

ORANGE COUNTY BAR ASSOCIATION

Formal Opinion 2011-01 (Collaborative Family Law)

Issue: Can a family lawyer enter into a collaborative law agreement consistent with her ethical duties, notwithstanding the obligations and limitations typically imposed on the lawyers in such agreements?

Introduction:

While ethics opinions from some jurisdictions have determined that the practice of collaborative family law is not inconsistent with the ethics rules, [*see, e.g.*, ABA Formal Opin. 07-447; New Jersey Ethics Opinion 699 (2005); Kentucky Bar Ass’n Ethics Opinion, Op. E-425 (2005); North Carolina State Bar Ethics Opin. 1 (2002)], other ethics opinions have concluded just the opposite. *See, e.g.*, Colo. Bar Ass’n, Formal Ethics Opin. 115 (2007). This opinion concludes that the practice of collaborative family law under a typical four-way agreement described below does not violate California’s Rules of Professional Conduct or other California ethics law.

Factual Hypothetical:

A lawyer enters into a collaborative law agreement, identified as a four-way agreement or a participation agreement (the “Agreement”), between the parties and the lawyers involved in a family law dispute. California Family Code section 2013 permits parties to use a “collaborative law process” and defines that process as one “in which the parties and any professionals engaged by the parties to assist them agree in writing to use their best efforts and to make a good faith attempt to resolve disputes related to the family law matters as referenced in subdivision (a) on an agreed basis without resorting to adversary judicial intervention.” The Agreement typically requires that (1) the lawyers’ participation is limited to the negotiation and facilitation of a cooperative settlement; (2) the lawyers must terminate their representation in the event that the process is unsuccessful and the matter proceeds to litigation; (3) the lawyers and the parties must disclose all relevant facts and documents without any formal requests for discovery, including full voluntary disclosure of all relevant financial information; and (4) a lawyer will withdraw from further representation if the lawyer determines that his client is participating in bad faith.

The Agreement contemplates that financial and mental health professionals will coordinate their services in the collaborative process to reach a cooperative settlement. The Agreement also provides that all information and documents disclosed or generated during the collaborative process will be kept in confidence, and shall be inadmissible in court. The withdrawal provision of the Agreement is intended to motivate the parties to settle the matter without the necessity of litigation.

Discussion:

I. The Duty of Competence

A lawyer must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Cal. Rules Prof. Conduct, Rule 3-110(A). Competence includes application of diligence, learning and skill, and the mental, emotional and physical ability reasonably necessary for the performance of such service. Rule 3-110(B).

Lawyers not experienced with collaborative family law will need to either associate or professionally consult with another lawyer reasonably believed to be competent, or otherwise acquire sufficient learning and skill before performance of the work. Rule 3-110(C). Competence includes consideration of whether the particular matter is appropriate for the collaborative process,¹ and advising the client of the availability of other processes, as well as the relative merits of all available processes, including the likely outcomes of such alternative approaches. Competence also includes advising the client of disclosure obligations, confidentiality considerations, and the evidentiary ramifications of disclosure of information pursuant to the Agreement.

II. How must the lawyer handle the limitations on the scope of representation created by the Agreement?

Because the lawyer's representation under the Agreement is limited to the negotiation and facilitation of a settlement, and the lawyer will terminate his or her representation of the client in the event the process is unsuccessful and the matter proceeds to litigation, the lawyer's representation properly is conceptualized as a representation of "limited scope." *See ABA Formal Opin. 07-447 (2007).*

In California, limitations on the scope of a lawyer's representation are permissible in some areas of practice, but impermissible in others. Cal. Rules of Prof. Conduct, Rule 3-400, Discussion.² Family law is one area in which limitations on the scope of representation are expressly permitted.³ The Orange County Bar Association ("OCBA") is of the opinion that a limitation on the scope of the representation in the family law context which excludes litigation is permissible.

¹ The International Association of Collaborative Professionals has issued Ethical Standards for Collaborative Professionals, available at <http://www.collaborativepractice.com/lib/Ethics/Ethical%20Standards%20Jan%20%2008.pdf>

² The California State Bar's Standing Committee on Professional Responsibility and Conduct has issued An Ethics Primer on Limited Scope Representation (the Primer). Available at http://www.abanet.org/legalservices/delivery/downloads/ethics_primer_on_limited_scope_representation.pdf.

³ *See* Judicial Council Form FL-950, "Notice of Limited Scope Representation," which has been approved for use in family law cases. The Limited Scope Representation Committee of the California Commission on Access to Justice also has created helpful and critical Risk Management Materials for attorneys to utilize in family law limited scope representation that may be adapted to particular limited scope representation matters. These forms may be obtained by contacting the State Bar of California Office of Legal Services or online from a link to the Commission on Access to Justice, which can be reached through <http://www.calbar.ca.gov>.

