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Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

Opinion 699
Advisory Committee on Professional Ethics

Collaborative Law

This inquiry involves application of the Rules of Professional Conduct to a form of legal representation known as "collaborative law" (also termed "collaborative practice" or "cooperative law"), in which all the participants commit to settlement of a dispute without resorting to traditional litigation. Most commonly utilized in family law, the parties to a divorce resolved through the collaborative law process agree to settle their differences through negotiation, after each provides full and honest disclosure of all information to each other. Each side retains a lawyer of the party's choosing who assists in the negotiation process, and experts such as accountants, appraisers and mental health professionals are also employed as needed. The essence of collaborative law, however, is that the parties commit to avoiding formal court proceedings. *See generally* Lande & Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004).

It is deemed critical to the success of the collaborative law process that the lawyers contractually limit the scope of their representation to achieving resolution through non-adversarial processes, and indeed the lawyers (and also their firms) enter into an agreement which provides that if there is ensuing adversarial litigation, both parties' attorneys must

withdraw from the representation. In this way, the lawyers have a practical incentive to resolve disputes without such litigation.

Collaborative law has become a significant phenomenon in family law practice in many states[1] and indeed in several foreign jurisdictions. The aspiration of collaborative law practitioners is to create a dignified and respectful setting for resolution of disputes, which setting is unfortunately often difficult to achieve in a contentious litigated matter. On the other hand, because collaborative law practice is at some variance with the traditional role of the lawyer as zealous and inherently adversarial advocate, some questions have been raised as to its compatibility with the Rules of Professional Conduct, which were conceived in the context of the traditional adversarial process.[2]

In particular, we note that the requirement that all lawyers must withdraw in the event the collaborative process fails raises some concerns about the lawyer's ability to represent a client competently and pursuant to a reasonable fee. We believe that this limitation requires very direct disclosures to the client about the risks of a failed process, including specifically the risk of fees paid to that point becoming waste, and a knowing consent to those risks by the client.

A. Professional Independence

The specific inquiry posed is whether the Rules of Professional Conduct permit the formation of a non-profit unincorporated association[3] whose members will consist of both lawyers, and non-lawyer professionals such as accountants or therapists, all of whom are

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[1] The inquirer states that collaborative law associations such as the one proposed in this inquiry exist in 29 states.

[2] See Larry 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).

[3] The inquirer states that the association will qualify under Section 501(c)(6) of the Internal Revenue Code, which covers trade associations, business leagues, chambers of commerce, and similar organizations. This Committee, of course, does make statements regarding substantive law, and therefore does not render any opinion on the application of tax statutes to the proposed organization.

committed to the principles of collaborative law. This association's purpose would be to educate the public about the benefits of collaborative law and practice, primarily through a website, and would identify its members as professionals who engage in collaborative practice.

The association's sole income would consist of membership dues, and it would not maintain an office or conventional place of business. The association itself would not provide legal services to clients, and lawyers who are members of the association would provide services within the context of their already existing firms or offices. The lawyer may also recommend that the client retain the services of another professional member of the association, but the client retains this non-attorney professional separately. Each member of the association would be retained and paid separately by clients, and no legal or other fees will be shared. Moreover, a lawyer who is a member of the association would not be limited to referring clients to other professionals who are members of the association, and thus may still exercise independent professional judgment on what professional best suits the needs of the client.

The inquirer asks whether a lawyer's membership in such an association would be consistent with the professional independence required by RPC 5.4. In particular, RPC 5.4(b) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." If the association's activities consist solely of educating the public on the possible benefits of collaborative law, and identifying various individual lawyers or firms who engage in such collaborative practice, then we do not believe that the association would be engaging in the "practice of law" and therefore RPC 5.4 would not be violated even though non-lawyers are partnered with lawyers. Since we do not have the specific education materials the association proposes to publish before us, we cannot make categorical statements in this regard. But so long as these materials do not purport to give advice

to clients by applying legal principles to the client's specific problem, then we do not think that merely educating the public about the possible advantages of collaborative law constitutes the "practice of law." *Cf. In re Jackman*, 165 N.J. 580, 586-87, 761 A.2d 1103, 1106-07 (2000) (describing activity that constitutes the practice of law). It would remain for the lawyer to consult with an individual client to make the determination of whether the collaborative process suited the client's needs, and that consultation would not constitute an activity of the association, but rather the lawyer acting independently.

