Before You Take a Collaborative Law Case

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Before You Take a Collaborative Law Case

What the ethical rules say about conflicts of interest, client screening, and informed consent

BY JOHN LANDE & FORREST S. MOSTEN

UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT, lawyers have a duty to screen potential Collaborative Law (CL) cases for appropriateness and obtain clients' informed consent to use CL. The duty to screen cases is based on the "reasonableness" requirement of Rule 1.2(c) and the requirement to avoid conflicts of interest that might interfere with competent and diligent representation under Rule 1.7. Both rules require lawyers to obtain clients' informed consent to participate in a CL process. Although the Uniform Collaborative Law Act is not an ethical rule, sections 14 and 15 create relevant duties, including detailed provisions requiring lawyers to make certain disclosures, provide prospective clients with information needed to make an informed choice of dispute resolution process, inquire about and discuss the appropriateness of CL, and create a presumption against using CL in cases involving a history of a coercive or violent relationship. (The Uniform Law Commission approved the Uniform Collaborative Law Act at its July 2009 meeting. In response to criticisms by some members of the American Bar Association, the commission is considering some changes not relevant to this article. See Uniform Law Commission, Uniform Collaborative Law Act, http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279.)

Collaborative law is an impressive dispute resolution process that offers significant benefits for disputants in appropriate cases. In CL, lawyers and clients sign a four-way "participation agreement" promising to use an interest-based approach to negotiation and fully disclose all relevant information. A key element of the participation agreement is the "disqualification agreement," which provides that both parties' CL lawyers would be disqualified from representing the clients if the case is litigated. The disqualification agreement is intended to motivate parties and lawyers to negotiate constructively because termination of a CL process would require both parties to hire new lawyers if they want legal representation. Although a CL process can be used in many types of cases, almost all cases to date have been in family law matters.

It is especially important for lawyers to screen cases and obtain informed consent to use CL before their clients engage in the process. By definition, parties in CL risk losing the continued representation by their CL lawyers and, under standard professional procedures, once parties have signed a participation agreement, they cannot mutually rescind the disqualification agreement. Section 4(b)(2) of the Uniform Collaborative Law Act would codify that practice by prohibiting parties from waiving the disqualification agreement. Since the disqualification provision is irrevocable and disqualification can have significant consequences, the precautions of screening and obtaining informed consent prior to representing parties in CL are quite appropriate.
Limiting the scope of representation

Rule 1.2(c) of the Model Rules of Professional Conduct states, “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” When lawyers provide CL representation, they limit the scope of their representation by excluding the possibility of representing CL clients in litigation. ABA Formal Ethics Opinion 07-447 (2007) confirms that CL is a “permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication.” To date, ten states, including the ABA, have issued ethical opinions about CL. Except for the Colorado opinion, all have indicated that CL practice can comply with the applicable ethical rules. The Colorado opinion states that CL is an impermissible conflict of interest where lawyers enter contractual agreements requiring them to withdraw if the CL process is unsuccessful, though the process does not violate the rules if the parties, not the lawyers, execute the participation agreement. Colorado Bar Ass’n Ethics Comm., Formal Op. 115 (2006). Of course, lawyers are governed only by binding opinions in their jurisdictions. Ethics opinions governing CL are posted on the website of the ABA Section of Dispute Resolution’s Collaborative Law Committee, http://www.abanet.org/dch/committee.cfm?com=DR035000.

Kentucky Bar Association Ethics Opinion E-425 (2005) states, “A lawyer cannot advise a client to use the collaborative process without assessing whether it is truly in the client’s best interest.” Pennsylvania Informal Opinion 2004-24, 2004 WL 2758094 (2004), states that CL lawyers “must consider each client’s situation (especially those who are victims of domestic violence) when deciding whether a Rule 1.2(c) limitation on the scope of representation is reasonable and whether [they] can, indeed, provide competent representation to a client under the limited scope of representation.” New Jersey Ethics Opinion 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055, 2005 WL 3890576 (2005), provides some elaboration:

Whether the limitation that forbids a lawyer engaged in collaborative practice from participation in adversarial proceedings is “reasonable” within the meaning of Rule 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 Rule 1.2(c)....

However, because of the particular potential for hardship to both clients if the collaborative law process should fail and an impasse result, 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.

