ETHICS ADVISORY OPINION

10-01

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

A licensed South Carolina attorney wishes to practice collaborative law. In a collaborative law setting, the parties and their lawyers gather in the same room with the goal of collectively resolving a dispute without litigation. Before collaborating, the parties are informed in writing that each attorney's scope of representation is limited to the collaborative process and the clients sign a consent. Additionally, all parties agree that if the collaborative effort fails and litigation ensues, no attorney representing a party in the collaborative process shall represent any party in any other proceeding.

Questions Presented:

1. Is it permissible for an attorney to limit the scope of his representation to the collaborative law process?
2. Is a non-consentable conflict of interest created when an attorney represents a client in the collaborative process because the attorney's representation can be terminated by a third party adversary?

Summary:

An attorney may limit the scope of representation to the collaborative law process, provided the attorney proceeds pursuant to the other Rules of Professional Conduct. While a potential conflict of interest may be created in the collaborative process, it is one to which the client may consent.

Opinion:

It is permissible for an attorney to limit the scope of his representation provided that: the attorneys first obtain each affected client's informed written consent regarding their limited scope of representation pursuant to Rule 1.4(a)(1), the attorney abides by the client's decisions concerning the objectives of the collaborative representation and consults with the client as to the means by which those objectives are to be pursued; and the limited scope of representation is reasonable under the circumstances.

Rule 1.7 states that a lawyer may represent a client even though the client's interest may be materially limited by the lawyer's responsibilities to a third person, provided that the lawyer reasonably believes he will be able to provide competent and diligent representation, and if each affected client gives informed consent, confirmed in writing.

Collaborative law is generally practiced in family law, in a setting with two attorneys and two clients. In family law, the four-way agreement is designed to create a commitment to a mutually beneficial resolution for two clients who are likely to have a continuing relationship after the dispute is resolved. The withdrawal provision in the four-way agreement is designed to foster commitment from the lawyers involved as well as the parties involved. Precluding the collaborative lawyers from representing their respective clients in any proceedings other than the collaborative proceeding is designed to encourage open communication and information sharing between the attorneys in order to favor as amicable and efficient a resolution as possible. One potential identifiable shortcoming in a collaborative law agreement containing a withdrawal provision is that it may not anticipate the type of emergency that, like collaborative law, also occurs almost exclusively in family law.

Custodial interference (parental kidnapping in violation of a court order), although uncommon, does occasionally occur. In a four-way agreement, the collaborative law attorneys, including the attorney for the victim parent, have no choice but to desert their clients. In that occasional instance a well intended process could be detrimental, and not only to a panicked and desperate victim parent, but also to an irrational perpetrator client. A familiar and positive attorney-client relationship could be instrumental in bringing a child home sooner rather than later. Conversely, losing counsel could be especially detrimental to emotionally charged and even psychologically traumatized domestic clients during an emergency. It is at that time that all the benefits unique to the collaborative law setting may invite detriment to both clients and their advocates. It is precisely this kind of risk that lawyers must explain to clients and ensure their understanding in order to obtain informed consent. There may be circumstances where the lawyer determines, in his or her professional judgment, that the collaborative law process is not reasonable for a particular client in a particular case. In such cases, the representation would not be allowed pursuant to Rule 1.2(c).

In conclusion, limiting the scope of representation with the informed consent of a client in a collaborative law agreement is not incongruent with other agreements that limit the scope of an attorney's representation. As long as an attorney explains to a client the risks associated with having counsel whose representation is limited only to the collaborative proceeding, and whose withdrawal may be triggered by an opposing party or opposing counsel and circumstances beyond his and his client's control, an otherwise legal and rule-compliant collaborative law agreement with a withdrawal provision such as the one described in the family law four-way agreement is not an agreement to be entered into lightly and without reservation, but it is not one that is prohibited.