

# The Ethics of Collaborative Law

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In an ancient parable—sometimes Hindu, sometimes Buddhist, sometimes Sufi—a group of blind men examines an elephant. One touches the trunk and says that an elephant is like a snake. One touches the legs and says that an elephant is like a tree. One touches the tail and says an elephant is like a rope. One touches an ear and says an elephant is like a hand fan.

None is wrong, but none is right.

Discussion of the ethics of Collaborative Law is in a similar situation. Scholars, practitioners, and various state and national ethics committees have weighed in, sometimes reaching startlingly different conclusions. In my view, these differences can best be explained by carefully examining what, exactly, their proponents were looking at when they described the process of Collaborative Law, and how they then characterized its ethical issues.

Collaborative Law is a contractual creation, and its ethical implications thus depend on careful analysis of the contracts that its practitioners use. Neither legal ethicists nor dispute resolution scholars are used to this—we normally assume that the profession's ethics codes will spell out our responsibilities for us, not that the contracts in which we enter will themselves trigger those codes. But this is exactly the situation in the Collaborative Law context. Collaborative lawyers use contract to alter the contours of the lawyer-client relationship, and in doing so those contracts themselves become the locus for ethical inquiry.

This article argues that Collaborative Law can be permissible under the current rules of legal ethics. At the same time, it contends that this is not a foregone conclusion, and that certain Collaborative Law contracts or arrangements are more suspect than others. In short, it argues that collaborative lawyers need to be extremely careful in *how* they go about their practice if they wish to withstand ethical scrutiny.

Given these conclusions, this article necessarily rejects the analysis of the recent Colorado Ethics Committee Opinion 115 (“Opinion 115”) holding that Collaborative Law creates an impermissible conflict of interest under Rule of Professional Conduct Rule 1.7.<sup>1</sup> In addition, however, it similarly rejects the analysis of the American Bar Association's even more recent Opinion 07-447 (“Opinion 447”), which attempted to rebut Opinion 115 and claim that there is no conflict of interest problem implicated by the practice.<sup>2</sup> Neither opinion gets it right because each oversimplifies both the process of Collaborative Law and the ethical issues at stake. I attempt to provide a more nuanced discussion than either of these authori-

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1. Colorado Bar Ass'n Ethics Comm., Formal Op. 115 (2007): Ethical Considerations in the Collaborative and Cooperative Law Contexts, *available at* <http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//>.

2. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

ties, in order to explore honestly the intricacies of the ethics of Collaborative Law while still reaching practical conclusions about its compliance with the ethics rules.

I am also convinced, however, that Collaborative Law practitioners have become too comfortable that the “big tent” of Collaborative Law can ethically accommodate almost any contractual variation on the practice. Because there is no consensus or clarity about which contractual forms are or are not compliant with the ethics codes, practitioners seem to have jumped from the belief (whether founded or not) that *some* Collaborative Law contracts are (or should be) permitted to the assumption that almost any contractual arrangement is likewise permissible.

The Collaborative Law bar has at times felt unfairly attacked or criticized on ethical grounds. At the same time, as an ethics scholar I have to say that I have at times felt that Collaborative Law practitioners have been too blasé about the ethical complexities of their experiment. I routinely hear, or see in print, broad, sweeping statements about Collaborative Law’s obvious compliance with the ethics codes. This is a deeply mistaken and naïve view. Although collaborative experimentation with the lawyer-client relationship can produce real benefits, it should not be undertaken lightly. The goal of this article is to map some of the potential ethical dangers for collaborative lawyers and their clients, and to begin to give advice on avoiding these pitfalls.

Part I describes Collaborative Law. This is not merely a summary, however. Instead, Part I analyzes the various contractual combinations that can be called “Collaborative Law” as a precursor to a more rich and complete ethical analysis of this type of practice. Unfortunately, recent ethics opinions have floundered at this step, depending upon mischaracterizations and oversimplifications. Part II discusses the existing ethics opinions on Collaborative Law, with focus on Colorado’s Opinion 115 and the American Bar Association’s Opinion 447. Part III then analyzes the two major ethical issues in Collaborative Law—the Rule 1.2 limited scope issue and the Rule 1.7 concurrent conflict issue—to try to create clarity and provide guidance for collaborative lawyers.

## I. WHAT IS COLLABORATIVE LAW? THE DIVERSITY OF CONTRACTUAL ARRANGEMENTS

Collaborative Law began in the early 1990s in the family law context. The basic idea is simple and ingenious. In Collaborative Law, both divorcing parties agree to hire self-identified “collaborative lawyers.” The lawyers and parties then agree that the attorneys will serve their clients only during negotiations. In other words, if the parties fail to settle, the attorneys will be disqualified from taking the case to trial and will instead withdraw.<sup>3</sup>

Because the legal ethics codes have no specialized Collaborative Law provision through which to enact such an arrangement, lawyers and clients interested in

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3. See generally PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001). For a useful overview of Collaborative Law, see William H. Schwab, *Collaborative Law: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004).

the process must formalize it by contract. Typically, each lawyer-client pair signs a “limited retention agreement” (LRA) or “limited scope agreement” that limits the scope of the lawyer-client relationship by requiring withdrawal if settlement fails.<sup>4</sup> In addition, however, the parties and their lawyers may sign a “four-way” document that details the interest-based, problem-solving nature of the Collaborative Law process and requires full voluntary disclosure of all information material to the divorce. The four-way agreement may also contain the mandatory withdrawal language.

This model has clearly appealed to many lawyers and clients. The Collaborative Law movement has grown rapidly in the last decade, and there are now more than one hundred and fifty local Collaborative Law groups around the country. The process provides incentives for lawyers and clients to use an interest-based, problem-solving negotiation approach rather than the pre-litigation adversarial posturing that can typically occur in divorce cases. The disqualification arrangement motivates the attorneys to seek settlement because they will not be able to collect additional fees by taking the case to court. Simultaneously, mandatory disqualification makes it costly—although not impossible—for a client to litigate because he or she will need to hire a new attorney and get that lawyer up to speed on the divorce.

Most important, each side knows *at the start* that the other has similarly tied its own hands by making litigation expensive. By hiring two Collaborative Law practitioners, the parties send a powerful signal to each other that they truly intend to work together to resolve their differences amicably through settlement.<sup>5</sup> It is this signal that explains the rapid and impressive success of the Collaborative Law process. The intention is to never *use* the disqualification provisions—by agreeing to mandatory attorney withdrawal, the parties credibly commit to settlement so that litigation (and attorney withdrawal) becomes far less likely.

Overall, the evidence suggests that Collaborative Law has lived up to its promise. One study, for example, found that Collaborative Law negotiations were indeed more problem-solving and interest-based, as well as more constructive in spirit.<sup>6</sup> It found no evidence that weaker parties fared worse in Collaborative Law than they would have otherwise, and that both lawyers and clients were extremely satisfied with the process overall.

Most fundamentally, Collaborative Law has the potential to be a relationship-preserving process, rather than relationship-destroying. As spouses dissolve their marriage, they may nevertheless need to go on working together productively—particularly if they have children and must share custody, work out visitation arrangements, and generally learn to parent separately but in harmony. Collabora-

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4. Note that the limited retention agreement may be verbal instead of written. Model Rule 1.2 does not require a writing. MODEL RULES OF PROF. CONDUCT, R. 1.2 (2007). Most lawyers, however, would normally embody their retainer agreement in a written contract. I will argue below that this may be ethically required in Collaborative Law circumstances. See *infra* discussion on page 153.

5. For an extensive discussion of how Collaborative Law serves as a signaling device, see Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005).

6. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 58-59 (2005), available at [http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005\\_1/2005\\_1.pdf](http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf). See also Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179.

tive Law seems to offer clients a way through the divorce process that puts their long-term relationship in less jeopardy.

The success of Collaborative Law both derives from and has caused a great deal of experimentation by collaborative lawyers with both the form and function of Collaborative Law. The two types of collaborative documents—limited retention agreements and four-way agreements—create several possible contractual configurations depending on what, exactly, the lawyers and clients sign and what, exactly, those documents say. For clarity later in this article, let me lay out these configurations here.

First, in what I will call a *Retention Agreements Only* scenario, the two lawyer-client pairs may each sign limited scope agreements. The divorcing wife and her lawyer would sign one such agreement; the divorcing husband and his lawyer would sign another. In this first configuration, imagine that the four do *not* sign a four-way agreement. They instead agree verbally or implicitly on the process to be followed, but each is aware that mandatory attorney withdrawal is in effect because of the parallel limited retention agreements.

Second, in what I will label an *LRAs plus Process Four-Way* scenario, the lawyers and clients sign limited retention agreements as above. In addition, however, they also sign a four-way document. In the “process” four-way scenario, that four-way agreement does not contain disqualification language. In other words, the four-way agreement may contain process guidelines for how the negotiations will unfold (e.g., that they will be interest-based, respectful, etc.), but it will not also contain a commitment to attorney withdrawal in the event of failure to settle.

Third, in an *LRAs plus Disqualification Four-Way* scenario, the attorneys and clients sign separate limited retention agreements and then a four-way, as above. The four-way agreement, however, *does* reiterate the mandatory attorney withdrawal language found in the two separate LRA documents. That four-way document is signed by both clients and both lawyers.

My understanding is that this structure—LRAs plus a disqualification four-way—is the original and most common structure for Collaborative Law. In Pauline Tesler’s well-known American Bar Association book *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, for example, the sample forms she presents follow this structure.<sup>7</sup> She provides a sample limited retention agreement that is clearly designed for just a lawyer and client to sign, which explicitly states that it is a limited scope agreement. Other prominent authors and Collaborative Law groups similarly offer either amending paragraphs to add to a lawyer’s standard retainer agreement<sup>8</sup> or full-blown limited scope agreements that are to be signed at the start of representation.<sup>9</sup>

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7. See TESLER, *supra* note 3, at 137-145 (presenting a lawyer-client limited retention agreement and a separate four-way form titled “Principles and Guidelines for the Practice of Collaborative Law” that contains a withdrawal provision).