Books written by CL experts identify factors regarding appropriateness of CL including: (1) the motivation and suitability of the parties to participate effectively in a collaborative process, (2) the trustworthiness of the parties, (3) whether a party is intimidated from participating effectively in the collaborative process, (4) whether there has been a history of domestic violence between the parties, (5) whether a party has a mental illness, (6) whether a party is abusing alcohol or other drugs, (7) whether the lawyers are suitable for handling the case collaboratively, (8) whether the parties would use professional services in addition to collaborative legal services, (9) the parties’ ability to afford to retain new lawyers if the collaborative process terminates without agreement, and (10) the parties’ views about the risks of disqualification of lawyers and other professionals in the case. See 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,’ 25 Ohio State Journal of Dispute Resolution 347 (2010). The existence of any of these factors does not necessarily preclude lawyers from undertaking a CL representation. Rather, these factors should help guide lawyers in complying with their ethical obligations.

If there is a significant risk that using CL in a case would not realistically advance a client’s (or prospective client’s) interests, the New Jersey opinion holds that undertaking a CL representation would not be a reasonable limitation of the scope of representation and would violate Rule 1.2. For example, if a CL client is a victim of domestic violence, is afraid that the other party is dishonest and would take
advantage of the CL process, and/or cannot afford to hire litigation counsel in the event of termination of a CL process, it might be unreasonable for a lawyer to use CL. Although Rule 1.2 requires clients to provide informed consent to a limited-scope representation, such consent would be insufficient to authorize the representation if it would be found unreasonable under the circumstances. It can be difficult to assess the reasonableness of using CL and practitioners' honest professional judgments may differ from later determinations by ethics committees or courts. Practitioners should avoid undertaking CL cases when it clearly would be unreasonable. On the other hand, ethics committees and courts should not chill lawyers' reasonable efforts to help clients when it appears that CL might be appropriate considering the facts reasonably knowable at the time.

The ethical rules suggest that CL lawyers should continue to assess the appropriateness of CL throughout a case. If continued use of the process becomes unreasonable at any time, CL lawyers may be required to reassess whether the representation is permissible and, if they conclude that it is no longer reasonable, terminate the representation.

Consider the following scenario: the parties have invested substantial time and money in a CL process, the prospects for settlement are doubtful, and if the CL process continues without reaching agreement, one or both parties may be unable to afford litigation. In another situation, at the outset of a CL case, the lawyers do not realize that a party has a serious substance abuse problem but, during the process, they discover the problem and the party refuses to get treatment and act cooperatively. In these situations, under Rule 1.2, lawyers would presumably be required to reassess the case and terminate representation if continuing would be unreasonable and/or harmful to clients.

Impermissible conflicts of interest

Rule 1.7 of the Model Rules of Professional Conduct requires CL lawyers to screen cases to avoid potential conflicts of interest and to obtain clients' informed consent prior to initiating representation. Rule 1.7 provides, in part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:... (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to...a third person....

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ...; and

(4) each affected client gives informed consent, confirmed in writing.

Comment 8 to Rule 1.7 states that "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 ABA ethics opinion is consistent with this analysis, stating that a "contractual obligation to withdraw creates on the part of each lawyer a 'responsibility to a third party' within the meaning of Rule 1.7(a)(2)" and concluding that "[r]esponsibilities 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."

Although the contractual structure of CL processes varies, many practitioners use CL participation agreements to establish contractual obligations to "third persons," namely the other lawyer and party. Standard 7.1.A(1) of the International Academy of Collaborative Professionals' (IACP) Ethical Standards for Collaborative Practitioners states that CL lawyers may not "knowingly withhold or misrepresent information material to the Collaborative process." Virtually all CL participation agreements include similar provisions. The IACP standards do not define "material information," but many participation agreements require disclosure of much more information than would legally be discoverable. For example, the model participation agreement in Pauline Tesler's book, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation (ABA Family Law Section, 2d ed. 2008), includes a provision committing lawyers and parties to "honesty and the full disclosure of all relevant information." Tesler argues that a CL process must be "transparent," which includes "honesty and candor about what one is doing and why one is doing it" and "candor about goals, priorities, and reasoning." Thus, CL requires parties to disclose what Professor Carrie Menkel-Meadow calls "settlement facts" which:

[M]ay not be legally relevant but which either go to the underlying needs, interests, and objectives of the parties—why they want what they want in a dispute—or such sensitive information as financial information, insurance coverage, trade secrets, future business plans that may affect the possible range of settlements or solutions but which would not necessarily be discoverable in litigation. Settlement facts are to be distinguished from "legal facts" (those which would be either discoverable or admissible in litigation).

A second obligation of lawyers under many CL participation agreements is to correct mistakes made by the other lawyer or party. For example, a party to a participation agreement (which sometimes include lawyers) may be required to inform the other side of any suspected numerical miscalculations or typographical errors, inaccurate factual assumptions, or reliance by that counsel on legal authorities that have been overruled or superseded.

Third, by definition, lawyers are obliged to withdraw from a CL case if any party, including the opposing party, terminates the case. Thus, CL lawyers undertake obligations to third persons, and rule 1.7 requires lawyers to consider whether they can provide competent and diligent representation to their clients in a CL case.

