347 (2010).

John Lande and Forrest S. Mosten, Before You Take a Collaborative Law Case: What the Ethical Rules Say About Conflicts of Interest, Client Screening, and Informed Consent, published in *Family Advocate*, Vol. 33, p. 31, Fall 2010.

A Final Thought: *The Promise of Collaborative Practice*

In 2008, Professor Julie Macfarlane, Windsor Law University of Windsor, authored *The New Lawyer: How Settlement is Transforming the Practice of Law*[3], which has been widely received in ADR circles. The preface points to "signs that the patience and deference of the consumers of legal services is beginning to fray around the edges and has ignited a growing demand among clients of all types - individual and corporate - for their lawyers to serve as "conflict resolvers" rather than "warriors."

In *The New Lawyer,* Professor Macfarlane coined the phrase "conflict management advocates," referring to the new role for lawyers engaged in conflict management and dispute resolution. The task of lawyers practicing in this area should be to assist clients in meeting their goals and interests, resolving disputes ethically, with civility and professionalism, as quickly, economically and peacefully as possible.

The phrase "conflict management advocates" and the book's subtitle, *How Settlement is Transforming the Practice of Law*, bring to mind the 1976 Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems.

[3]Julie Macfarlane, The New Lawyer: *How Settlement is Transforming the Practice of Law* (UBS Press 2008).

Following the Pound Conference, Derek Bok, the former Dean of Harvard Law School and former President of Harvard University, reflected on the significant events of the conference and opined:

> "Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time."

Collaborative law is an ethical form of limited scope representation. It is, indeed one of the "mechanisms" envisioned by Derek Bok. The process offers parties a meaningful choice in the selection of methods for resolving disputes. It can be tailored to the needs of the parties in the context of the unique characteristic of their dispute. The process encourages voluntary, early and peaceable settlement of disputes, thereby enabling parties to avoid the significant expense that, unfortunately, will be incurred in any adversarial process.

Collaborative law is a rapidly developing process for managing conflicts and resolving disputes outside of the courthouse, and its future growth and development has significant benefits for clients and the legal profession.

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