

# 115

## ETHICAL CONSIDERATIONS IN THE COLLABORATIVE AND COOPERATIVE LAW CONTEXTS \*

Adopted February 24, 2007.

### *Introduction and Scope*

For many years, parties have turned to Alternative Dispute Resolution (ADR) methods to resolve disputes. ADR methods allow the parties to customize the process of resolving a particular dispute. One ADR method which has emerged in recent years is commonly referred to as the Collaborative Law process. The touchstone of Collaborative Law is an advance agreement, often referred to as a “Four-Way Agreement” or “Participation Agreement,” entered into by the parties and the lawyers in their individual capacities, which requires the lawyers to terminate their representations in the event the process is unsuccessful and the matter must proceed to litigation. Cooperative Law, on the other hand, is a process which incorporates many of the hallmarks of Collaborative Law discussed below but does not require the lawyer to enter into a contract with the opposing party providing for the lawyer’s disqualification. While Collaborative and Cooperative Law are most frequently employed in the family law context, their application is not restricted to family law.<sup>1</sup>

It is the opinion of this Committee that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful.<sup>2</sup> The Committee further concludes that pursuant to Colo.RPC 1.7(c) the client’s consent to waive this conflict cannot be validly obtained. Because Cooperative Law lacks the disqualification agreement found in Collaborative Law, the practice of Cooperative Law is not *per se* unethical. However, those participating in Cooperative Law face unique ethical issues and must be mindful of myriad potential ethical pitfalls discussed below.

### *What Are Collaborative and Cooperative Law?*

The Collaborative Law model of practice is generally regarded as constituting a fundamental shift in the lawyer’s role from an advocate in an adversarial system to an advocate in a collaborative environment where the commitment is to the settlement of a dispute outside the traditional litigation model.<sup>3</sup> Collaborative Law involves the advance agreement entered into by the clients and the lawyers. Importantly, the lawyers execute this Four-Way Agreement as independent parties. The Four-Way Agreement limits the lawyers’ participation to the negotiation and facilitation of a settlement without the threat of litigation. If the parties decide to use the court system, they must hire lawyers other than the lawyers who participated in the Collaborative Law process. The lawyers agree to discontinue representing their client if the parties choose to litigate the dispute, which creates a practical incentive to resolve the dispute without the need for litigation.<sup>4</sup> While Collaborative Law has not been universally defined, “[v]irtually all collaborative law leaders and practitioners believe that the disqualification agreement is the irreducible minimum condition for calling a practice collaborative law.”<sup>5</sup>

The Collaborative Law process is based upon a problem-solving model rather than an adversarial model. In order to resolve the dispute, the Four-Way Agreement requires that parties freely and timely exchange information and commit to joint problem solving. The typical Four-Way Agreement contractually obligates the parties to timely and fully disclose all relevant materials.<sup>6</sup> Some Four-Way Agreements even require counsel to withdraw if he or she determines that the client is participating in bad faith. As a product of this agreement, the lawyer’s continued participation serves as an implicit certification of the client’s good faith.<sup>7</sup>

The process itself usually involves a series of meetings with all of the parties and their lawyers in attendance. These meetings, or “four ways,” as they are frequently called, are designed to foster a team

approach to creative problem solving that encompasses elements such as open and honest communication, cooperation, good faith, and willingness to listen.<sup>8</sup> In this respect, the Collaborative Law process focuses on the future relationship of the parties. By taking the adversarial piece out of resolving a dispute, it is thought the Collaborative Law process allows the parties to settle the dispute in a manner that leaves them with a new productive relationship.

Cooperative Law, which is a much smaller movement than the Collaborative Law movement, uses the same principles as Collaborative Law, except that Cooperative Law does not involve a disqualification agreement.<sup>9</sup> Cooperative Law therefore includes a written agreement to make full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation. Thus, Cooperative Law, as defined in this Opinion, is identical to Collaborative Law, with the exception of the disqualification agreement.

### ***Nonconsentable Conflict Under Rule 1.7(b)***

Rule 1.7(b) of the Colorado Rules of Professional Conduct, *Conflict of Interest: General Rule*, provides in relevant part:

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:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

The comment to Rule 1.7 explains: "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."