The lawyer should fully communicate the risks and benefits of the limited scope representation to the client, ensure competent representation regarding the scope of the representation, and put in place procedures that will avoid any prejudice to the client upon the withdrawal of the attorney from representation. “It is of paramount importance that any fee agreement that purports to limit the scope of the attorney’s representation be in writing, and be clear, unambiguous, and reasonable regarding the services to be performed by the attorney and client, respectively.” Primer, p. 4. The attorney must inform the client of: “(1) the limitations on the scope of the attorney’s services; and (2) the possible adverse implications of the limited scope representation.” Primer, page 5, citing *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1686-87 (1993).

Because the client is a party to the Agreement, the limited scope of the representation necessarily is documented in writing and disclosed to the client. However, the attorney must also explain to the client the possible adverse implications of the limited scope representation. In that regard, the attorney should disclose to the client the availability of other procedures that do not involve limited scope representation, and should disclose all adverse consequences of the limited scope representation to the client, including (a) the likelihood that the inability of the attorney to continue to represent the client in litigation may increase significantly the costs of the representation in the event of litigation, and (b) the advisability of consulting different counsel for other aspects of the representation.

III. Does the Agreement create a conflict of interest?

Pursuant to California Rules of Professional Conduct, Rule 3-310(B), a member shall not accept representation of a client without providing written disclosure to the client where (1) the member has a legal relationship with a party or witness in the same matter; . . . or (2) the member has a legal relationship with another person the member knows or reasonably should know would be affected substantially by resolution of the matter. Disclosure means “informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client.” Cal. Rules Prof. Conduct, Rule 3-310(A)(1).

Under the circumstances contemplated by the hypothetical factual situation, by virtue of the Agreement, the lawyer has a legal relationship with the adverse party and the adverse party’s counsel. In addition, the lawyer’s legal relationship with the adverse party and the adverse lawyer pursuant to the Agreement necessarily would be affected substantially by the resolution of the matter because the contemplated resolution of the matter will effectuate the parties’ divorce. Accordingly, the lawyer is obligated by Rule 3-310(B)(1) to disclose that relationship in writing to the client. In addition, the lawyer must advise the client of the foreseeable adverse consequences to the client of the Agreement. For example, one foreseeable adverse consequence is that the lawyer can be forced to withdraw from representation of the client by the adverse party if the adverse party elects litigation, causing the client to incur the expense of engaging new counsel to represent the client in the litigation. The potential adverse consequences to the client of the relationship also include the possible compromise of some of the client’s interests in order to achieve settlement of the dispute. In the opinion of the OCBA, lawyers

encourage clients to make such compromises to achieve settlements in a variety of contexts; however, the potential conflict of interest arises from the lawyer's commitment in the Agreement to the collaborative law process and to the adverse party. While written consent of the client is not required by Rule 3-310(B)(3), obtaining a written confirmation of the client's consent to the arrangement is advisable.

As a practical matter, the client already is aware of the relationship because the client also is a party to the Agreement. If the Agreement itself includes the disclosures required by Rule 3-310(B)(3), those disclosures would satisfy the lawyer's obligations under that Rule. Cal. State Bar Formal Opin. 1995-139 (insurance contract satisfied disclosure requirement). More likely, the required disclosures of the potential adverse consequences are appropriate for the lawyer's engagement letter with the client.

IV. Duty of Candor

Under the Agreement the lawyer will engage in communications with the adverse party, and the adverse party's lawyer. In connection with such communications, the lawyer may use only such means as are consistent with the truth, Cal. Bus. & Prof. Code §6068(d), and may not engage in any deceit or collusion with intent to deceive the other parties to the Agreement. Cal. Bus. & Prof. Code § 6128(a) (providing such conduct constitutes a misdemeanor). Nor shall the lawyer suppress evidence the member's client has a legal obligation to produce. Cal. Rules of Prof. Conduct, Rule 5-220.

Having consented in the Agreement to full voluntary disclosure of all relevant facts and documents, should the client refuse to comply, the lawyer must withdraw from the representation in the manner discussed further below. Cal. Rules of Prof. Conduct, Rule 3-700(B)(2).

V. How must the lawyer handle issues of confidentiality under the Agreement?

The Agreement requires that the parties "disclose all relevant facts and documents without any requests for discovery, including full voluntary disclosure of all relevant financial information." While much of this information already would be subject to disclosure through the normal discovery process, because the Agreement frames the obligation very broadly, it could encompass the disclosure of otherwise confidential information. In addition, the Agreement eliminates the necessity of a discovery request, and the corresponding option of withholding production of information not requested.

It is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e). A lawyer shall not reveal confidential information, that is, information protected from disclosure by Business and Professions Code section 6068(e), without the "informed consent of the client." Cal. Rules of Prof. Conduct, Rule 3-100. *Commercial Standard Title Co. v. Super. Ct.*, 92 Cal. App. 3d 934, 945 (1979).

The Agreement reflects the consent of the client to the disclosure of all relevant information without a request for discovery of the information. However, the Agreement itself does not necessarily reflect whether or not the consent given by the client was “informed.” The lawyer should inform the client that, although some of the same information would be disclosed in litigation, it is possible that not all of the same information would be requested or would be disclosed, and that the client’s case might be resolved differently as a result of the differences in the disclosure requirements of the Agreement as compared to discovery under family law.

