A Warning to Collaborators
Colorado bar ethics panel takes aim at a growing ADR practice

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ONE OF THE MOST RAPIDLY expanding forms of alternative dispute resolution in family law may have found its growth slowed.

In February, the Colorado Bar Association’s ethics committee declared that collaborative law, a process by which lawyers agree to withdraw if settlement talks collapse, is per se unethical. Although nonbinding, the opinion is significant because it is the first time that this form of ADR has been declared in violation of a state’s rules of professional conduct.

The idea behind collaborative law, its proponents say, is to encourage settlement by easing the exchange of information between parties. The process would bar the use of that information and require the lawyers to withdraw should the dispute go to court. (See “Collaborative Counselors,” June 2006 ABA Journal, page 52.)

The lawyers and the parties agree to these and other terms at the outset of the process in a contract termed a “four-way agreement.” Part of the rationale for the agreement is to encourage the parties to settle by imposing the threat of having to find new lawyers if they go to court.

However, the ethics committee said the four-way agreement creates an insurmountable conflict of interest among lawyers and clients. The agreement violates state 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.” Ethics Opinion 115, Ethical Considerations in the Collaborative and Cooperative Law Contexts (Feb. 24).

Nor is the agreement permissible if the client consents, the opinion says, because the conflict impairs the lawyer’s independent judgment about the need for litigation.

Meanwhile, the opinion does endorse a little-used offshoot of collaborative law, known as cooperative law, that dispenses with the four-way agreement.

Nevertheless, the opinion worries Colorado lawyers who use collaborative law—especially family lawyers—as well as proponents of the practice nationwide.

“It’s a nightmare,” says Denver family law practitioner Kathleen Hogan. “The opinion states very strongly in very definite terms that the problem is with attorneys signing the four-way agreement.”

Adds Hogan: “Unfortunately, the opinion also spends a lot of time on cooperative law, which is not something that anyone in Colorado does and any one of us knows what it is supposed to be.”

The opinion arose after a Colorado lawyer and collaborative law practitioner informally asked the bar’s ethics committee to review the process. The committee decided to issue the opinion because of the rapid growth of collaborative law in the state, says Alexander Rothrock, a Denver-area lawyer who is a member of the committee.

LIMITED INROADS
ALTHOUGH COLLABORATIVE law has expanded rapidly in the field of family law, it has been slow to gain traction outside that area of practice. Critics have long charged that the four-way agreement places too much power in one party’s hands. If one party quits, the entire process fails.

Ohio State University law professor Christopher Fairman, who studies ADR ethics, has long been concerned about how the collaborative model fits into the current ethical constructs of the ABA Model Rules of Professional Conduct. The Colorado opinion goes to the very heart of the problem, he says.

“The opinion explicitly states that the collaborative agreement makes the lawyer beholden to a third party, and that limits the lawyer’s ability to represent his client—so they can’t do it.”

Five other jurisdictions, including New Jersey, Pennsylvania and Kentucky, have weighed in on collaborative law, and while all have raised concerns about the four-way agreement, none has found it unethical, Fairman notes.

FOOTNOTE IN QUESTION
BUT THE COLORADO ETHICS OPINION does not necessarily spell the death knell for collaborative law in the state. A footnote suggests that lawyers can lift the ethical cloud by limiting the agreement to the parties, says Rothrock, who stressed that he was speaking for himself rather than the committee.

“Footnote 11 is important,” he says. “It’s the fix. If you do it as a two-way agreement and not a four-way agreement so that it removes the attorney’s responsibility to the other counsel and the other party, [that] removes the conflict.”

In suggesting this quick fix, however, collaborative law practitioners complain that it guts the collaborative process and morphs into cooperative law, which does not require lawyers to withdraw from the process should settlement talks fail, Fairman says.

Hogan, for her part, thinks the footnote, if anything, creates even more of a dilemma. Collaborative law has developed a considerable following, including international organizations with resources to train...
lawyers and answer their questions, among them the International Academy of Collaborative Professionals. By contrast, cooperative law is practically nonexistent.

Hogan notes that there are few documented uses of the cooperative model, and most practitioners would be unsure how to proceed without the four-way agreement.

“The opinion will give Colorado a black eye on the national scene because at the same time our ethics opinion says it is per se unethical, other states have gone the other way,” Hogan says.

Proponents of collaborative law also fear the ethics opinion will harm efforts to formalize its use. The National Conference of Commissioners on Uniform State Laws has formed a drafting committee for collaborative law, which is charged with coming up with model statutory language.

“The concern is how to write a statute to allow for collaborative law to say that this is an ethical, legal practice,” Fairman says.