Collaborative Law, by definition, involves an agreement between the lawyer and a "third person" (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client. In particular, the lawyer agrees to discontinue the representation in the event that the Collaborative Law process is unsuccessful and the client wishes to litigate the matter. The entry of the Collaborative Law Four-Way Agreement therefore implicates Rule 1.7(b) of the Colorado Rules of Professional Conduct. Under Rule 1.7(c), the client's consent to a conflict "cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation."<sup>10</sup>

However, this does not end the inquiry. A client has the autonomy to authorize the representation notwithstanding the conflict but this autonomy is not without limitation. A client's consent to the representation is only effective where the lawyer "reasonably believes the representation will not be adversely affected" by the responsibilities to the third party. *See* Colo.RPC 1.7(b)(1) & (2). The comment to Rule 1.7 further clarifies:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

The Committee concludes that a client may not consent to this conflict for several reasons. First, in the Collaborative Law context, the possibility that a conflict will materialize is significant. In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that "reasonably should be pursued on behalf of the client," or at least considered, is foreclosed to the lawyer.

Moreover, a potential conflict under Rule 1.7 is not ethically reconciled simply because another lawyer can represent the client if the conflict materializes. Rule 1.7 prohibits the lawyer originally retained from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to a third person. Thus, the ability of another lawyer to alleviate the materialized conflict is irrelevant. Rather, it is the ethical obligation of the collaborative law practitioner to ascertain whether the disqualification agreement materially interferes with that lawyer's "independent professional judgment in considering alternatives" or "foreclose courses of action that reasonably should be pursued on behalf of the client" by the collaborative law practitioner. *See* Colo.RPC 1.7 cmt. Because 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, it violates Rule 1.7.<sup>11</sup>

It is also noteworthy that disqualification from future litigation is not contingent upon any good faith erosion of the collaborative process. If the process does not result in an agreement between the parties, regardless of the good or bad faith participation of any party to the process, the Four Way Agreement requires the Collaborative Law practitioner to withdraw. The process is particularly susceptible to abuse in this respect.

### ***Ethical Considerations Relative to Cooperative Law***

Cooperative law, which is identical to Collaborative Law in all material respects with the exception of the disqualification agreement, is not *per se* unethical. However, even without such a contractual requirement, a lawyer practicing Cooperative Law must be mindful of a number of potential ethical pitfalls. While the balance of this Opinion discusses some of those potential ethical pitfalls, it is not intended to be an encyclopedic compendium of all issues which could possibly arise during the Cooperative Law process. Lawyers who elect to practice Cooperative Law are subject to all ethical rules whether or not such rules are discussed in this Opinion.

#### ***The Cooperative Law Agreement***

It is unclear whether lawyers participating in Cooperative Law are required to execute a Cooperative Law agreement in their individual capacity and there may well be variation in the practice. As discussed above, to the extent a lawyer enters into an agreement with the opposing party and/or opposing counsel that requires that lawyer to withdraw in the event the process fails, the agreement violates Rule 1.7(b). However, a Cooperative Law Agreement that merely obligates the lawyer to ensure full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation, is not necessarily antithetical to Rule 1.7(b) because those obligations do not materially limit or interfere with the lawyer's ability to represent the client. *See* Colo.RPC 1.7(b) & cmt.<sup>12</sup>

Such a Cooperative Law Agreement is not without ethical trappings, however. For example, instances may arise where relevant information subject to disclosure under the Cooperative Law Agreement is acquired by the lawyer from his or her client in connection with attorney-client communications. Rule 1.6(d) states in pertinent part: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using such (confidential) information. . . ." When information that would otherwise be subject to disclosure pursuant to the Participation Agreement is provided to the lawyer in confidence, Rule 1.6(a) may nonetheless authorize the disclosure if such disclosure is "impliedly authorized in order to carry out the representation." However, in some circumstances, the client expressly directs the lawyer not to disclose information obtained by the lawyer in confidence. This problem, not uncommon in the litigation context, may be compounded where the lawyer participating in the Cooperative Law process executed a Cooperative Law Agreement requiring disclosure of relevant information irrespective of whether it was acquired in confidence.