In some situations, CL lawyers would have an impermissible conflict of interest because they would not be able to provide competent and diligent representation. The appropriateness factors listed in the preceding section would be relevant to this analysis. For example, if a lawyer represents a victim of domestic violence who seeks a divorce from her abuser, who has been proved to be untrustworthy and would likely seek to take advantage of a victim, rule 1.7 would presumably prohibit the lawyer from representing the client in a CL process. In that situation, the victim's lawyer would be caught in a conflict between protecting the client, who may be harmed by participating in CL, and complying with obligations under the CL participation agreement. For some vulnerable clients, merely participating in a process with an intimidating opponent may seriously undermine their ability to assert their interests. Abusers can send subtle signals to victims, which everyone else may miss, threatening the victims if he or she does not accede to the abuser's demands. In such situations, lawyers might have difficulty in diligently representing their clients' interests in negotiating an agreement with an unscrupulous adversary. Although it is possible that such lawyers could avoid an impermissible conflict of interest, it is a significant risk that lawyers should consider seriously.

Rule 1.7 requires a lawyer to obtain a client's informed consent before representing the client in a conflict-of-interest situation, though the client's consent is not sufficient to authorize the representation if the lawyer cannot provide competent and diligent representation. If the concerns described above are reasonably addressed, however, CL lawyers can provide competent and diligent representation that fully meets ethical standards.

Obtaining informed consent

Rule 1.0(e) defines informed consent as "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." Comment 6 to rule 1.0 states:

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

The ethics opinions set high standards for informed consent in a CL process. For example, the Kentucky opinion states, "[B]ecause the relationship between the [CL] lawyer and the client is different from what would normally be expected, the lawyer has a heightened obligation to communicate with the client regarding the representation and the special implications of collaborative law process...." This opinion states that CL lawyers must advise clients about a list of potential risks.

The client must consent to the limited representation, which means he or she must be advised of the limited nature of the relationship and the implications of the arrangement. For example, obtaining new counsel will entail additional time and cost; the client may feel pressured to settle in order to avoid having to obtain new counsel; and the failure to reach a settlement, necessitating new counsel, is not within the exclusive control of the client—the opponent can effectively disqualify both counsel. The client may be willing to assume these and other risks of the collaborative process but, as previously discussed, the lawyer must communicate sufficient information so that the
The New Jersey opinion also notes significant risks in CL, indicates that CL lawyers have a heightened duty of disclosure, and warns CL lawyers that they must provide clients with a reasonable analysis of the clients' interests regarding possible use of CL, even if this conflicts with the lawyers' interests in getting CL cases:

"It is easy to imagine situations in which a lawyer who practices collaborative law would be naturally inclined to describe [the] 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.... We are not prepared to conclude categorically that the parties could become "captives" to a process to the client, or, alternatively, the possibility that the parties could become "captives" to a process that does not suit their needs."

The Kentucky opinion indicates that mere signing of a CL participation agreement is insufficient to constitute informed consent. 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 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.

The Kentucky opinion indicates that mere signing of a CL participation agreement is insufficient to constitute informed consent and that CL lawyers should discuss the process with clients and provide an opportunity for questions.

Although the collaborative law agreement may touch on these matters [such as advantages and risks of different processes], it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decision making. The agreement may serve as a starting point, but it should be amplified by a fuller explanation and an opportunity for the client to ask questions and discuss the matter. Those conversations must be tailored to the specific needs of the client and the circumstances of the particular representation. The Committee recommends that before having the client sign the collaborative agreement, the lawyer confirm in writing the lawyer's explanation of the collaborative process and the client's consent to its use.

Thus the ethical opinions make clear that lawyers must engage in a thorough discussion with clients to comply with the obligation of obtaining informed consent.

### Conclusion

Lawyers offering CL representation must comply with all ethical rules for lawyers generally. Under the rules governing a limited scope of representation and conflicts of interest, before undertaking a CL representation, lawyers must determine if the process is appropriate for a prospective client and obtain informed consent. Although the consent is normally in writing, lawyers do not comply with their duties if they obtain clients' signatures without a careful discussion of the benefits and risks of CL and other dispute resolution options. By providing appropriate information before parties decide whether to use CL, lawyers can have greater confidence that parties will have realistic expectations, participate in the process more constructively, and be less likely to terminate a CL case.

Although preventing all problems is impossible, compliance with these duties seems likely to prevent some, but certainly not all, complaints about CL (or any form of practice), as well as maximize competent client care. Clearly, complying with these ethical duties advances the interests of clients and lawyers. Not only are clients better protected, but also such compliance increases confidence in and use of CL, which is growing in consumer demand and acceptance by lawyers and judges. 

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