8. See, e.g., Int’l Academy of Collaborative Professionals, Collaborative Law Paragraph for Retainer Agreement (on file with author).

9. See, e.g., SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 383-386 (2004).

Tesler also offers a sample four-way process agreement, titled “Principles and Guidelines for the Practice of Collaborative Law,” that is for all four to sign. The four-way contains the following paragraph:

We understand that our lawyers’ representation is limited to the Collaborative Law process and that neither of our lawyers can ever represent us in court in a proceeding against the other spouse. In the event a court filing is unavoidable, both lawyers will be disqualified from representing either client.<sup>10</sup>

This is very typical<sup>11</sup> and often-repeated language.<sup>12</sup>

There are three more variations worth noting, however. The fourth is what I will call a *Disqualification Four-Way Only* scenario. The lawyers and their clients do not create separate lawyer-client limited scope agreements but instead only sign a four-way document. In order to be considered Collaborative Law, in such a scenario the four-way agreement would necessarily contain the mandatory attorney withdrawal language. This agreement would obviously be signed by both lawyers and both clients.

Fifth, practitioners have developed a related negotiation process, termed “Cooperative Law,” that is essentially a *Process Four-Way Only* scenario as opposed to a “disqualification four-way only” agreement.<sup>13</sup> Cooperative Law is not nearly as developed as Collaborative Law, and some practitioners doubt its longevity or usefulness. Nevertheless, it fits into the taxonomy presented here, and it is certainly in use to some extent. This approach, like Collaborative Law, involves a four-way process agreement to share information, problem-solve, and generally work together amicably to achieve settlement. Unlike Collaborative Law, however, the Cooperative Law four-way agreement does *not* involve mandatory disqualification in the event of litigation, and the lawyers and clients have not signed limited retention agreements with disqualification language. The negotiating attorneys are thus free to proceed to trial if necessary. (Although lawyers could theoretically sign a separate retainer agreement with their clients in a Cooperative Law situation, there is no structural need to do so because of the lack of mandatory disqualification. For simplicity, I will therefore assume that there are not limited retention agreements in Cooperative Law practice.)

Finally, the Colorado Ethics Committee’s Opinion 115 recently proposed another contractual possibility in which the mandatory attorney withdrawal lan-

10. TESLER, *supra* note 3, at 145.

11. *See, e.g.*, GUTTERMAN, *supra* note 9, at 381 (providing example of Collaborative Law contracts that follow this structure).

12. *See* Massachusetts Collaborative Law Council, Principles and Guidelines, “Disqualification by Court Intervention,” <http://www.massclc.org/principles.htm>, *reprinted in* 1 COLLAB. L.J. 17 (2003). In the forthcoming second edition of her book, Tesler’s sample form alters this language somewhat, but maintains the same general wording:

We, the parties, understand that the Collaborative lawyers’ representation is limited to the Collaborative Divorce process. Thus ... we, the parties, have entered into a binding agreement with one another and with our respective lawyers that neither lawyer can ever represent either of us in court in proceedings against the other spouse ....

PAULINE TESLER, COLLABORATIVE LAW 6.3.15 (2d ed., forthcoming).

13. *See* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RES. 619, 632 n.62 (2007) (providing citations on Cooperative Law).

guage might be contained in a client-to-client contract signed by neither lawyer.<sup>14</sup> We could call this innovation the *Client-Client Agreement* scenario. It is most plausible, as I will show in Part II, that such a client-client agreement would be used in conjunction with LRAs, and possibly also with a process four-way agreement.

These are the dominant structures in practice and possibility. I must discuss two significant complications, however, before going on.

First, whether one is discussing disqualification or process four-way documents, one can imagine a spectrum of four-way agreements ranging from unbinding statements of principle or belief, on the one hand, to clearly contractual statements of binding obligation, on the other. I will call these two extremes *Hortative* and *Contractual*, respectively. In between, one would find hybrid documents that are unclear about whether they are meant to be legally enforceable contracts.

Why does this matter? To the extent that Client A or Lawyer A feared that Client B and Lawyer B might renege on their collaborative commitments and choose to litigate using Lawyer B, Client A and Lawyer A might want the ability to enforce their disqualification four-way agreement to disqualify Lawyer B. Whether they brought a direct contract claim or made a motion to disqualify by referring to their four-way agreement, Client A and Lawyer A would need to characterize the four-way as contractual, rather than hortative, in nature. On the other hand, if the four-way agreement is not contractual but instead merely an aspirational document intended to signify symbolic, but not legally enforceable, agreement to the Collaborative Law process, then Client A and Lawyer A would have no means to enforce it. One's understanding of the four-way could, therefore, make a significant difference. (A contractual *process* four-way could also be enforceable—if, for example, B violated disclosure provisions in a process four-way, the A side might seek contractual redress.)

As far as I can tell, most four-way examples found in Collaborative Law texts are framed as hortative statements of principle. The most common are titled "Principles and Guidelines for the Practice of Collaborative Law." These widely-used guidelines include:

We acknowledge that the essence of "collaborative law" is the shared belief by participants that it is in the best interests of parties and their families in typical family law matters to commit themselves to settling all issues and avoiding litigation. . . .

We commit ourselves to settling our case without court intervention.

We will work to protect the privacy, respect, and dignity of all involved, including parties, attorneys, and experts. . . .

We shall maintain a high standard of integrity and specifically shall not take advantage of each other or of the miscalculations or inadvertent mistakes of others, but shall identify and correct them.

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14. See Colorado Bar Ass'n Ethics Comm., Formal Op. 115, at n.11.

We understand that our attorneys' representation is limited to the Collaborative Law process and that neither of our attorneys can ever represent us in court in a proceeding against the other spouse.

Both parties and attorneys hereby pledge to comply with and to promote the spirit and written word of this document.<sup>15</sup>

This language is written to be more hortative than contractual. It is not framed, for example, in the terminology of binding obligations (e.g., "we hereby agree . . .", "each party is obligated . . .", "in the event of breach . . .", "each party can enforce by . . ."). It is titled "Principles and Guidelines," not "Agreement to . . ." or "Contract." The final signature lines are preceded by the above-quoted language, "[b]oth parties and attorneys hereby pledge to comply," which suggests something less than a legal agreement.

Perhaps most telling, these statements of principles and guidelines—also sometimes called a "statement of understanding"<sup>16</sup>—do *not* include certain terms that one would expect if this were a true, enforceable contract. For example, there is no dispute resolution clause. Given the collaborative focus of these practitioners, one might think that they would include a mandatory mediation and/or arbitration provision if they expected this four-way to be enforceable. Similarly, there are no choice of law, jurisdictional, or damages provisions, which one might, again, expect.

In short, I do not believe that many of the four-way "agreements" currently in use were actually intended as binding contracts, or, regardless of subjective intent, could be enforced as such. Instead, most seem to be hortative statements of process principles that all hope to follow but do not expect to have to enforce.

That said, the hortative-to-contractual spectrum is nevertheless relevant. I have found some examples of hybrid four-ways that seem to lean more towards the contractual pole, even if they are not clearly contractual. For example, the Collaborative Law Alliance of New Hampshire's sample four-way form is titled "*Agreement to the Principles and Guidelines of Collaborative Law.*"<sup>17</sup> Although it contains many of the same provisions quoted above, they have been reframed in somewhat more contractual language. For example, it contains a disqualification term that states:

The parties understand that their lawyer's representation is limited to the Collaborative Law process. Each lawyer serves as his/her client's advisor, confidant, counselor, advocate, and negotiator. However, the lawyer cannot represent the client in court, or be named as the client's lawyer on any document filed with the court other than an agreement of the parties, or go to court in person with the client other than to the uncontested divorce. . . .

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15. GUTTERMAN, *supra* note 9, at 390-393 (2004).

16. *See, e.g.*, Collaborative Council of the Redwood Empire, Statement of Understanding for Collaborative Team Process (on file with author).

17. *See, e.g.*, Collaborative Law Alliance of New Hampshire, Agreement to the Principles and Guidelines of Collaborative Law, <http://www.collaborativelawnh.org/agreement.pdf> (emphasis added).

Both parties and their lawyers acknowledge that they have read this Agreement, understand its terms and conditions, and agree to abide by them.<sup>18</sup>

This language is clearly more contractual than the generalized statement of principle discussed above. The final quoted paragraph, for example, sounds much more like a binding, enforceable agreement. At the same time, I label this a hybrid example because this form still leaves out many terms (e.g., dispute resolution, forum selection, choice of law, etc.) that one expects to see in an enforceable contract.<sup>19</sup>

I have also found examples of clearly contractual four-way agreements.<sup>20</sup> One, for example, is titled “Collaboration Contract,” and it contains various terms phrased in contractual language. The final set of terms before the signature page, for example, is titled “Promise to Follow Contract,” and it contains the following provision: “The Participants agree to be bound by the terms of this Contract and to promote the spirit of Collaboration.”<sup>21</sup>

This entire document seems intended as a binding set of obligations. Although it does not contain specific damages terms or a dispute resolution provision, this example looks far more like a traditional contract than the hortative or hybrid examples discussed above.

Similarly, another Collaborative Law four-way agreement ends as follows: “We have read this Agreement in its entirety, understand its content and agree to its terms.”<sup>22</sup>

Another states: “Both parties and their attorneys hereby pledge to comply with and to promote the spirit and written word of this document and to execute and incorporate this document into the Stipulation and Order re: Collaborative Law.”<sup>23</sup> (This is one way to transform the four-way document from a hortative statement of principle into an enforceable contract.)

This variation—from hortative to contractual—is intriguing. We simply do not know whether most Collaborative Law professionals and their clients believe that the four-way documents they are signing are legally binding. Collaborative lawyers certainly often talk about these agreements as if they are contractual. As Sheila Gutterman, a noted collaborative lawyer, has written, the Collaborative Law process “mandates the total *contractual* commitment to a collaborative outcome *without litigation*, made by *all* participants at the start of the process.”<sup>24</sup> But

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18. *Id.* at arts. III(A), XVII.

