

New York State Bar Association

Committee on Professional Ethics

Opinion 678 - 1/10/96 (42-95)

Topic: Lawyer's participation in divorce mediation referral service.

Digest: A lawyer may not participate in a divorce mediation referral service that is not operated, sponsored or approved by a bar association.

Code: DR 2-101, 2-103(C).

QUESTION

May a lawyer receive referrals from an agency that advertises the availability of divorce mediators?

OPINION

The inquirer proposes to participate in a divorce mediation referral service. The service would use television and the Yellow Pages to advertise the availability of divorce mediators. An "800" number would be provided and, based on the caller's geographic location, the caller would be referred to a participating mediator. Mediators on the list, including both lawyers and nonlawyers, would be co-shareholders in the service.

The threshold question is whether the proposed service constitutes a "referral service" subject to DR 2-103(C) rather than "group advertising" subject to DR 2-101. We believe that, as described, the service would constitute a referral service for the reasons discussed in N.Y. State 597 (1989). In that opinion, we stated:

We believe that a program in which an advertising agent runs

generic ads for legal services and distributes prospective clients to participating lawyers who have been assigned the exclusive right to cases arising in particular geographic areas is more in the nature of a lawyer referral service than advertising by an individual lawyer. When a prospective client answers the advertisement, the purpose is to be given the name of a lawyer, rather than to contact a particular lawyer.

Id. at 2-3. We distinguished group advertising, in which

the advertisement presents in a meaningful fashion the names of the lawyers or law firms participating in the group advertisement, along with their addresses and the geographical areas assigned to them, so that the potential client knows the identity of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent.

Id. at 3. In the case of the mediation service described by the inquirer, the caller would not be choosing a particular mediator, but would be given the name of a mediator within the caller's location; consequently, the arrangement would be "more in the nature of a lawyer referral service than advertising."

The next question is whether this arrangement runs afoul of DR 2-103(C), which provides: "A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services . . . , other than by advertising or publicity not proscribed by DR 2-101[.]" The applicability of this prohibition turns on whether divorce mediation services represent a "lawyer's services" within the meaning of DR 2-103(C).

If divorce mediation does not constitute professional services of the type contemplated by the rule, then the lawyer would not be bound by its restrictions. For example, if a lawyer also provided piano instruction, a service that plainly does not entail the practice of law, the lawyer-pianist could solicit students for piano instruction independent of the restrictions imposed by DR 2-103, including through a referral agency.

If divorce mediation services represent a "lawyer's services," however, then the proposed arrangement would be impermissible under DR 2-103(C). Since the program in question has not been approved by a bar association, it would not fall under the exception in DR 2-103(C)(1), which permits a lawyer to request referrals from a bar-approved lawyer referral service.

The question of whether divorce mediation services represent a "lawyer's services" within the meaning of DR 2-103(C) depends to some extent on the nature of mediation. On the one hand, so far as we are aware nonlawyer professionals who

engage in divorce mediation have not been found to be engaged in the unauthorized practice of law. On the other hand, a lawyer may engage in mediation as an aspect of providing legal services. Whether or not one conceives of the lawyer as "representing" the participants in divorce mediation, the lawyer's role as a neutral mediator may include rendering advice about legal questions or preparing a separation agreement--services that would ordinarily seem to entail the practice of law when performed by lawyers. See *generally* Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 *Ariz. L. Rev.* 329, 342-46 (1984).

Other ethics committees have considered the question of whether divorce mediation constitutes the practice of law for purposes of a different disciplinary rule, DR 3-103(A), which forbids a lawyer to "form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." Some committees have concluded that divorce mediation does constitute the practice of law for purposes of DR 3-103(A), because the lawyer invariably exercises legal judgment with respect to issues on which the couple must reach agreement such as the division of property, spousal support, and child custody. See *ABA/BNA Lawyers' Manual on Professional Conduct* 91:408, *citing* Nassau County 89-34 (1989); Tennessee 83-F-39 (1983); New York City 1987-1; Rhode Island 87-3 (1988). Others have opined that lawyers may participate with nonlawyers in providing divorce mediation services as long as the lawyer engages only in the kind of mediation that non-lawyers could provide and does not exercise legal judgment. See *id.*, *citing* New York City 80-23; Connecticut 35 (1982); Illinois 92-5 (1992); Kansas 84-8 (1984).

The former view, that lawyer-mediators are engaged in the practice of law, finds support in a recent federal district court decision, *Poly Software International, Inc. v. Su*, 880 F. Supp. 1487, 1491-94 (D. Utah 1995), which held that a lawyer who mediates a dispute between two parties will later be subject to the former-client disqualification rule. The latter view, however, is supported by a recent opinion of the Maryland State Bar Association Committee on Ethics, which concluded that a lawyer's marketing of mediation services is not subject to ethical restrictions on solicitation. It reasoned that the mediator does not form an attorney-client relationship with the parties, and therefore mediation does not entail the provision of legal services. Maryland 93-10 (1993), *summarized in* *ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports*, vol. 9, No. 3, pp. 43-44 (March 10, 1993).