If the lawyer's representation of the client within the Cooperative Law process will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). If the client prohibits the disclosure simply on grounds that it is harmful or per-

ceived as harmful to the client's case, the lawyer should nonetheless consider withdrawing, provided such withdrawal can be accomplished without material adverse effect on the client's interests. *See* Colo. RPC 1.16 cmt.

#### *Terminating the Relationship*

Even without a Four-Way Agreement containing a disqualification provision, the termination of the representation in the Cooperative Law environment raises a number of unique ethical considerations, particularly where the lawyer and client agree to the termination in advance. Rule 1.2 allows a lawyer practicing in Colorado and client to limit the scope of the lawyer's representation. In accordance with Colorado Bar Association Formal Opinion 101, a lawyer may also provide a client with some, but not all, of the work normally involved in litigation. This is typically referred to as "unbundled" legal services. *See* CBA Formal Opinion 101 (1998). Thus, an advance agreement with the client to terminate or limit the representation is ethical.

Rule 1.16 governs termination and withdrawal. Subsection (b)(3) provides: "A lawyer may not request permission to withdraw in matters pending before a tribunal and may not withdraw in other matters unless such request or such withdrawal is because... (3) the lawyer's client knowingly and freely assents to termination of the lawyer's employment." The subject has not been addressed directly in Colorado, but at least one case seems to indicate that an advance assent to withdrawal may violate public policy in some circumstances. *See Jones v Feiger, Collison and Killmer*, 903 P.2d 27, 34-35 (Colo. App. 1994) (holding fee agreement authorizing lawyer's right to withdraw if the client unreasonably refused settlement in violation of public policy and Colo.RPC 1.2), *rev'd on other grounds*, 926 P.2d 1244 (Colo. 1996). However, an advance agreement authorizing withdrawal is not *per se* unethical.

Even if the client's advance agreement is made "knowingly and freely," the comment to Rule 1.16 permits withdrawal only where it can be accomplished without "material adverse effect" on the client's interests. Where the client is of relatively meager means, the lawyer's withdrawal may be materially adverse to the client. Under such circumstances, the lawyer's withdrawal may be unethical.

If counsel has filed pleadings in the case prior to commencement of the Cooperative Law process, withdrawal will be governed by the Court.<sup>13</sup> Rule 1.16(c) provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Assuming that the client consents and there is no material adverse effect on the client from the withdrawal, a court would likely authorize the withdrawal. However, such judicial authorization can not be presumed. An advance agreement with the client to withdraw should therefore recognize and make exception for the Court's ability to require the lawyer to continue the representation.

#### *Communications with Clients*

The potential for participation in the Cooperative Law process implicates some unique issues with respect to a lawyer's communication obligations pursuant to Rule 1.4 of the Colorado Rules of Professional Conduct. Rule 1.4 requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo.RPC 1.4(b).<sup>14</sup> The comment to Rule 1.4 clarifies that this obligation applies to the means in which a dispute may be resolved. The Rule does not, however, require that a lawyer provide information as to every method by which the dispute can be resolved. Rule 2.1 makes it clear that the lawyer need not provide the client information regarding all forms of Alternative Dispute Resolution, but should discuss those that would be reasonable based upon the specific circumstances of the client's case. In analyzing the appropriateness of the Cooperative Law process, the lawyer should consider not only the facts of the case, but the personalities of the parties to participate in the cooperative process and the relative financial means given that failure of the process may prove more costly.

If the lawyer believes that the Cooperative Law process may be suitable for the client after due consideration and reasonable investigation into the client's case, the lawyer must advise the client of the "possible legal effect of each alternative course of action." Colo. RPC 1.4 cmt. This necessarily includes

an explanation of the risks and benefits of the different means that can be used to resolve her dispute.<sup>15</sup> Additional care may need to be taken when describing the risks and benefits of Cooperative Law because it is dramatically different from litigation and other ADR methods.<sup>16</sup>

In the event that the Cooperative Law process is successful, it may in some circumstances be more cost effective than litigation. However, if the process is not successful, the client may be required to litigate the dispute, which will prove more costly than immediately litigating a dispute. Depending on the scope of the representation as agreed to by the lawyer and client, the client may also be required to incur the additional cost associated with hiring trial counsel. A client's and lawyer's tactical decisions will also be limited. For instance, a party participating in the Cooperative Law process may not use the courts to compel discovery. This limitation should also be fully discussed.