19. Another hybrid example is the “Collaborative Family Law Process Agreement” put forth as a model by the International Academy of Collaborative Professionals. This document purports to be an agreement, as opposed to merely a statement of principles, and it contains more contractual language (e.g., “we agree,” “we pledge,” etc.) (on file with author).

20. *See, e.g.*, The Lanark Collaborative Law Association, Collaborative Law Agreement (on file with author); Medicine Hat Collaborative Law Contract (on file with author); Collaborative Law Institute of Texas, Collaborative Law Participation Agreement (on file with author).

21. Cincinnati Academy of Collaborative Professionals, Collaboration Contract, available at [http://www.collaborativelaw.com/4-1\\_Participation-Agreements.cfm](http://www.collaborativelaw.com/4-1_Participation-Agreements.cfm).

22. Ontario Collaborative Law Task Force, Collaborative Practice Participation Agreement (on file with author).

23. Collaborative Law Association of Contra Costa, Collaborative Law Process, Goals and Commitment, available at <http://www.collaborativelawsource.com> (follow “Principles” hyperlink).

24. Sheila Gutterman, *Collaborative Family Law—Part II*, 30 COLO. LAW. 57, 57 (Dec. 2001).

these lawyers are clever, and they clearly know how to draft a binding contract. If they have chosen to use far more hortative language, it is probably on purpose. For now, it suffices to understand that this spectrum of enforceability exists. Later we will examine its ethical consequence.

The second of our two complications arises only within the subset of four-ways that *are* contractual in nature. Assuming that the four-way document is contractual rather than hortative, are both a client and a lawyer who sign the four-way able to enforce it? In other words, who exactly is a real party to a contractual four-way? Assuming Client A was not interested in enforcing against Client B or Lawyer B, could *Lawyer A* independently enforce the four-way? Would there be privity and standing to do so?

In a contractual disqualification four-way scenario, for example, one can imagine two different versions of the four-way. In one version, the lawyers would explicitly or implicitly take on contractual obligations to each other (and/or each to the opposing client) vis-à-vis the mandatory withdrawal provision. In an explicit form, such an agreement would actually say that the lawyers were in contractual privity with each other, and that one or the other of the lawyers could thus enforce the mutual withdrawal provision even without their individual client's consent. I will call this a "*Lawyer Privity*" version of a contractual disqualification four-way agreement.<sup>25</sup>

Take, for example, a situation in which the negotiation process failed and Client A decided to go to court. Imagine that Lawyer A agreed to take Client A's case to litigation, despite having signed a four-way agreement (and probably a limited retention agreement) saying that Lawyer A would be disqualified. Imagine also that Client B decided she did not really care, and that she was not going to do anything to try to have Lawyer A disqualified from representing Client A in the pending litigation. Could Lawyer B nevertheless move, on his own, to disqualify Lawyer A from that litigation as a breach of their four-way agreement?

If the answer is "yes," it is because Lawyers A and B are in privity and are actual contracting parties when they sign a disqualification four-way. If one rejects the possibility that a lawyer has an individual contractual right to enforce the disqualification of the lawyer on the other side even without her client's consent, then something else must be going on in a disqualification four-way. The second option is that the four-way is *not* intended in this sense, but is instead intended in a different way—which I will call a "*Clients Only*" version of a contractual disqualification four-way. The lawyers might, for example, be simply signing as witnesses to a client-client contract. Or they could be real signatories but not be in privity. One could even imagine that a four-way Collaborative Law agreement might explicitly state that the lawyers were not in privity and that they took on no obligations by signing the document. Finally, perhaps the disqualification provision in a disqualification four-way is not intended as a binding provision but is simply a symbolic reference to the disqualification agreements already in place in the two separate LRA contracts between the lawyer-client pairs. (This last charac-

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25. The privity issues remains in Cooperative Law as well, although there is obviously no possibility of disqualifying the other lawyer. One could still ask, however, whether a lawyer who signs a Cooperative Law four-way agreement has an independent right to enforce the process constraints in that contract even if the lawyer's client chose not to do so.

terization, of course, does not work in a Disqualification Four-Way Only scenario.)

I have found one example of a four-way document that dealt explicitly with the privity question (although I am still looking for others). Not surprisingly, it is the most contractual of the four-way documents discussed above. (Only a contractual, as opposed to hortative, four-way even raises the privity issue.) That four-way states:

It is specifically understood each Lawyer represents only the Participant who retained that attorney as her/his legal counsel. This Collaboration Contract does not alter or change the attorney-client relationship between that Lawyer and that Participant. Likewise, this Collaboration Contract does not create any legal rights or privity of contract between the non-client Participant and the other attorney.<sup>26</sup>

This is a fascinating paragraph. It disclaims the creation of privity or rights between Lawyer A and Client B, and Lawyer B and Client A. (We will return to this in Part II, when we discuss whether four-way agreements create any sort of conflict of interest.) Note, however, that even this explicit paragraph about privity does not disclaim that the lawyers may be in privity *with each other*. In other words, it is possible that under this “Collaboration Contract,” Lawyer A could sue Lawyer B in contract to disqualify Lawyer B in the event that B tried to go to court.

Just as fascinating is the omission from some clearly contractual four-way documents of any discussion of privity. As mentioned above, I have found several four-ways that I consider contractual rather than hortative. But only this one mentions privity. That leaves open a very important contractual—and ethical—set of questions. If the document itself does not determine whether the lawyers are in privity and with whom, then what should we assume about a contractual four-way? That the lawyers are not in privity with anyone? That the lawyers are in privity with each other but not with the opposing client (as in the privity example above)? Or that the lawyers are in privity both with each other and with the other’s client?

This discussion shows how complicated this privity issue may be. In any circumstance where a four-way is meant to be contractual rather than hortative, the question of lawyer privity arises. For now, I do not want to try to sort this issue out completely, or decide whether a contractual disqualification four-way agreement that is not explicit about privity is or is not actually intended in a Lawyer Privity” or “Clients Only” form. I will return to the ethical significance of these variations in Part II.

These two variables—hortative versus contractual and “lawyer privity” versus “clients only”—complicate our understanding of Collaborative Law. For me, just describing these contractual arrangements in this much detail is novel. I had not realized until recently that so much variation existed. Most importantly for our pending ethical analysis, to date all of these structures have simply been called

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26. Cincinnati Academy of Collaborative Professionals, Collaboration Contract, *available at* [http://www.collaborativelaw.com/4-1\\_Participation-Agreements.cfm](http://www.collaborativelaw.com/4-1_Participation-Agreements.cfm).

No. 1]

*The Ethics of Collaborative Law*

141

“Collaborative Law.” It should now be obvious, however, that one could say those words—like saying “it’s an elephant”—and mean two (or three or four) quite different things (*see Figure 1*).

*Contractual Possibilities*

Scenario	Location of Mandatory Attorney Withdrawal Language	Lawyer Has Ability to Withdraw if Client Proceeds to Litigation	Client Has Ability to Enforce Four-Way (including Disqualification) If Other Side Renegs	Lawyer Has Ability to Enforce Four-Way (including Disqualification) Against Other Side Even Without Client
Retention Agreements Only	In lawyer-client contracts only	Yes	No	No
LRAs plus Process Four-Way	In lawyer-client contracts only	Yes	No (Can enforce process provisions if Contractual)	No (Can enforce process provisions if Contractual and lawyers in privity)
LRAs plus Disqualification Four-Way	In lawyer-client contracts <i>and</i> four-way	Yes	Yes if Contractual	Yes if Contractual <i>and</i> lawyers in privity
			No if Hortative	No if Hortative <i>or</i> Clients Only (lawyers not in privity)
Disqualification Four-Way Only	In four-way only	Maybe (assuming four-way serves as a LRA)	Yes if Contractual	Yes if Contractual <i>and</i> lawyers in privity
			No if Hortative	No if Hortative <i>or</i> Clients Only (lawyers not in privity)
LRAs plus Client-Client Agreement	In lawyer-client contracts <i>and</i> client-client	Yes	Yes if the client-client document is Contractual	No
Process Four-Way Only (“Cooperative Law”)	None	No	Yes if Contractual (but no Disqualification)	Yes if Contractual and lawyers in privity (but no Disqualification)

Figure 1

## II. COMPETING OPINIONS: COLORADO, THE ABA, AND OTHERS

The contractual diversity discussed in Part I has created several problems. First, it has made it almost impossible to achieve a uniform description of what Collaborative Law *is*. Although both practitioners and academics—myself included—have generally *asserted* that the practice is this or that, or that this or that contractual structure is most common,<sup>27</sup> the reality on the ground has been diverse and fluid. Practitioners have been using contractual arrangements that the academic community (and the legal ethics committees) have not focused on.

This lack of consensus on what constitutes the process has now created real mischief. None of the existing ethics opinions—including the recent Colorado and ABA opinions—addresses this diversity of contractual structures. Each instead assumes that one particular structure is “Collaborative Law” and reasons from there. This necessarily limits the usefulness and accuracy of these opinions.

This Part explores the various ethical opinions that ground the debate about the ethics of Collaborative Law. In particular, it analyzes the two most recent opinions: Colorado’s ethics Opinion 115, which found that Collaborative Law creates a *per se* violation of the conflicts of interest rules, and the ABA’s Opinion 447, which states that it does not. It draws on the analysis in Part I, and on the structural variation explained by *Figure 1*, to make sense of these divergent opinions.

## A. Colorado’s Opinion 115

Prior to 2007, the ethics committees of five states—Kentucky,<sup>28</sup> Minnesota,<sup>29</sup> New Jersey,<sup>30</sup> North Carolina,<sup>31</sup> and Pennsylvania<sup>32</sup>—had addressed the propriety of Collaborative Law, and all had found it in compliance with the legal ethics codes. Three states—California, North Carolina, and Texas—had passed statutes codifying the practice.<sup>33</sup> At the same time, some practitioners and Collaborative Law scholars had expressed reservations about whether the practice complied fully with the existing ethics regime.<sup>34</sup>

In February 2007, Colorado’s legal ethics committee issued Opinion 115, the first opinion in the United States to find the practice of Collaborative Law unethical. The opinion set off a great deal of debate and controversy as collaborative

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27. See, e.g., Peppet, *supra* note 5, at 488 (describing Collaborative Law as always using an LRA plus process four-way structure).