The view that lawyer-mediators are not engaged in the practice of law also seems to find support in the ABA Model Rules of Professional Conduct. Model Rule 2.2 addresses the situation in which a lawyer "act[s] as intermediary between clients." The accompanying Comment clarifies that a "lawyer acts as intermediary . . . when the lawyer represents two or more parties with potentially conflicting interests" and distinguishes this role from that of mediator. The Comment explains that Model Rule 2.2 "does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed

with the concurrence of the parties." The Comment notes that "[i]n performing such a role the lawyer may be subject to applicable codes of ethics," thereby implying that a lawyer serving as mediator (as distinguished from "intermediary") is not subject to the ABA Model Rules.

As this summary reflects, authorities have disagreed as to whether to conceptualize divorce mediation as a legal or nonlegal service when provided by lawyers. Our judgment is that, on the present state of knowledge about how lawyers function as mediators, lawyers who serve as mediators should be presumed to be rendering a legal service. See, e.g., Jay Folberg & Alison Taylor, *Mediation* 254-55(1984):

Presumably a lawyer who serves as a mediator outside of the law office, gives no legal advice or opinions, and does not draw up an agreement is not acting in any legal capacity and is not then governed by the lawyer's code. *This would, however, be a rare case.* More often the lawyer would offer impartial legal advice or explain the law to the participants.

(Emphasis added).

Furthermore, we are concerned that characterizing mediation by lawyers as a non-legal service overlooks the participants' expectations. Participants in divorce mediation cannot be kept unaware of a mediator's professional qualification as a lawyer. They are entitled to know the mediator's professional qualifications, and it would be deceptive for a mediator who is a lawyer to withhold that fact. Compare N.Y. State 662 (1994) ("a lawyer does not resolve the ethical objections to the joint provision of services with a nonlawyer simply by concealing his or her status as an attorney"). The participants' awareness that the mediator is a lawyer may give rise to expectations about the nature of the mediator's services that affect the participants' decisions. For instance, they may give greater weight to the mediator's advice about issues with legal implications because the mediator is a lawyer. This possibility could not be avoided by warnings or disclaimers to the effect that the lawyer-mediator would not draw on his or her training and expertise as a lawyer in conducting the mediation. Thus, from the participants' perspective, even if not from that of the lawyer-mediator, the divorce mediation will entail a legal service. This would be true even if (as seems unlikely) a lawyer engaged in divorce mediation could avoid exercising legal judgment with respect to issues that have legal implications.

Our conclusion that lawyers who serve as mediators are engaged in the practice of law is consistent with our past opinions regarding various other services that can be performed appropriately by both lawyers and nonlawyers. We have concluded, for example, that DR 3-103(A) forbids a lawyer to affiliate with a nonlawyer to represent homeowners in small claims proceedings, N.Y. State 662 (1994), to assist homeowners in obtaining real estate tax deductions, N.Y. State 644 (1993), to assist clients in

financial planning, N.Y. State 633 (1992), or to prepare tax returns and provide tax-related advice, N.Y. State 557 (1984). Although all these services may appropriately be performed by nonlawyer professionals, lawyers who provide them are engaged in the practice of law for purposes of DR 3-103(A).

We recognize that DR 2-103(C), a rule restricting the solicitation of clients, serves quite different purposes from DR 3-103(A), which restricts affiliations between lawyers and nonlawyers. Nonetheless, the purposes of DR 2-103(C) are best served by applying its restrictions to lawyer-mediators as to lawyers providing other legal services. Generally speaking, the rule forbids lawyers from arranging for third parties to recommend their services in a seemingly disinterested manner. It thereby protects parties who are in need of legal assistance from being misled to believe they are receiving a disinterested recommendation. As applied specifically to referral services that would be operated by the very lawyers who would receive the referrals, the rule prevents these lawyers from creating or exploiting the misimpression that a referral by the service reflects a disinterested endorsement of the lawyer.

We see no reason why the protection of the rule should not extend to parties who would obtain the services of a divorce mediator through a referral agency. To be sure, the parties themselves may not initially perceive that divorce mediation entails a legal service and may not particularly be seeking the services of a lawyer-mediator as distinguished from a nonlawyer-mediator. But, after they are referred to the lawyer-mediator, and presumably at some point before they engage the mediator's services, they can be expected to learn that the mediator is in fact a lawyer. In deciding to employ the services of the lawyer-mediator and in making any other decisions regarding the lawyer-mediator's services, the parties should not act on the mistaken belief that the lawyer came recommended by a disinterested agency.

For these reasons, divorce mediation by a lawyer necessarily entails "the use of the lawyer's services." A lawyer is therefore forbidden by DR 2-103(C) from participating in a mediation referral service that is not operated, sponsored or approved by a bar association.

CONCLUSION

For the reasons stated above, the question is answered in the negative.
