

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

Opinion No 12-01

The SBAND Ethics Committee has been asked if it is ethical to engage in the practice of collaborative law in the state of North Dakota. Collaborative law is a process in which the collaborative lawyers adequately advise their respective clients of the advantages and disadvantages of limited scope of representation underlying the collaborative law process, and to which each client must give informed consent before their lawyer agrees with opposing counsel to not utilize the formal discovery process and not represent their clients in adversarial litigation.

Supporting the permissibility of the collaborative law process is ABA Opinion 07-447, which says the “collaborative law process and the provisions of the four-way agreement represent a permissible limited scope representation 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.” 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. Rule 1.0(e). 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. *See 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.”

ABA Opinion 07-447 rejects “the suggestion that the collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2)”.

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 her

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. Rule 1.7(b)(1) & Rule 1.7(b)(4). 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."

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." 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. 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.

Contrary authority of Colorado Formal Ethics Opinion 115 holds that the collaborative law agreement between the parties and their attorneys violates that state's Professional Rule of Conduct 1.7(b), which bars a lawyer from representing a client if the representation is "materially limited by the lawyer's responsibilities to a third person." The Colorado opinion says the agreement creates an impermissible conflict by impairing the lawyer's independent judgment about the need for litigation if the parties fail to resolve their dispute. The opinion states "a potential conflict under Rule 1.7 is not ethically reconciled simply because another lawyer can represent the client if the conflict materializes. . . . The disqualification agreement invariably interferes with such

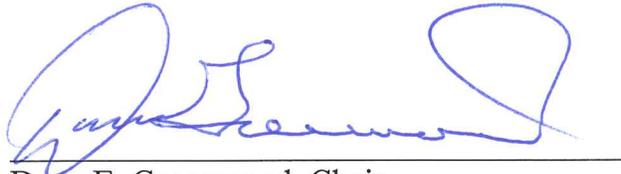
independent professional judgment in considering alternatives and forecloses courses of action for the client and the collaborative law practitioner”

The ABA expressly rejected this position, stating the “responsibility to a third party” created by the collaborative agreement, namely opposing counsel, does not create a conflict of interest, and the client’s informed consent can ethically be obtained. Other states have evaluated the collaborative law process under Rule 1.2, Rule 1.16, and Rule 5.6 and found collaborative law to be ethically acceptable. Some states have specific rules for the practice of collaborative law and treat collaborative law as limited scope representation. Colorado itself now has a Collaborative Law Task Force.

While concerned about the collaborative law process’s potential for abuse and the additional legal fees it may require a client to incur in matters concluded through litigation, the Ethics Committee of the State Bar Association of North Dakota finds the reasoning of Colorado Formal Ethics Opinion 115 less persuasive, and adopts the position of the American Bar Association Opinion 07-447 permitting the practice of collaborative law subject to the limitations stated in the reasoning of ABA Opinion 07-447.

This opinion is provided pursuant to rule 1.2(b), North Dakota Rules for Lawyer Discipline, which provides that a lawyer who acts in good faith and in reasonable reliance upon a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Robin Gordon and approved by the Ethics Committee on July 31, 2012.



Dann E. Greenwood, Chair