28. Ky. Bar Ass’n Ethics Comm., Op. E-425, 3 (2005), available at [http://www.kybar.org/documents/ethics\\_opinions/kba\\_e-425.pdf](http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf).

29. Advisory opinion (on file with author).

30. N.J. S.C. Advisory Comm. on Prof’l Ethics, Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055 (2005).

31. N.C. St. Bar, Formal Op. 1 (2002), available at <http://www.ncbar.com/ethics/ethics.asp?order=0>.

32. Pa. Bar Ass’n Comm. Leg. Ethics & Prof’l Resp., Informal Op. 2004-24 (2004).

33. For a convenient listing of these opinions and statutes, see <http://www.abanet.org/dch/committee.cfm?com=DR035000>.

34. See Peppet, *supra* note 5, at 489 (“I have my doubts about whether mandatory mutual withdrawal provisions can be squared with Rule 1.2”). See also 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, 1375-78 (2003); Douglas Yarn, *The Attorney as Duelist’s Friend: Lessons from the Code Duello*, 51 CASE W. RES. L. REV. 69, 79 (2000).

lawyers struggled to understand both how this could have happened and what it meant for their practice.

To understand Opinion 115, it is important first to get a clear picture of the way in which the Committee seems to have characterized or understood the process of Collaborative Law. The Committee focused on a four-way agreement signed by both divorcing spouses and their respective lawyers. As described in Part I, such four-way contracts typically include provisions setting out the Collaborative Law process (requiring full disclosure of all relevant, material information; explaining the nature of collaborative, interest-based negotiations; expressing a preference for four-way meetings as opposed to meetings just between the lawyers; etc.). In addition, however, the Committee was clearly presented with examples of four-way agreements that *also* included the mandatory attorney disqualification provision. As the Committee put it, “[t]he 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.”<sup>35</sup>

In Part I’s terminology, the Committee seemed to believe that Collaborative Law is *always* practiced as a “disqualification four-way only” scenario.<sup>36</sup> The Opinion never mentions the separate lawyer-client limited scope agreements that often, and perhaps usually, precede such four-ways. Instead, it assumed that the contractual foundation of Collaborative Law practice is a four-way document.

In addition, the Committee seems to have assumed that all four-ways are contractual and that each lawyer is in privity with the opposing client. The above quoted language—“entered into by the parties and the lawyers in their individual capacities”—is a signal that the Committee believed that the attorneys were contracting parties *as individuals*. Opinion 115 never explicitly states that the lawyers are in privity, but it certainly seems to assume that, as we will see.

This characterization of the process is critical to the outcome of the opinion because it determines everything that follows. Having found that collaborative lawyers contractually obligate themselves to the other side by agreeing in a four-way contract to withdraw in the event that negotiations are unsuccessful, the Committee then found that “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.”<sup>37</sup> This necessarily implicates Colorado’s conflict of interest rules, in particular Rule 1.7(b), which states that “[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 the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation.”<sup>38</sup>

At this point, one can already see where the Committee is headed. Before going on, however, it is worth noting that had the Committee understood the Col-

35. Colorado Bar Ass’n Ethics Comm., Formal Op. 115, at 1.

36. See *supra* discussion on page 135 of this article.

37. Colorado Bar Ass’n Ethics Comm., Formal Op. 115, at 4.

38. COLORADO RULES OF PROFESSIONAL CONDUCT R. 1.7(b). This rule is essentially identical to MODEL RULE OF PROFESSIONAL CONDUCT R. 1.7(a)(2).

laborative Law process in one of several slightly different ways, it could easily have reached a different result. Indeed, it most likely would not have found there to be a conflict of interest in the first instance, let alone a non-consentable conflict.

First, the Committee could have considered the other contractual configurations discussed above. If, for example, the Committee had thought about the *retention agreements only* scenario, it would obviously not have found this formalistic Rule 1.7 conflicts problem. In that scenario the opposing sides never sign a document together, and thus there would not be the potential for a conflict.

Similarly, had the Committee considered an *LRA plus four-way* scenario, it still might not have found a conflict. In an *LRA plus process* four-way situation, the four-way agreement does not even contain the disqualification language. Instead, the disqualification or withdrawal language is in the LRA. In those instances the Rule 1.7 conflict would not occur, at least not as the Committee imagined it.

Third, even if the Committee considered an *LRA plus disqualification four-way* scenario, the inclusion of LRAs in the analysis might have changed the outcome. The Committee could have found that the lawyers were not truly taking on contractual disqualification obligations to the other side in the four-way. The Committee might have found that the four-way was not contractual but instead hortative—merely reiterating the language of the limited retention agreements. Or, it might have found the four-way to be contractual but determined that the lawyers were not in privity. It is not at all clear that collaborative lawyers intend to bind themselves to the other side by including a disqualification statement in the four-way—instead, that provision may be intended more as an expression of the pre-existing agreement each lawyer has already made with her client to that effect in their LRA. In other words, the disqualification obligation is not to a third party—it is to one's own client. Each side then clarifies to the other, in the four-way, that that prior lawyer-client agreement is in place.

Thus, it is only because the Committee understood the process to entail a *contractual, lawyer-privity, disqualification four-way only* structure that it found that the process necessarily creates a conflict of interest. In so characterizing the process, the Colorado Committee was at odds with the way that many Collaborative Law practitioners actually structure their agreements, as Part I showed. It was also at odds with the way in which the process seems to have been understood by the five other state committees that had considered Collaborative Law. Unfortunately, because the Committee focused narrowly on situations in which the four-way (and only the four-way) does contain a disqualification provision, it both ignored the reality that some Collaborative Law is not practiced in this way and missed an opportunity to clarify whether it would have found any of these other structures acceptable.

As stated, however, the Colorado Committee seems to have understood Collaborative Law to *always* include a contractual, lawyer-privity disqualification four-way only structure. It thus proceeded on that basis. It found that this provision created a *per se* conflict of interest and held that “a client may not consent to this conflict for several reasons.”<sup>39</sup> First, it believed that there was a “significant” likelihood of the conflict materializing (because of the possibility that negotiations

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39. Colorado Bar Ass'n Ethics Comm., Formal Op. 115.

would fail).<sup>40</sup> Second, it found that the limitation on the lawyer's ability to go to court "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."<sup>41</sup> It therefore found a per se violation of Rule 1.7.<sup>42</sup>

Some have disagreed with the Colorado Committee on this point, arguing that no conflict exists. If one understands the process as the Colorado Committee seems to have understood it, however, then I think one must agree with the Committee that a formal conflict of interest is created. In a contractual, lawyer-privity disqualification four-way only structure, the lawyers *have* taken on contractually binding obligations to the opposing client. This is a highly unusual step to take in the context of dispute settlement.

If one grants the Committee that there is a conflict, then disagreement with Opinion 115 ultimately is about the gravity of the lawyer's conflict as the Committee understood it. (This is a big "if," however, because I do not accept the Committee's very limited characterization of what Collaborative Law *is*. But assume momentarily that one accepts that characterization.) The standard, again, is reasonableness: the lawyer has to reasonably believe that the conflict will not adversely affect the lawyer's representation of the client. Is it reasonable for a collaborative lawyer to believe that they can objectively and fully represent their client even after signing a contractual four-way agreement and pledging to withdraw should negotiations fail? Some believe that it is. Although the lawyer cannot litigate the matter herself, she is not incapacitated by signing a four-way: she still can reason her way through the client's interests and alternatives, engage in legal research, and decide whether litigation is in the client's best interest.

I, however, am not totally persuaded. If the only document signed was a four-way agreement, if that agreement was contractual in nature, and if the lawyers were in privity with the opposing party, I think those lawyers would have put themselves and their clients in a very precarious position. Remember that in this scenario there is no separate limited retention agreement limiting the scope of the lawyer's representation to negotiation. Instead, the only document signed is the four-way, and that document simultaneously creates mandatory withdrawal obligations to one's client and to the other side. Can I say for certain that this is a Rule 1.7 violation? No, I cannot. But does it seem plausible for an ethics committee to find such a violation? Absolutely. In fact, to me it seems more likely than not.

Thus, although one may quickly criticize the Colorado Committee and Opinion 115, the Opinion is not surprising given the facts as the Committee seems to have understood them. Unfortunately, the Collaborative Law community set itself up for this decision by losing clarity about the lawyer's role in a collaborative process. This opened the door for the Committee to treat the Collaborative Law process as it did.

