



Committee on Professional Ethics

Opinion 878 (9/21/11)

Topic: Lawyers as mediators

Digest: When a lawyer serves as a mediator, under some circumstances the lawyer must reveal his or her status as lawyer and explain the import of that status to participants in the mediation.

Rules: 2.4

QUESTION

1. When a lawyer serves as a volunteer mediator under the auspices of a community mediation service, is the lawyer permitted or required to reveal his or her status as a lawyer to the parties in mediation?

OPINION

2. Mediators working in certain programs of “community dispute resolution” are expected to take ethical guidance from the Standards of Conduct for New York State Community Dispute Resolution Center Mediators. Those Standards are interpreted by the Mediator Ethics Advisory Committee (“MEAC”), which issues advisory ethics opinions. In MEAC Opinion # 2010-02, MEAC apparently concluded that the Standards do not require disclosure by a lawyer-mediator of his or her status as a lawyer, and perhaps even discourage such disclosure.

3. This Committee is not authorized to second-guess or comment on MEAC Opinion # 2010-02 and has no jurisdiction to interpret the Standards of Conduct for New York State Community Dispute Resolution Center Mediators. We are charged only with construing the New York Rules of Professional Conduct (the “Rules”), which are binding on all New York lawyers, including lawyers serving as mediators.

4. One Rule of Professional Conduct – Rule 2.4 (“Lawyer Serving as Third-Party Neutral”) – specifically governs lawyers who serve as mediators. Rule 2.4 was added to our ethical standards effective April 1, 2009 – it had no equivalent in the former Code of Professional Responsibility. Rule 2.4(a) provides as follows:

(a) A lawyer serves as a “third-party neutral” when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of

a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a **mediator** or in such other capacity as will enable the lawyer to assist the parties to resolve the matter. [Emphasis added.]

Thus, Rule 2.4 by its express terms applies to a lawyer who is serving as a mediator.

5. Rule 2.4(b), which is the operative part of Rule 2.4 for our purposes, provides as follows:

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, **the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.** [Emphasis added.]

6. While Rule 2.4(b) does not explicitly require a lawyer-mediator to reveal her status as a lawyer, Rule 2.4(b) makes plain that the lawyer-mediator is ethically obligated to avoid any party's confusion or misunderstanding regarding the lawyer's limited role in the mediation process. The precise content of the required conversation, and the exact information the lawyer-mediator will have to disclose to a party about the lawyer's role, may vary from one mediation to another. However, Comment [3] to Rule 2.4 makes clear some of the important differences between lawyers as mediators and nonlawyers as mediators. Comment [3] provides as follows:

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

7. When a lawyer-mediator follows the mandate of Rule 2.4(b) by explaining to a confused or uninformed party "the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client," the explanation will usually need to include a disclosure that the mediator is a lawyer. Similarly, if the lawyer-mediator considers it "appropriate" under Comment [3] to explain the "important

differences” between the lawyer’s roles as mediator and as a client representative, as well as “the inapplicability of the attorney-client evidentiary privilege,” these explanations likewise will usually need to include disclosure that the mediator is a lawyer. Certainly nothing in Rule 2.4 or any other Rule prohibits a lawyer-mediator from disclosing her status as a lawyer.

8. Indeed, long before the Courts added Rule 2.4 to New York’s ethics rules, this Committee addressed the role of a lawyer as mediator. In N.Y. State 678 (1996), while considering whether a lawyer serving as a divorce mediator is providing legal services, we said: “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.”

9. Thus, unless all mediating parties are represented by counsel in the mediated matter, a lawyer-mediator must explain whatever needs to be explained to assure there is no confusion about the lawyer-mediator’s role and the difference between a lawyer’s role on behalf of a client and a mediator’s role as a neutral. If this explanation requires revealing that the lawyer is a lawyer -- as we think it most often will -- then the lawyer is ethically obliged to do so. If the lawyer reveals that she is a lawyer, then she should also explain the significance of that fact. And if the mediator discloses his or her status as a lawyer to any party, then the mediator should disclose his or her status as a lawyer to all parties.

CONCLUSION

9. A lawyer-mediator’s obligations under Rule 2.4(b) will in certain circumstances require the lawyer to reveal to all parties that he or she is a lawyer and to explain the significance of that fact.

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