We therefore answer the inquirer's specific inquiry by holding that a lawyer may become a member of an association that includes non-lawyers whose purpose is to engage in public education about collaborative law, assuming that the activities of the association do not themselves amount to the practice of law.

Although the inquirer does not raise the issue explicitly, we have also considered the situation that is implied in the inquiry in which counsel for opposing parties are both members of the same collaborative law association such as the one proposed here. Based on the assumption that this association does not practice law and is therefore not a "firm" within the meaning of RPC 1.0(c) and RPC 1.10, and furthermore that no association member constrains representation of clients by virtue of membership in such association, we find that there is no inherent conflict of interest under RPC 1.7(a)(1), any more than there would be if lawyers who are members of the same bar association would have such a conflict. As with any situation in which the personal relationship with opposing counsel might colorably affect a client's representation, however, both lawyers should consider whether the independence of their professional judgment on behalf of their respective clients, within the meaning of RPC 2.1, will be impaired by their relationship to the other lawyer. If there is a significant risk that the representation of one or more clients will

be materially limited by the lawyer's responsibilities to or personal relationship with the other lawyer, then the representation can continue only if each affected client gives informed consent, confirmed in writing, after full disclosure and consultation. RPC 1.7(b)(1).

B. Limiting and Terminating the Relationship

Although we have answered the inquirer's specific question regarding a lawyer's membership in an association that promotes collaborative law, a complete response requires further discussion of the propriety of collaborative law itself. It would of course be improper for a lawyer to engage in communications concerning that lawyer's service that is "false or misleading." RPC 7.1. In particular, a lawyer shall not engage in a communication that is "likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law." RPC 7.1(a)(2). Given the recent growth of collaborative law in the family law area, we endeavor to give guidance on the whether the general contours of collaborative practice are consistent with the Rules of Professional Conduct.

Usually, when a client retains an attorney to handle a matter, the assumption is that the attorney will thereafter provide the full range of legal services necessary to provide a complete resolution of the client's legal problem, including, if necessary, representation in court. A fundamental principle of collaborative law, however, is that a lawyer is retained for a limited purpose: settlement of the dispute without litigation. If for whatever reason the collaborative process fails and either party resorts to traditional litigation, then the lawyers for both sides are required to withdraw, and any lawyer associated with the same firm as withdrawing counsel would be barred from accepting the representation. Thus, in some sense the client's continuing relationship with the lawyer is at the discretion of the opposing spouse. This could conceivably

work a considerable hardship upon a client, who would then be required to retain new counsel to take up the case from scratch. *Cf.* RPC 1.16(b)(1) (withdrawal by lawyer permitted if "withdrawal can be accomplished without material adverse effect on the interests of the client").

Because this imposed limitation on the scope of the lawyer's services is known at the outset of the representation, we think it is more accurate to analyze this condition as a limitation on the scope of representation, rather than as a withdrawal under RPC 1.16. Lawyers are permitted to impose some limitations on the nature of their practice. RPC 1.2(c) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The reasonableness of such a limitation can be informed by a number of factors. Certainly the competence of counsel (RPC 1.1) may justify a limitation on a representation that permits the lawyer to restrict his or her practice within the bounds of professional ability. The requirement that a lawyer withdraw if the collaborative process fails, however, is not necessarily derived from a lack of competence to engage in traditional adversarial litigation, but rather is compelled in order to prevent misuse of the collaborative process to garner unfair advantage, both in terms of shared information and resources expended on legal services. The parties know that neither attorney is secretly building a case against them during the collaborative process for use in a later adversarial proceeding, thus providing a necessary confidence and incentive to cooperate fully in the process.

Whether the limitation that forbids a lawyer engaged in collaborative practice from participation in adversarial proceedings is "reasonable" within the meaning of RPC 1.2(c) is a determination that must be made in the first instance by the lawyer, exercising sound professional judgment in assessing the needs of the client. If, after the exercise of that judgment, the lawyer believes that a client's interests are likely to be well-served by participation in the

collaborative law process, then this limitation would be reasonable and thus consistent with RPC 1.2(c). *See* 2002 N.C. Eth. Op 1, 2002 WL 2029469 (N.C. St. Bar) (RPC 1.2(c) permits a lawyer, if the client consents after consultation, to ask a client to agree, in advance, that the lawyer limits representation the collaborative family law process and will withdraw from representation prior to court proceedings).