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40. *Id.*

41. Colorado Bar Ass'n Ethics Comm., Formal Op. 115, at 4.

42. *Id.*

Since the start of Collaborative Law, practitioners have exhibited some confusion over what, exactly, a collaborative lawyer's role *is* and who, exactly, that lawyer represents. Fervor for collaboration has led some to sound like collaborators. Professor Lande has noted, for example, that some collaborative lawyers seem to view themselves as representing the divorcing spouse fifty-one percent and representing the family forty-nine percent.<sup>43</sup> Others have raised similar concerns about whether collaborative lawyers really remain loyal to their clients. Robert Collins has argued that Collaborative Law is "NOT creative, fair negotiations between attorneys who have foregone the threat of court, done in the presence of their clients, but really IS co-mediation with two non-neutral mediators."<sup>44</sup> Perhaps most troubling, the interviews of collaborative lawyers conducted by Julie Macfarlane turned up some degree of role confusion among practitioners. Some clearly saw themselves as partisan advocates for their clients who had merely agreed to a problem-solving process. Others, however, expressed sentiments suggesting personal or moral commitments to acting as a "team player"—loyal more to the process itself than to their individual client. For example, one attorney said "I don't really care about whether the outcome is optimal in terms of dollars and cents, but that [my client] and I live up to our collaborative principles."<sup>45</sup> Although her report stresses that few, if any, interviewed lawyers expressed extreme versions of this "team player" sentiment, her interviews led Macfarlane to suggest that "[i]t may . . . be that lawyers favouring this [team player] approach see their primary relationship to be with the lawyer on the other side, rather than with their own client."<sup>46</sup>

Other state ethics committees had also noted the potential for conflict of interest. Minnesota's opinion on Collaborative Law took pains to mention that "[g]reat care must be taken to clarify the nature of the relationship between the attorney and the opposing party so that there is no misunderstanding. It must be made very clear that the attorney does not represent the opposing party and cannot provide that person with legal advice."<sup>47</sup> Similarly, in Pennsylvania's Informal Opinion 2004-24 the writer stressed that if a collaborative lawyer took on any obligations to the other side, she might run afoul of Rule 1.7.<sup>48</sup>

The Colorado Committee appears to have been presented with evidence, perhaps in the form of testimony, that suggested that the collaborative lawyers before it did feel obligated to the "process" above all else, and perhaps even to the other party. Either that, or the Committee read between the lines and interpolated that collaborative lawyers had become confused about their partisan loyalties to their clients. If that belief took hold, it is easier to understand why the Committee became so focused upon what seems to be a somewhat formalistic Rule 1.7 problem—particularly given that it seemed to believe that Collaborative Law consists of a contractual, lawyer-privity, disqualification four-way only.

Many practitioners have been careful, of course, to remember that a collaborative lawyer has the same duties to her client as any other attorney and that the

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43. See Lande, *supra* note 34, at 1384, n. 70.

44. See Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J. 41, 42 (Spring 2004).

45. MACFARLANE, *supra* note 6, at 11.

46. *Id.*

47. Minnesota Office of Lawyers Professional Responsibility, Advisory Op. (March 12, 1997).

48. Pennsylvania Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2004-24 (2004).

Collaborative Law process in no way diminishes those obligations. A collaborative lawyer, in other words, must remain partisan—she is her client’s advocate one hundred percent, albeit in a modified context or process. She must recite this partisan loyalty to her client, the client’s spouse on the other side, and that spouse’s lawyer. And she must live up to that loyalty, acting as her client’s advocate.

This does not mean that the collaborative lawyer must be mindlessly zealous, or must revert to the traditional adversarial tactics or mindset that many family lawyers use. The Collaborative Law process is a cooperative, friendly, interest-based, problem-solving, creative, respectful one. A collaborative lawyer should strive to act in accord with these ideals or principles. But the lawyer should not forget that at the most fundamental level her client is involved in a legal matter, and that she is that client’s legal representative. If the Collaborative Law process is not best serving her client’s interests, the lawyer must put aside her personal commitments to those collaborative goals and advocate that her client go to trial.

Responsible collaborative lawyers know all of this. But, the Collaborative Law community has allowed so much contractual experimentation in the name of process innovation that it has left a very unclear picture of what the process actually is. That confusion opened the door for the characterization found in Opinion 115—and for its outcome.

In concluding this section, it is worth noting that although Opinion 115’s opening statement that Collaborative Law creates a per se Rule 1.7 violation seems at first glance to sound the death knell, by now it should be clear that the opinion left plenty of room for the practice to continue—albeit in a more careful, cleaned-up form. Because the Committee believed that all Collaborative Law practice involved a four-way agreement including the disqualification provision, it did not address other Collaborative Law structures. It did offer hints, however, that suggest ways for even Colorado’s collaborative lawyers to move forward.

First, the second section of the Opinion deals with, and approves of, the practice of Cooperative Law, which the Committee characterized as “identical to Collaborative Law in all material respects with the exception of the disqualification agreement . . . .”<sup>49</sup> Although there is not space in this article to discuss its commentary on Cooperative Law, it is important for Collaborative Law practitioners to note that the Committee found that a four-way *process* 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.”<sup>50</sup> In other words, the four-way process agreements that many Collaborative Law (not just Cooperative Law) attorneys are already using should be fine—so long as they do not include a disqualification provision.

Second, in Footnote 11 of the Opinion the Committee stated that clients are, of course, free to sign a contract—without their lawyers—committing to terminate

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49. Colorado Bar Ass’n Ethics Comm., Formal Op. 115, at 1.

50. *Id.*

their respective lawyers in the event that the collaborative process fails.<sup>51</sup> This would “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.”<sup>52</sup> This highlights, again, that the Committee was truly focused on the formalistic conflict of interest created by a lawyer’s signing of a disqualification agreement to which the other lawyer was a signatory—and was not fundamentally opposed to the disqualification practice itself. Further, it suggests a new method for Collaborative Law parties to signal their respective commitments to the disqualification of their lawyers should negotiations terminate.

### B. *The American Bar Association’s Opinion 447*

On August 9, 2007, only six months after Opinion 115 was released, the American Bar Association’s Standing Committee on Ethics and Professionalism issued Formal Opinion 07-447, titled “Ethical Considerations in Collaborative Law Practice.”<sup>53</sup> This opinion found that Collaborative Law practice represents a permissible scope limitation under Model Rule 1.2, and it “reject[ed] the suggestion that Collaborative Law practice sets up a non-waivable conflict under Rule 1.7(a)(2).”<sup>54</sup>

Like Colorado’s Opinion 115, Opinion 447 focused on a contractual, disqualification four-way only Collaborative Law process:

Although there are several models of collaborative practice, all of them share the same core elements that are set out in a *contract* between the clients and their lawyers (often referred to as a “four-way” agreement). In that agreement, the parties commit [themselves] to negotiating a mutually acceptable settlement. . . . To ensure the commitment of the lawyers to the collaborative process, the four-way agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients . . . .<sup>55</sup>

It should now be clear that this description leaves out some important parts of the elephant. First, it makes no mention of a separate limited retention agreement. It thus seems to assume a four-way only scenario, just as Colorado did. Second, it assumes a disqualification, as opposed to process, four-way, again like the Colorado Committee. Third, it seems to assume a contractual four-way, as opposed to a hortative four-way—the Committee describes the four-way as a “contract.” Fourth, the ABA assumed lawyer privity, at least with the client on the other side. The Committee accepted that a contractual four-way “creates on the part of each lawyer a ‘responsibility to a third party.’”<sup>56</sup>

51. *Id.* at n.11.

52. *Id.*

53. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-447 (2007).

54. *Id.* at 3.

55. *Id.* at 2 (emphasis added).

56. *Id.* at 3.

I have to say that I am puzzled by this descriptive reduction of Collaborative Law. Perhaps the ABA was simply reacting to Colorado's simplifying characterization of the process and thus adopted that description uncritically. Perhaps the ABA Committee wanted to focus on the hardest type of Collaborative Law process to analyze. I don't know. But the somewhat unfortunate consequence of this limited description of the process is that the ABA passed by an opportunity to analyze the contractual complexity of the practice and clarify which contractual structures do and do not comply with the legal ethics rules.

That missed opportunity aside, how did the ABA reach the opposite conclusion from Colorado, given that the ABA's description of Collaborative Law is essentially identical to the characterization in Opinion 115? Opinion 447 makes a simple analytic move. It accepts, per Opinion 115, that a contractual disqualification four-way creates "responsibilities to third persons" on the part of each lawyer.<sup>57</sup> It then says, however, 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."<sup>58</sup> Finally, it concludes that a disqualification four-way agreement will not materially limit the lawyer's representation because the only responsibility to a third person that the lawyer has taken on is the responsibility to withdraw in the event of failure to settle, and the lawyer has limited the scope of her representation to her client such that she is permitted to withdraw in that circumstance:

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.<sup>59</sup>

In other words, "no conflict arises" under Rule 1.7: "there is no foreclosing of alternatives . . . 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.*"<sup>60</sup> In the ABA's view, Colorado's Opinion 115 simply had it wrong. It neglected to consider that a limitation on scope may in itself prevent a conflict of interest from ever arising.<sup>61</sup>

For this analysis to work, three things must be true. First, as a factual matter one must find a limited retention agreement between the lawyer and the client to effect the limited scope upon which the ABA's reasoning relies. Second, one must find the LRA valid under Rule 1.2, which governs limited scope agreements. Third, it must be accurate that if a lawyer limits the scope of representation in a valid LRA (e.g., by committing not to litigate), that necessarily means that the

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57. *Id.* at 4.

58. *Id.* (emphasis added).

59. *Id.* at 4.

60. *Id.* at 5 (emphasis added).

61. Given that Colorado's Opinion 115—like the ABA's Opinion 447—focused on a four-way only contractual form, it is not surprising that Opinion 115 did not consider whether a limitation on scope removed the conflict of interest problem. The Colorado Committee was not imagining that a limitation on scope *existed*. What is surprising is that the ABA Committee *did* focus on the impact of an LRA, given that it too was imagining a four-way only scenario.

lawyer taking on similar contractual obligations to a third person (e.g., not to litigate) does not impair her ability to represent her client.

I believe that Opinion 447 is confusing at each of these three steps. Although I ultimately agree with its reasoning, I do not think that the opinion should be read as a total vindication of all types of Collaborative Law practice. Instead, I think it implicitly underscores that some of the contractual configurations detailed in Part I pose more ethical risk than others.

Taking these three steps in order, the first question is whether, in the process as the ABA described it, there *was* a limited retention agreement in place. Opinion 447 never explicitly discusses the possibility of a separate lawyer-client LRA of the type used in the “retention agreements only” or “LRAs plus four-way” scenarios described in Part I. Instead, the opinion only says that “collaborative law practice *and the provisions of the four-way agreement* represent a permissible limited scope representation under Model Rule 1.2. . . .”<sup>62</sup>

One can read this sentence in two ways. It is possible that when it said “collaborative law practice *and the provisions of the four-way agreement* represent” a limited scope agreement, the ABA Committee meant to imply (by the words “collaborative law practice and . . .”) that a separate LRA had been reached prior to the four-way. In other words, maybe the Committee had an “LRAs plus disqualification four-way” scenario in mind. There is a paragraph of Opinion 447 that supports this reading, in which the Committee describes how a lawyer must provide her client with information about the risks of limited representation, etc., in order to secure informed consent.<sup>63</sup> If that is the meaning of Opinion 447, however, then it is unfortunate that the drafters did not clarify their intention. Moreover, it seems that the Committee must have been assuming at most a verbal limited retention agreement, rather than written. Otherwise it just does not seem plausible that Opinion 447 would never discuss it.