VI. Does the Agreement impermissibly limit the member’s right to practice law?

In the Agreement, the lawyer has agreed that, in the event the clients do not resolve their dispute, the lawyer will not represent the client in future litigation pertaining to the family law dispute. This raises the issue whether this provision is an impermissible restriction on the member’s ability to practice law. The OCBA concludes that it is not.

Rule 1-500(A) of the California Rules of Professional Conduct provides that a member shall not be a party to or make an agreement that restricts the right of a member to practice law. This rule makes clear that the practice, in connection with a settlement agreement, of proposing that a member refrain from representing *other clients* in similar litigation, is prohibited. Cal. Rule of Prof. Conduct, Rule 1-500 *Discussion* (emphasis added); *see also* ABA Formal Opin. 00-412. Counsel may not demand, suggest, or agree to such provisions. *Id.*

The purpose of the ethical rule prohibiting a lawyer from entering into any agreement restricting the lawyer’s right to practice is the preservation of a prospective client’s choice of competent counsel by removing contractual barriers to accepting or competently representing clients. Restatement (Third) the Law Governing Lawyers § 1.5.D Int. Note. For example, a lawyer entering into a settlement agreement cannot agree that she will not represent other clients in connection with similar matters, nor can an adverse lawyer request such an agreement, because such an agreement may limit the choice of counsel available to future clients.

Although a collaborative law agreement may prevent a particular lawyer from continuing to represent a particular client, in a specific matter in litigation, as a result of the Agreement, this is not the type of provision targeted by the rules prohibiting restrictions on the lawyer’s right to practice law. (Kentucky Bar Ass’n Ethics Opin. KBA E-425, at 7). That is because, in the case of the Agreement, the client who in the future may be restricted from using his lawyer of choice has agreed in writing (in the Agreement) that he cannot use the same lawyer should litigation follow the attempted collaborative settlement. The opinions and cases enforcing Rule 1-500(A) against restrictive agreements generally seek to protect a future, unknown client – or at least a future client who did not have the opportunity to consent to the arrangement – from losing his or her right to counsel of choice in the future.

The collaborative law Agreement does not constrain the lawyer's right to practice altogether, but instead constrains only the lawyer's opportunity to represent a particular client, in a particular matter, pursuant to an agreement with the affected client. The OCBA's opinion is that such an agreement does not violate Rule 1-500.

VII. How must the lawyer withdraw from representation?

Before withdrawing from the representation, the attorney must "take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with Rule 3-700(D), and complying with all applicable laws and rules." Cal. Rules of Prof. Conduct, Rule 3-700 (A)(2). A member may withdraw from employment if the client knowingly and freely assents to termination of employment. Cal. Rules of Prof. Conduct, Rule 3-700(C)(2)(5).

Because the representation may cease prior to the conclusion of the client's matter, the attorney's obligations upon withdrawal should be expressly addressed in the Agreement or in a separate written agreement between the attorney and the client. Primer, p. 6.

If the circumstances pertaining to the conclusion of the attorney's services have been adequately addressed at the outset of the attorney-client relationship, and there have been no unforeseen developments that have materially altered the situation, an advance agreement between the attorney and client setting forth the parameters for withdrawal should be sufficient to prevent reasonably foreseeable prejudice to the rights of the client.

In Family Law matters, the Judicial Council has created a form that permits the attorney to request an order relieving him or her as counsel because the limited scope representation has been completed as agreed. This application is served on the client, and if the client disagrees, he or she has the right to file an objection with the court.

Conclusions:

The lawyer's participation as a party to the Agreement, along with parties and lawyers involved in a family law dispute, does not violate the California Rules of Professional Conduct or other ethics law in California. The Agreement implements a permissible form of limited scope representation. Specifically, the OCBA finds that:

- (1) The lawyer must exercise competence in advising the client regarding optional processes, including the likely outcomes with alternative processes, and advantages and disadvantages of entering into the Agreement. In addition, the lawyer must competently perform the collaborative process.
- (2) The potential conflict of interest created by a collaborative law agreement does not require the lawyer to withdraw from representation, and may be resolved by disclosure of the potential adverse consequences of the conflict of interest to the client.
- (3) Even when engaged in the collaborative law process, the lawyer must continue to satisfy his or her duty of confidentiality, and may do so by

obtaining the client's informed consent to disclosure of otherwise confidential information, including financial information, even without a request for discovery.

- (4) Entering into a collaborative law Agreement does not impermissibly restrict the lawyer's right to practice law. The limitation on the representation resulting from the Agreement, pursuant to which the lawyer agrees not to represent the client in litigation, is a permissible limitation on the scope of the representation.
- (5) If the lawyer participating in a collaborative law Agreement must withdraw from representation, the withdrawal must be accomplished without prejudice to the client other than that inherent in and contemplated by the parties in entering into the Agreement.

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