One of the hallmarks to the Cooperative Law model is the requirement that the parties voluntarily disclose all relevant information. The lawyer should discuss this requirement with the client before entering into the process and ensure that the client understands the implications of this requirement.

The potential benefits of Cooperative Law should also be disclosed. For example, Cooperative Law allows the parties to privately resolve their dispute. The process may also enable the participants to maintain a relationship after the dispute is resolved because it is designed to be less adversarial than litigation and many of the traditional methods of ADR. This may be particularly important in the family law context where allocation of parental responsibilities is at issue.

Finally, parties to Cooperative Law often retain a single, joint expert on issues ranging from financial affairs to sociological family dynamics. Lawyers should discuss with the client the ramifications of hiring a single expert. The attorney expert may also face ethical considerations in the Cooperative Law context, similarly implicated in domestic relations litigation as a result of Rule 16.2(g) of the Colorado Rules of Civil Procedure. The ethical implications of a lawyer serving as a joint expert are outside the scope of this Opinion.

#### *Client Under Disability*

In evaluating the Cooperative Law process, the lawyer should also consider whether the client may be under a disability which prevents the client from "adequately considering decisions in connection with the representation." Colo. RPC 1.14(b). As a preliminary matter, the lawyer must determine if the client can understand, deliberate and make conclusions about his or her well-being. *Id.* If the client suffers from a disability and has no guardian, the lawyer must often act as the de facto guardian. *Id.* Thus, under such circumstances, the lawyer may need to independently determine whether the Cooperative Law process is appropriate. Given the unique nature of Cooperative Law, which promotes active client participation, lawyers should be reluctant to engage in the process when the client's ability to make adequately considered decisions in connection with the representation is impaired and/or where the client lacks the legal capacity to enter into an advance agreement with the opposing party on the client's own accord.

The lawyer considering participation in the Cooperative Law process should be particularly cognizant of a history of domestic abuse. Though not universally the case, Cooperative Law may not be suitable in such circumstances given the abused client's increased susceptibility to intimidation during the "four-way meetings."<sup>17</sup>

#### *Cooperative Law Organizations*

With the increase in popularity of this form of alternative dispute resolution, lawyers must be aware of issues ancillary to the process. Of particular note, Cooperative Law organizations are becoming more prevalent in Colorado and across the country. Typically, these organizations refer clients who are interested in participating in the Cooperative Law process to members of the organization. In addition to ethical considerations relating to the structure of the organization itself and potential member representation of both parties to the Cooperative Law process, the referral function of such Cooperative Law organizations raises significant ethical issues.

The referral processes employed by such organizations must be considered under the construct of Rules 1.5 and 7.2. Rule 1.5(e) prohibits a lawyer from accepting or paying a referral fee. Rule 7.2(c) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services, except the reasonable costs of advertisements and the usual charges of a not-for-profit lawyer referral service or legal service organization.<sup>18</sup> As this Committee stated in Formal Opinion 106, *Referral Fees and Networking Organizations*, "lawyers may pay the 'usual charges' of a not-for-profit lawyer referral service or legal service organization" and lawyers and law firms "may engage in cooperative marketing with other firms and may refer clients to each other informally" so long as the referral and/or cooperative marketing does not violate Rule 7.2.

A lawyer is therefore prohibited from participating in a for-profit cooperative law organization that functions as a referral service if payment of a fee is a condition of membership. However, a lawyer may participate in a for-profit referral service that does not require any payment from the lawyer, so long as the lawyer's participation in the for-profit referral service does not otherwise violate any of the Colorado Rules. CBA Formal Opinion 106 (1999); *see also* Colo.RPC 5.4 (prohibiting a lawyer from forming a "partnership" with the for-profit organization).