There is a second way to read this sentence, however, and it seems more likely that this second interpretation is what the ABA intended. The opinion gives the impression that the four-way agreement *itself* is the contractual embodiment of the limited retention agreement, if such an embodiment exists. If that is what Opinion 447 means, then it essentially reduced Collaborative Law to a four-way agreement only, but then expansively characterized that four-way as both a contract between the two disputing parties (and their lawyers) and as containing two independent lawyer-client limited scope agreements.

This would be a novel understanding of the process, and it would be fundamentally mistaken.

Describing a contractual disqualification four-way as itself containing the two lawyer-client limited retention separate agreements is a stretch. As Part I showed, when collaborative lawyers sign separate LRAs with their clients, those lawyer-client documents are extensive retainer agreements that contain very explicit language limiting the scope of representation to negotiation. Such documents unmistakably state that the retention agreement is modifying the traditional lawyer-client relationship and changing the lawyer’s obligations to her client. One standard form, for example, says as much:

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62. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (emphasis added).

63. *Id.* at 3.

My representation of you as a collaborative lawyer differs in some important respects from conventional representation by a litigation lawyer. Please read carefully the following section describing my responsibilities, and yours, in collaborative representation under this agreement.

Your retention of me as your Collaborative lawyer is a “limited purpose retention.” You are retaining me specifically to assist you in reaching a comprehensive agreement with your spouse or partner, and for no other purpose. You retain the right to terminate the collaborative law process at any time and go to court, but doing so ends my representation of you.

If your spouse should elect to go to court, this also terminates the collaborative law process, and you would need to retain litigation counsel to assist you in court. Accordingly, my representation of you and your retainer agreement with this firm are subject to the following:

- I will not be your lawyer of record, except for purposes of filing the judgment.
- I will not represent you . . . in litigation . . . .

Please read this letter carefully, and if you are in agreement with its terms, sign the copy which is enclosed and return it to me. This agreement is a legally binding contract between us, which you are free to have reviewed by another attorney before signing. We encourage you to do that if you have any uncertainty about entering into any part of this agreement with us.<sup>64</sup>

This language underscores to the client that the document in question is a contract that it is between the lawyer and the client, that it is modifying the “normal” or traditional terms of their relationship, and that it limits the scope of what the lawyer will do for the client.

To say that *all* four-ways do this is obviously wrong. As we saw in Part I, many four-ways do not even contain disqualification language, are not contractual, or leave unclear whether the lawyers are real parties to the document. I have never seen a four-way Collaborative Law agreement that explicitly suggests that it is also serving as a limited retention agreement, which would be simple to effect with clear contractual language. They may exist, but I have yet to see one. Nor have I seen a four-way agreement that contains any of the explicit language about limiting the lawyer-client relationship that is normally contained in a Collaborative Law LRA.

In my view, even to say that a contractual, lawyer-privity, disqualification four-way could ever *reasonably* be construed to include two independent limited scope agreements is unconvincing. To the extent that a four-way agreement is intended as a contract, it is a contract “across the table”—between opposing

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64. TESLER, *supra* note 3, at 137-142 (2001) (emphasis removed) (providing a sample Collaborative Law retainer agreement).

sides—not “behind the table”—between lawyer and client.<sup>65</sup> It is drafted as a statement of mutual commitment between the two sides, and the lawyers and clients on both sides are signatories. Given that, I do not think that such a four-way document can also serve as two separate lawyer-client LRAs. There is no precedent for having an opposing party (and counsel) as signatories to a lawyer-client scope agreement, and with good reason. Doing so introduces “the other side” into a preliminary discussion about the lawyer-client relationship that should best be kept private to that relationship. (I discuss this in more detail below, in Part III.)<sup>66</sup>

Whichever reading of Opinion 447 one prefers, the Committee left an extremely important aspect of its decision unclear. I am disappointed that Opinion 447—like Opinion 115—left out discussion of what, exactly, suffices to constitute a limited retention agreement, and instead muddied already murky waters further by suggesting that a four-way agreement itself might do so.

All of this goes to the first question of whether an LRA existed at all within the ABA’s description of the Collaborative Law process. The second question is whether, assuming a limited retention agreement existed, that LRA complied with the requirements of Rule 1.2. Rule 1.2 permits that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>67</sup> Under the Rules, “informed consent” requires “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.”<sup>68</sup>

Let us consider each of the ABA’s two possible understandings of what constitutes the limited retention agreement.

If the ABA meant that there can be a verbal limited scope agreement in place prior to the signing of the four-way, that raises the question whether Rule 1.2 permits a verbal scope limitation. There is nothing on the face of Rule 1.2 that requires a writing to effect a limited retention agreement. Moreover, when the ABA modified Rule 1.2(c) as part of the Ethics 2000 revisions to the Model Rules, there was explicit and vigorous objection to requiring a writing as part of a Rule 1.2(c) informed consent process.<sup>69</sup> Those advocating against a writing wanted the ability to deliver legal services to the poor, for example, over the telephone.<sup>70</sup> Thus, assuming a lawyer verbally conveyed sufficient information to the client to permit informed consent, it seems that a verbal LRA is possible.

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65. See ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* chs. 7 & 8 (2000) (making this distinction).

66. See *infra* discussion on pages 157-59 of this article.

67. MODEL RULES OF PROF’L CONDUCT, R. 1.2(c) (2002).

68. MODEL RULES OF PROF’L CONDUCT, R. 1.0(e) (2002).

69. See Testimony of John Skilton, then chair of the ABA Standing Committee on the Delivery of Legal Services (Los Angeles, Feb. 1999), available at <http://www.abanet.org/cpr/e2k/skilton.html>.

70. See ABA Standing Committee on the Delivery of Legal Services, *An Analysis of Rules That Enable Lawyers to Serve Pro Se Litigants*, 8 (April 2005), available at <http://www.abalegalservices.org/delivery> (follow “White Paper on Unbundling Available (PDF)” hyperlink).

At the same time, I must raise a few strong cautions. Some states have modified Rule 1.2(c). Ohio states a preference for a writing.<sup>71</sup> New Hampshire likewise states a preference for a written limited scope agreement and provides its lawyers with a sample form.<sup>72</sup> Florida<sup>73</sup> and Arizona<sup>74</sup> require a writing. Maine requires use of a particular written form,<sup>75</sup> and Wyoming<sup>76</sup> both requires a writing and declares that use of a particular form establishes a presumption of consent with the rule. Thus, for some practitioners it would not suffice to depend upon a verbal limited retention agreement.

I must also say that I find the notion of a verbal LRA in the Collaborative Law context extremely anxiety-producing. Given lack of time and resources, I can understand why advocates for pro se litigants wanted to make verbal limited scope agreements possible to permit other than in-person representation. That is not the situation in Collaborative Law, however, where in-person meetings are a hallmark of the process. I think it is quite possible that an ethics committee could find that a verbal Collaborative Law LRA is *not* “reasonable,” and/or could be left very unsure about whether there was informed consent because of the lack of written documentation. There is plenty of opportunity to draft and sign a written LRA as part of the Collaborative Law process, and this is obviously the best practice. (Indeed, the International Academy of Collaborative Practitioners has adopted ethical guidelines that require that a LRA be in writing.)<sup>77</sup>

I also urge Collaborative Law practitioners to avoid interpreting Opinion 447 to say that verbal LRAs are a permissible practice. The opinion does not address these questions clearly or head-on. To rely on it would therefore be extremely unwise, as the ABA could quite easily issue a separate and more restrictive opinion directly on point in the future.

Now let us turn to the second understanding of Opinion 447—that the opinion says that the four-way agreement itself can constitute the limited retention agreement. We have already seen examples of both four-way language and the long excerpt, above, from a typical separate LRA. There is no comparison. On its own, the language of most existing four-ways seems utterly inadequate to serve as two lawyer-client limited retention agreements. The minimal explanation given in

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71. See OHIO RULES OF PROF'L CONDUCT R. 1.2(c) (Feb. 1, 2007) (“A lawyer may limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client, preferably in writing.”).

72. See NEW HAMPSHIRE RULES OF PROF'L CONDUCT R. 1.2(c).

73. See FLORIDA RULES OF PROF'L CONDUCT R. 1.2(c) (“[A] lawyer may limit the objectives of the representation if the client consents after consultation.”).

74. See ARIZONA RULES OF PROF'L CONDUCT R. 1.5(b) (“The scope of representation and the basis or rate of the fee . . . shall be communicated to the client in writing, before or within a reasonable time after commencing the representation. . . .”).

75. See ABA Standing Committee on the Delivery of Legal Services, *supra* note 70, at 9.

76. See WYOMING RULES OF PROF'L CONDUCT FOR ATTORNEYS AT LAW R. 1.2(c)(2) (2006) (“Unless the representation of the client consists solely of telephone consultation, the disclosure and consent required by this subsection shall be in writing.”). The Wyoming rule then goes on to establish that use of a form approved by the Board of Judicial Policy and Administration creates a presumption of compliance. See WYOMING RULES OF PROF'L CONDUCT FOR ATTORNEYS AT LAW R. 1.2(c)(3).

77. The International Academy of Collaborative Professions have issued a set of ethical guidelines that require that a “Fee Agreement”—by which I assume they mean a retainer agreement—be in a signed writing. See Intl. Acad. Of Collab. Prof'ls, Ethical Standards for Collaborative Practitioners, Standard 7.1 (adopted Jan. 27, 2007), available at <http://www.collaborativepractice.com/lib/Ethics/LACP-Ethical%20Stds-Adopted-70127-FINAL.pdf>.

most four-ways is radically insufficient—the typical four-way document, even a contractual four-way document, just does not contain language clarifying for a client that this is an amendment to the typical contours of the attorney-client relationship. In my view, taken alone, no four-way document that I have seen satisfies the informed consent requirement of Rule 1.2(c).

