

Advisory Committee of the Supreme Court of Missouri

Formal Opinion 124

COLLABORATIVE LAW

The question is whether it is ethically permissible for Missouri attorneys to engage in “collaborative law” practice. For purposes of this opinion, “collaborative law” will be a process by which both parties agree that they will seek to settle their dispute and, if they are unable to do so, each will get new counsel to litigate the case.

The agreement can take many forms. For example, it can be drafted in such a way that the parties can obtain judicial enforcement or it can be legally unenforceable. From an ethics perspective, it does not matter whether the agreement is enforceable between the parties. The ethical concerns focus on the agreement and communication between the attorney and the attorney’s client.

Ethically, the primary concern is whether the client has given informed consent as defined by Rule 4-1.0(e). A collaborative law process is a type of limited scope representation. The attorney must clearly and thoroughly inform the client how the process works. The attorney must explain the pros and cons of the process and provide a clear, thorough explanation of the alternatives. Under Rule 4-1.2, the client must sign a written consent.

The agreement between the attorney and client may provide that the attorney will withdraw if settlement fails. This may create a tension between the client’s interests and the attorney’s interests. The attorney may not want to withdraw, but the attorney must not put his or her interests above the client’s interests, as determined by the client. If the client determines that settlement has failed, the attorney may not try to persuade the client to continue to pursue a settlement or to accept a settlement, unless the attorney objectively believes it is in the client’s best interest. The attorney’s desire to remain in the case cannot be a factor.

This potential tension does not make the collaborative law process unethical. Similar tensions exist in many other attorney-client relationships. The most obvious example is the potential tension between the attorney and client in a contingent fee case. The client may wish to accept a settlement far less than the attorney considers advisable. If the attorney’s assessment is correct, accepting such a settlement will result in a much smaller fee for the attorney. Similarly, a client may be unwilling to accept a settlement that the attorney considers advisable because of the attorney’s doubts about the likelihood of success at trial. We allow contingent fees because we are willing to rely on attorneys to follow their ethical obligations of putting their clients’ interests ahead of their personal interests. We are only using contingent fees as an example of a similar situation where

the attorney must be relied upon to put the client's interests first. Contingent fees are not permissible in most domestic relations matters. Rule 4-1.4(d)(1).

The potential that individual attorneys may violate the duty of loyalty, from time to time, does not make the practice generally unethical, as long it is reasonable to believe that the vast majority of attorneys will fulfill their ethical obligations. In the context of collaborative law, the tension between the interests is not unreasonable. The practice of collaborative law is considered ethical in Missouri.

If an attorney practicing collaborative law finds him or herself in an actual conflict situation, relating to this or any other issue, that attorney must withdraw or, if permissible, obtain conflict waivers consistent with the conflict rules found within Supreme Court Rule 4. If the attorney's personal interests create a situation that materially limits the attorney's representation to the extent that the attorney will no longer be able to provide competent and diligent representation, an unwaivable conflict exists and the attorney must withdraw.

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