However, because of the particular potential for hardship to both clients if the collaborative law process should fail and an impasse result,[4] we think it appropriate to give some more specific guidance to the Bar as to when this limitation upon representation is "reasonable" under the circumstances. Thus, given the harsh outcome in the event of such failure, we believe that such representation and putative withdrawal is not "reasonable" if the lawyer, based on her knowledge and experience and after being fully informed about the existing relationship between the parties, believes that there is a significant possibility that an impasse will result or the collaborative process otherwise will fail.

C. Professional Judgment and Informed Consent

We stress that our prior discussion on the propriety of imposing the limitations on practice required by collaborative practice is dependent on both: (1) the professional and reasoned judgment of the lawyer that the collaborative law process will serve the interests of the particular client, and (2) the informed consent of the client to submit to that process. Collaborative law, if successful, can have the salutary effect of making less painful and divisive a process that is often rife with bitterness and unnecessary rancor. But there are also some disputes that may not be amenable to resolution through the collaborative process, such as where

[4] The inquirer is unable to provide any empirical data on the rate at which collaborative law processes fail and thereafter require resort to traditional litigation, nor has our research revealed any such studies or anything more than anecdotal reference to impasses in collaborative law.

the relationship of the divorcing parties is so irretrievably beyond repair that cooperative dialogue between them—a prerequisite to the negotiations that are at the heart of collaborative law—is impossible. Where such circumstances are apparent at the outset of the representation, it is the duty of the lawyer either to decline the representation completely or to engage in it in the traditional manner outside the collaborative law process and without the requirement of withdrawal in the event of adversarial proceedings.

Equally essential is the requirement of informed consent. A prospective client is unlikely to be aware either of the potential benefits of the collaborative law process, or of the risks. Even if the lawyer comes to the prudent professional judgment that the limitations on representation imposed by collaborative practice are reasonable, RPC 1.2(c) requires that lawyer practicing collaborative law make certain that the client is fully aware of both the significant limitations imposed on the representation by the collaborative process, as well as the full range of litigation and other alternatives, and after being so informed, consents. "Informed consent" means "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." RPC 1.0(e). The consequences if the collaborative process fails, and the lawyer is required to withdraw, must therefore be fully described to the client for such consent to be informed.

One commentator has warned starkly: "The danger is that a lawyer committed to the collaborative law process may lack the capacity, even unconsciously, to provide a client with a fair representation of the risks and benefits of utilizing such a process."[5] Indeed, it is easy to imagine situations in which a lawyer who practices collaborative law would be naturally inclined

[5] Spain, *supra* note 2, at 161.

to describe those risks and benefits to the client in a way that promotes the creation of the relationship, even if the client's interests might be better served by a more traditional form of legal representation. Such potential conflicts of interest, however, in which the lawyer's interest in being retained is at odds with the client's interest in being served by another lawyer with different expertise, is commonplace in the private practice of law. We are not prepared to conclude categorically at this juncture that lawyers who engage in collaborative law would be unable to deal with those conflicts honorably, or could not give the client the information necessary to decide whether to consent to the limitation. But informed consent regarding the limited scope of representation that applies in the collaborative law process is especially demanded, and the lawyer's requirement of disclosure of the potential risks and consequences of failure is concomitantly heightened, because of the consequences of a failed process to the client, or, alternatively, the possibility that the parties could become "captives" to a process that does not suit their needs.

To summarize:

(1) A lawyer should not agree to undertake a representation pursuant to the collaborative law process if the lawyer, based on her knowledge and experience and after being fully informed about the existing relationship between the parties, believes that there is a significant possibility that the collaborative process will fail.

(2) Even if the limited representation meets "reasonable" standard of RPC 1.2(c), the lawyer must also disclose the potential risks and consequences of failure of the collaborative law process to the client, and the alternatives provided by other dispute resolution mechanisms such as traditional litigation with its risks and

consequences, and thereby receive informed consent.

Subject to these very important qualifications, we find that collaborative law practice as described in this inquiry is not inconsistent with the Rules of Professional Conduct.

Finally, we note that all of an attorney's actions in pursuing the collaborative law approach are fully subject to all other requirements of the Rules of Professional Conduct, including, without limitation, the strictures of RPC 1.6 (confidentiality).