Again, I am unclear about what exactly the ABA believed the LRA to be. As Part III discusses, I believe that a separate, written limited retention agreement is necessary for Collaborative Law to comply with the ethics rules. Perhaps the ABA agrees with me—perhaps Opinion 447 says something else. Regardless, it should be clear that the opinion does little to clarify this issue.

The third of my three general questions was whether it is true that a lawyer can take on contractual obligations to a third person not to do something without creating even the shadow of a conflict of interest so long as the content of those obligations is the same as the LRA's limitation on scope. Assuming that a valid LRA is in place, does Opinion 447 have this correct?

I generally agree with Opinion 447 on this point, although I am wary. In the normal course, a limited scope agreement does not *forbid* a lawyer from doing things outside the designated scope, but instead insulates the lawyer from criticism should she fail to do those things. In other words, the LRA insures that the client cannot later accuse the lawyer of malpractice for omission of certain types of representation or advocacy. For example, Client A might hire Lawyer A only for trial advice, but agree in an LRA that the lawyer had no obligations to research, schedule, or take depositions in the case. In that scenario, however, if Lawyer A then signed a contract with Client B committing that Lawyer A would not take any depositions, I think Client A could be legitimately miffed. What if Client A changed her mind and decided that she wanted Lawyer A to take depositions? She would be unable to entice Lawyer A into that arrangement because of Lawyer A's contractual commitment to the other party. So in a normal LRA scenario, taking on parallel obligations to the other party might still cause problems.

In Collaborative Law, of course, the scope limitation is slightly different. The lawyer is not merely insulating herself from accusation if she fails to go to trial—she is disqualifying herself from litigating. A Collaborative Law LRA does not just say “we don't currently plan on me litigating”; it says “we agree that I cannot litigate under any circumstance.” Given that, is it then conflict-free for the lawyer to contractually reiterate this to the other side?

The ABA's view in Opinion 447 seems to be that on these facts the lawyer is not really giving up anything to the other side. She is only committing to not do something that she has *already* bound herself not to do. So there is no conflict.

But there is one small problem. The lawyer actually *is* giving up something. In a contractual four-way scenario she is giving the other side the ability to enforce the withdrawal requirement, even if she and Client A change their minds. She is, in other words, taking a constraint that heretofore was internal to the lawyer-client relationship (and thus could be changed by consent of just the lawyer and the client), and making that pledge enforceable by others. As discussed in Part I, those “third persons” could be Client B, Lawyer B, or both, depending on who is in privity in the four-way.

Whether this is a “material limitation” under Rule 1.7 on the lawyer's ability to represent the client is the hard question. But Opinion 447 does not address that question fully because it assumes that the question is made moot by the limited

scope agreement. It ignores that a limited scope agreement does not vest enforcement rights with the other side—and that perhaps such vesting could itself give rise to the material limitation.

Does it? It depends on whether one cares about the possibility that Client A and Lawyer A could change their minds. Imagine the following: Lawyer A and Client A sign an LRA; Lawyer B and Client B do as well. All four then sign a contractual, lawyer-privity disqualification four-way agreement. Negotiations fail, and Client A asks Lawyer A whether she is willing to go to court on her behalf. Lawyer A says she will, but only if Client B agrees and waives any rights otherwise. Client B does so. Lawyer B then steps in and disqualifies Lawyer A.

I can certainly imagine that many Collaborative Law clients—and lawyers—might be surprised in this situation. I could also see Client A feeling disappointed that Lawyer A had ceded rights to Lawyer B. Could Client A reasonably feel that Lawyer A had been disloyal to do so? Perhaps. Would it be an uncomfortable—and strange—situation? Absolutely.

That is why most four-way agreements do not seem contractual or do not seem to bring the lawyers into privity. I do not think that most collaborative lawyers want the possibility of ending up in this situation. But at the end of the analysis I suppose I agree with Opinion 447 that if a lawyer were to contract away this enforcement right, her decision probably survives Rule 1.7 scrutiny.

I do not, however, agree with Opinion 447 on the first two of these three critical points—that this is what is actually happening in Collaborative Law practice, or that Rule 1.2 is easily satisfied in a contractual, disqualification four-way only scenario. As a result, I am disappointed with the Opinion, which seems to me a wasted opportunity to clarify the ethics of Collaborative Law. I turn to that task next.

### III. CLEANING UP THE MESS

Here is what we know.

There is a great deal of contractual variation in existing Collaborative Law practice.

One state ethics committee—Colorado's—has found that a lawyer cannot sign a contractual, lawyer-privity four-way disqualification agreement without running afoul of Rule 1.7.

The American Bar Association has found that so long as each lawyer has a limited retention agreement in place that limits the scope of the lawyer's obligations to settlement, a contractual, lawyer-privity four-way document then does *not* violate Rule 1.7.

The American Bar Association has also held that such a limited retention agreement can comply with Rule 1.2's "reasonableness" and informed consent requirements.

Here is what we do not know.

Regarding Rule 1.2, what, exactly, is required to comply with Rule 1.2 in the Collaborative Law context? In particular, what is required for informed consent? Must a Rule 1.2 limited retention agreement be in writing in this context, or can it be verbal? Can the four-way agreement itself constitute the limited retention agreement, or must the LRAs be in separate lawyer-client-only documents? Can

those documents be signed concurrently with (or even after) the four-way agreement, or must they be signed prior to the creation of the four-way?

Regarding Rule 1.7, will state ethics committees generally follow the ABA's decision and hold that there is no Rule 1.7 problem so long as a valid Rule 1.2 LRA is in place? If they do not, then what sort of four-way agreements should be avoided? And even if they do, are there any other Rule 1.7 issues that Opinion 447 leaves unaddressed?

In this Part, I try to answer these questions in the form of advice on best practices for collaborative lawyers.

### A. *Best Practices*

#### 1. *Receive, and Document, Informed Consent to Collaborative Law*

Although 2007 occasioned much discussion of Rule 1.7's implications for Collaborative Law practice, Rule 1.2 is in many ways the more important ethical bedrock on which Collaborative Law rests. Particularly in light of the ABA's Opinion 447, attention should now rightfully shift back to the requirements and contours of Rule 1.2 in this context.

The most important issue outstanding is what exactly is required to satisfy Rule 1.2's new informed consent requirement. Because this term—"informed consent"—is relatively new to the ethics rules, we simply do not know. Obviously informed consent requires that a lawyer fully explain the costs and benefits of entering into a limited retention agreement and the alternatives to doing so. In the Collaborative Law context, this certainly necessitates describing the process fully; explaining its advantages and disadvantages vis-à-vis other dispute resolution processes (e.g., litigation, mediation, arbitration, regular negotiation, etc.); and warning the client explicitly about potential financial, strategic, and personal risks or costs.<sup>78</sup>

Although nothing in the Model Rules requires informed consent or a Rule 1.2 limited scope agreement to be in writing, a writing should be best practice in the Collaborative Law arena. I cannot see how a lawyer could adequately ensure that the client has an opportunity to consider the process fully and reflect upon its consequences without a written explanation to take home, read, and consider. Similarly, it seems like folly to fail to memorialize a limited retention agreement in writing. A written Rule 1.2 scope agreement provides evidence of the lawyer's communications to the client and reduces headaches about whether or not the client was fully informed, and consented.

A well drafted limited scope agreement should not, however, be taken as sufficient by the Collaborative Law community. Just because a client signs a writing does not mean she has truly given informed consent. Although I believe it would be highly unlikely that a lawyer could be disciplined for violating Rule 1.2's informed consent standard if the lawyer secured such a signature, the point here is that clients deserve to know what they are signing away. I am confident that the Collaborative Law community, with its deep interest in process, fairness, and

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78. See generally Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 165.

client empowerment, will continue to take seriously the need to train collaborative lawyers to discuss the process fully with their clients and not push clients into Collaborative Law in any fashion.

In addition, practitioners should not forget that Rule 1.2 requires that a lawyer determine that a limited scope agreement is “reasonable” under the circumstances. This element of Rule 1.2 received no attention from Opinions 115 and 447, but it remains important. It would be a mistake for lawyers to assume that collaborative representation is always reasonable just because the American Bar Association’s ethics committee, for example, has implicitly found that it can *sometimes* be reasonable.

I have expressed reservations about this point in the past.<sup>79</sup> I continue to have those reservations, particularly in the limited circumstance that I have discussed in past writing—where one party would face drastically asymmetrical costs if both parties must retain new counsel because the Collaborative Law process fails. But there are other questionable scenarios as well, such as if an attorney knows that there has been a history of spousal or child abuse, the divorcing spouses have a terribly dysfunctional relationship that will preclude collaborative negotiation, the attorney fears a high probability of incomplete disclosure or, worse, misrepresentation, or one of the spouses is mentally incompetent in some fashion. In such circumstances, a lawyer risks violating Rule 1.2’s reasonableness requirement if she allows her client into the Collaborative Law process.

Again, the key here is for collaborative lawyers to understand that their entire experiment rests on a Rule 1.2 limited scope agreement, and that amending the traditional lawyer-client relationship is serious business. The leaders of the field know this, but I have met a non-trivial number of practitioners who have never read Rule 1.2, who assume that there is a special legal ethics rule about Collaborative Law already in place, or who admit to not explaining the Collaborative Law process to their clients in much detail. These practitioners worry me.

## *2. Separate Limited Retention Agreements From Any Across-the-Table Documents (Four-Way or Client-Client), and Sign the LRAs First*

Can a four-way agreement also constitute the two required limited retention agreements, as the ABA’s Opinion 447 seemed to imply and as some collaborative lawyers will argue?