If the cooperative law organization functioning as a referral service is "not-for-profit," participation is permissible provided the lawyer (1) pays nothing more than the "usual charges" for membership to the not-for-profit organization and (2) provides neither the organization nor its members something of value for the referrals other than the "usual charges," provided of course that membership does not otherwise violate the Rules.<sup>19</sup> The initial, threshold question is therefore whether the organization qualifies as not-for-profit. An organization generally satisfies the not-for-profit requirement if it is organized as such pursuant to Colorado Statute. However, such designation is not determinative. "[A] lawyer who intends to use a purportedly not-for-profit referral service not sponsored by a bar association should verify for himself or herself that the referral service in fact is a legitimate not-for-profit organization and that it is not a profit-making enterprise masquerading as a non-profit entity." CBA Formal Opinion 106 (1999) (citing *People v. Zimmermann*, 938 P.2d 131, 132 (Colo. 1997)).

Once the lawyer is satisfied that the cooperative law organization is truly not-for-profit, the lawyer must consider whether payment to the organization for membership exceeds the "usual charges" of a not-for-profit lawyer referral service. The Rules do not define the phrase "usual charges." Thus, a clearly defined rule or litmus test does not exist. It is generally accepted that a nominal membership fee, commensurate with membership fees charged by other legal service organizations, such as a local bar association, is permissible. *See* CBA Formal Opinion 106 (1999); ABA Informal Opinion 85-1512 (1985); *see also* CBA Ethics Comm. Abstract 98/99-10 (finding \$2,500/month to violate Rule 7.2). On the other hand, payment of exorbitant membership fees or payment of a percentage of fees collected by participating lawyers from plan referrals, are likely impermissible. *See* CBA Formal Opinion 106 (1999) (prohibiting exorbitant fees and referring to payment of a percentage fee as "problematic"); *but see* ABA Comm. On Prof. Ethics and Grievances, Formal Opinion 291 (1956) (permitting percentage fee payment to a lawyer referral service).

Finally, a lawyer may participate in a not-for-profit cooperative law organization functioning as a referral service if, and only if, the lawyer provides the organization nothing of value other than the "usual charges" for the referrals. In other words, the lawyer may not provide the organization anything of value other than monetary consideration for membership. There are other types of consideration for referrals that could potentially violate Rule 7.2(c). The most likely (and perhaps most undetectable) violation exists where members to the Cooperative Law organization contract to refer business to one another. While lawyers may agree to "consider each other for appropriate referrals," the exchange of a binding promise to do so constitutes giving something of value for referrals in violation of Rule 7.2(c). *See* CBA Formal Opinion 106 (1999).

### **Conclusion**

The Colorado Rules of Professional Conduct prohibit a lawyer from participating in Collaborative Law so long as a contractual obligation exists between the lawyer and the opposing party whereby the

lawyer agrees to terminate the representation of the client. Absent such a contractual obligation, a lawyer may participate in the process referred to as Cooperative Law provided that the lawyer complies with all of the Rules of Professional Conduct.

## NOTES

1. See Larry R. 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, 141-42 (2004).

2. The Colorado Ethics Committee is aware that several similar committees and bar associations have concluded that a lawyer is ethically permitted to enter into the disqualification agreement unique to Collaborative Law. See, e.g., 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*. However, none of those commentaries have focused on Model Rule of Professional Conduct 1.7(b) or any similar state rule. It is also worthy of note that several commentators have called into question whether Collaborative Law fits within the current ethic construct. As one commentator aptly put it: "It may be that the existing rules of professional conduct for lawyers must be redefined to allow for alternative conceptions of practice while ensuring that clients continue to be served by ethical practitioners who meet uniform professional standards of conduct." Spain, *supra* note 1, at 172-73; accord Elizabeth K. Strickland, *Putting "Counselor" Back In The Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 *N.C. L. Rev.* 979, 1001 (2006) ("Current ethical codes may have to be reworked to adapt to the new methods of dispute resolution.").

3. *Id.* at 141-42

4. See New Jersey Advisory Committee on Professional Ethics, *Collaborative Law*, Op. 699, 12/12/05 ("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. . . .").

5. John Lande & Greg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 *Fam. Ct. Rev.* 280, 283 (2004) (internal quotations omitted); see also Spain, *supra* note 1 at 143 ("Despite the variety of definitions of collaborative law, it has been suggested that there is a universal and necessary element for the model of practice referred to as collaborative law: A written commitment from each party's counsel disqualifying them from representing their client against the other in court.").

6. This requirement is analogous to the requirements under Colorado's relatively new Rule 16.2(e) of Civil Procedure, which provides that parties to domestic relations cases "owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case."

7. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 *Ohio St. L. J.* 1315, 1332 (2003) (citing Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation I*, ABA Manual Section of Family Law (2001)).

8. Tom Arnold, *Collaborative Dispute Resolution: An Idea Whose Time Has Come*, 16 *A.L.I.-A.B.A.* 379, 381, 382-85 (2000).

9. See Lande and Herman, *supra* note 5 at 284; Joshua Isaacs, *A New Way to Avoid the Courtroom: Ethical Implications Surrounding Collaborative Law*, 18 *Geo. J. Legal Ethics* 833, 835 (2005).

10. Similar language also appears in the Comment to ABA Model Rule 1.7.

11. While it is not within this Committee's province to comment on legal issues, it is axiomatic that private parties in Colorado may contract for any legal purpose. Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.

12. The lawyer's duty to the Cooperative Law process, however, cannot prevail over the lawyer's duty to the client.

13. See Colo. R. Civ. P. 121 § 1-1(2) and Rule 1.16

14. Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

15. See Kentucky Bar Ass'n Ethics Comm., Op. E-425, 6/05.

16. *Id.*

17. Lande, *supra* note 7, at 1382.

18. The comment to Rule 7.2(c) further explains that “. . . a lawyer is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs.”

19. For instance, the lawyer must ensure that the lawyer's professional judgment remains independent, that confidentiality requirements are not compromised, and that conflicts of interest are avoided.

## CITED RULES, CASES AND OTHER MATERIALS

### Rules

C.R.C.P. 16

C.R.C.P. 121 § 1-1(2)

Colo.RPC 1.2

Colo.RPC 1.4

Colo.RPC 1.5

Colo.RPC 1.6

Colo.RPC 1.7

Colo.RPC 1.16

Colo.RPC 2.1

Colo.RPC 7.2

### Cases

*Jones v Feiger, Collison and Killmer*, 903 P.2d 27 (Colo. App. 1994)

*People v. Zimmermann*, 938 P.2d 131 (Colo. 1997)

### Formal Ethics Opinions

ABA Comm. On Prof. Ethics and Grievances, Formal Opinion 291

Colorado Bar Association, *Unbundled Legal Services*, Formal Opinion 101 (1998)

Colorado Bar Association, *Referral Fees and Networking Organizations*, Formal Opinion 106 (1999)

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.

Informal Ethics Opinions and Abstracts

ABA Informal Opinion 85-1512 (1985)  
CBA Ethics Comm. Abstract 98/99-10

Other Materials

Tom Arnold, *Collaborative Dispute Resolution: An Idea Whose Time Has Come*, 16 A.L.I.-A.B.A. 379, 381 (2000)

Joshua Isaacs, *A New Way to Avoid the Courtroom: Ethical Implications Surrounding Collaborative Law*, 18 Geo. J. Legal Ethics 833, 835 (2005)

John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L. J. 1315 (2003)

John Lande & Greg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280, 283 (2004)

Larry R. 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, 141-42 (2004)

Elizabeth K. Strickland, *Putting "Counselor" Back In The Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. Rev. 979, 1001 (2006)

Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation 1*, ABA Manual Section of Family Law (2001)

\* With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course of conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." See Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

\* On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, Conflict of Interest: Current Clients, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

## **Addendum to Opinion 115**

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. Most importantly for Opinion 115, the text of Colo.RPC 1.7 was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the Committee concludes that the practice of Collaborative Law, as defined in Opinion 115, creates a “concurrent conflict of interest” under Colo.RPC 1.7 (a) to which a client may not validly consent under 1.7 (b) for the same reasons set forth in Opinion 115.

Significant changes were also made to the Rules discussed in the section of Opinion 115 addressing Cooperative Law, including, among others, Colo.RPC 1.4, 1.6, 1.16 and 7.2. The changes to those Rules, however, do not alter the Committee’s analysis of the potential ethical pitfalls associated with the practice of Cooperative Law. Nor do the changes to Colo.RPC 1.7 alter the conclusion of Opinion 115 that Cooperative Law is not *per se* unethical, so long as the lawyer practicing Cooperative Law does not execute a disqualification agreement with the opposing party requiring the lawyers to withdraw in the event that the process is unsuccessful.