To start, I should say that I understand the efficiencies that such a structure would create for lawyers and clients. Rather than having to explain the Collaborative Law process to a client, have the client sign a limited retention agreement, and then have a *second* conversation about the same issues and a second signing of a four-way, the “one stop shopping” approach necessitates only one conversation and one contractual experience. In addition, sometimes a lawyer and her client may not *know* ex ante whether they want to handle the client’s matter using Collaborative Law because they may not know the other side’s intentions. By delaying any commitment to the collaborative process until the first four-way meeting, and then embodying all of the necessary contractual commitments in one

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79. See Peppet, *supra* note 5, at 489.

four-way document at that meeting, the lawyer and client can put off the decision whether to “collaborate” until the other side’s approach is clear.

At the same time, any increased efficiency of combining the LRAs into the four-way agreement comes at a price: vastly increased ethical risk for the lawyers and serious pragmatic consequences for the clients.

First, and most importantly, the ethical risk for lawyers. In order for a four-way agreement to be a limited retention agreement, it must be contractual (not hortative). Moreover, the lawyers *must* be in privity—at least with their respective clients—because a limited retention agreement by definition is a *contract* that binds both lawyer and client. And the four-way agreement must contain the disqualification language because there is no separate LRA anywhere to effect that critical Collaborative Law component.

As discussed in Parts I and II, however, a contractual, lawyer-privity disqualification four-way is exactly the type of agreement that poses the most ethical risk and that Colorado’s Opinion 115 challenges. In my view, a collaborative lawyer would be unwise to believe that the ABA’s Opinion 447 definitely states that a four-way document can also constitute an LRA—as discussed in Part II, that aspect of the Opinion is very unclear. In addition, *if* that is what the ABA is saying, I would be surprised if some states did not choose to say otherwise if faced with the issue directly.

Again, to comply with Rule 1.2 a client must provide informed consent to an LRA. This requires that the client be given information about the scope agreement and its costs and benefits, and that the client have an opportunity to engage with the lawyer about those advantages and disadvantages. If that conversation occurs in a four-way meeting with the lawyer and client from the other side, it is unlikely that a client will have the freedom to discuss the issue fully. That discussion would not be confidential (because of the presence of the other side), nor would the client likely feel able to raise concerns about the process with her lawyer. If the client is concerned that her divorcing husband will not fully disclose information, for example, she may not express that reservation as freely with the husband sitting across from her.

I thus think it a very bad idea for lawyers to rely on their four-way documents and discussions to effect their Collaborative Law limited retention agreements. Doing so creates unnecessary ethical risk for little gain.

Second, and somewhat less importantly, the pragmatic consequence for clients. Because a contractual, lawyer-privity disqualification four-way is required to make this approach work, that four-way creates the possibility, as discussed in Parts I and II, that a client’s lawyer has an independent contractual right to disqualify the lawyer on the other side in the event the Collaborative Law process terminates.<sup>80</sup> Although I do not know empirically, I doubt that clients expect or want this possibility. Instead, I expect that clients think that the disqualification agreement is between them and their lawyer—and, perhaps, the client on the other side. Trying to merge the LRAs with the four-way necessarily gives rise to this unwanted complication. (I say that this second reason is less important only because I think it highly unlikely that any lawyer would seek to enforce these rights independently in practice.)

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80. See *supra* notes 25-26 and accompanying text.

Given these downsides, I do not see why collaborative lawyers would want to take this approach. Instead, collaborative practitioners should keep their contracts clean: sign an LRA with the client, and then, if deemed necessary, a document with the other side.

Finally, I think that lawyers should talk through and sign their limited retention agreements with their clients prior to their first four-way meeting. This gives the lawyer and client an appropriate time and place to discuss the process fully and reflect on whether Collaborative Law will best serve the client's needs. Further, the timing concern—that one cannot commit to Collaborative Law before knowing if the other side will reciprocate—does not seem insurmountable. A lawyer could simply write a contingent retainer agreement that contains all of the Collaborative Law language, including mandatory disqualification, but states that such terms will only come into effect at the time that both clients sign their across-the-table documents (such as a four-way or client-client agreement).

### *3. Avoid Contractual, Lawyer-Privity Four-Way Documents Completely*

Third, it should become best practice to avoid contractual, lawyer-privity four-way documents completely. They cause more trouble than they are worth, and should be abandoned.

There are various justifications for such contractual four-way documents, but none holds up to scrutiny. A four-way is obviously useful to bind the other side to the process and provide an enforcement mechanism in case the other side reneges on its collaborative commitments. A client-client agreement, however, is as powerful a tool in that respect—if the clients sign an across-the-table contract committing to Collaborative Law, that eliminates the possibility (to the extent that contract can do so) of one side pulling out of the process unilaterally. If across-the-table enforcement is a major concern, a client-client agreement is a much more simple means to that end.

A four-way is also touted as a means of expressing shared beliefs, attitudes, and commitments—of getting everyone on the “same page” at the start of the process. These are fine goals and probably wise process moves, because signing a paper stating the group's shared intention to collaborate and be respectful will undoubtedly channel the participants' behavior in important ways. But there is no reason that such a document needs to be contractual (rather than hortative) to accomplish these goals, nor that the lawyers need to be in privity. A hortative four-way (e.g., a statement of shared principles, etc.) will serve the same emotional, relational purpose, as would a document binding the clients but only witnessed by the lawyers.

Some leaders in the Collaborative Law field have already shifted their contracts to avoid lawyer-privity contractual disqualification four-ways. The forthcoming second edition of Pauline Tesler's well-known text *Collaborative Law* contains a sample form laying out a four-way participation agreement. Unlike the same form found in her first edition, this newer iteration clarifies that only the two clients are actually parties to the contract. The signature page contains separate sections for the clients to sign as “Parties” and for the lawyers to sign. Above the space for the lawyers' signatures is the following: “In signing below, each of us confirms that the foregoing document conforms to the agreement of our respective

clients, and each of us affirms our intent to proceed in a manner consistent with the letter and spirit of this document.”<sup>81</sup>

This simple change takes the Collaborative Law field back to its origins—it places the contractual emphasis on the lawyer-client limited retention agreement by turning the “four-way” into a two-way. Although I do not believe that Tesler’s form changed in response to Colorado’s opinion, it is worth noting that this form follows the Colorado Committee’s suggestion to place disqualification language in a client-client agreement rather than in a four-way contract. The lawyers play only a witnessing or affirming role here; they are not contractual parties. This reduces the ethical risk for collaborative lawyers.

Many collaborative lawyers have not yet integrated these innovations into their contracts, however, and many do not know why they should. I have not surveyed all existing collaborative agreements, so I cannot empirically prove this hunch. I have, however, solicited agreements from several dozen leading collaborative lawyers around the country, and *none*—with the exception of Tesler’s new forms—showed these evolutions. This must change, and quickly.

### B. What’s Next?

If anything, 2007 showed collaborative lawyers that it is difficult to predict the future. Nevertheless, I will venture a few predictions here.

First, many collaborative lawyers will overly celebrate the ABA’s Opinion 447 as a complete vindication of their efforts. This will cause some complacency about the ethical issues in Collaborative Law and reinforce complacency where it already exists.

Second, additional states will issue ethical opinions vindicating the practice. Hopefully these opinions will consider the complexity of these various possible contractual forms and distinguish those that are acceptable under the state’s ethics rules from those that are not.

Third, additional states will follow Colorado’s lead and question Collaborative Law. Just as Colorado did not ban the practice completely but instead required it to take a certain form, so other states will likely decide that certain types of Collaborative Law practice are better than others.

Fourth, the Collaborative Law community—and the ADR community generally—will overreact to these skeptical opinions, rather than taking them as welcome opportunities to continue to refine this emerging practice.

Finally, more states will enact Collaborative Law statutes. Whether these statutes help or hurt remains to be seen. The most promising drafting effort—the pending National Conference of Commissioners on Uniform State Laws (NCCUSL) Collaborative Law Act—will undoubtedly exert a great deal of influence once it is released in final form. Unfortunately, I am concerned that the most recent draft of the NCCUSL Collaborative Law Act continues much of the confusion that the ABA’s Opinion 447 also showed. It does not, in short, make much sense of the elephant.

Without going into detail about the Act, I must just mention that the most recent draft (December 2007) seems to imagine binding four-way documents with-

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81. TESLER, *supra* note 12, at 6.3.19.

out separate, and prior, limited retention agreements. The draft defines a “Collaborative law participation agreement” as “a written agreement voluntarily signed by the parties to a dispute and their collaborative lawyers.”<sup>82</sup> The Act requires that this four-way agreement contain disqualification language and also states that it must contain a “signed acknowledgement by each party that the party . . . recognizes that the party is entering into a retainer agreement with a collaborative lawyer for the limited purpose of engaging the collaborative lawyer to represent the party in collaborative law.”<sup>83</sup>

This language, which I acknowledge is currently in draft form, continues the confusion that the ABA began. It does not clarify whether a lawyer is supposed to enter into a limited retention agreement with her client *prior* to or separate from entering this “Collaborative Law participation agreement.” The language is ambiguous: “the party . . . recognizes that the party *is entering* into a retainer agreement” could mean either that the four-way participation agreement is itself the LRA, or that the party has already entered an LRA. The Act itself, however, makes no other mention of limited retention agreements. It does not require them, explain them, set standards for them, or provide examples. This is a major oversight and, again, is likely to lead practitioners to assume that the document called for in the Act—the four-way participation agreement—is sufficient. All of this will hopefully be revised prior to the Act’s adoption.

Finally, the easiest prediction: Collaborative Law will continue, and continue to grow. There is clearly market demand for this type of practice, as well as a great number of lawyers eager to adopt it. What exactly the elephant looks like in the end, however, is beyond speculation.

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82. National Conference of Commissioners on Uniform State Laws, *Collaborative Law Act*, § 2(2) (Interim Draft, Dec. 2007), available at [http://www.law.upenn.edu/bll/archives/ulc/ucla/2007dec\\_interim.htm](http://www.law.upenn.edu/bll/archives/ulc/ucla/2007dec_interim.htm).

83. *Id.* at § 3(c)(3)(D)(emphasis added).