



**New York State Bar Association
Committee on Professional Ethics**

Opinion 999 (3/28/14)

Topic: Marital Mediation and referrals.

Digest: An attorney who works exclusively in the field of Marital Mediation, with a stated goal “to help couples resolve problems and stay together”, may ethically refer such couples to the attorney’s spouse, a psychiatrist, who has volunteered to provide two free couples-counseling sessions to such couples.

Rules: 1.7; 2.4(a); 2.4(b); and 8.4.

QUESTION

1. May an attorney who works exclusively in the field of marital mediation, with a stated goal: “to help couples resolve problems and stay together” ethically refer couples to the attorney’s spouse, a psychiatrist who has volunteered to provide two free couples-counseling sessions to such couples?

OPINION

2. Rule 2.4(a) is entitled: “Lawyer Serving as Third Party Neutral” and provides that, “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.” Since the inquiring attorney is engaging in neutral mediation, that attorney is not representing clients.

3. The attorney serving as a third-party neutral must be mindful of the obligations imposed by Rule 2.4(b), which requires that, “a lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them.” Additionally, should it become apparent 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.”

4. Because the lawyer is not engaging in the representation of a client or clients during the course of the mediation, the lawyer would not have a personal interest conflict under Rule 1.7 (Rule 1.7 applies only to client representation).

5. With respect to the attorney/inquirer’s spouse’s offer to provide two free “couples-counseling” sessions to the mediating parties, the attorney/inquirer must also be mindful of Rule

8.4(c), which provides that an attorney must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” It may be that under the circumstances Rule 8.4(c) would require the attorney/inquirer to make clear disclosures that the psychiatrist is in fact the spouse of the attorney and also that the two free sessions might not be sufficient to resolve every issue between the parties and that therefore the attorney could conceivably derive an indirect benefit from fees charged to the parties by the attorney/inquirer’s spouse for work beyond the two free sessions.

6. The attorney should be aware that even though a neutral mediator is not representing a client, the lawyer neutral may still be practicing law, and other Rules may apply. *See* N.Y. State 979 (2013); N.Y. State 678 (1996).

CONCLUSION

7. The attorney inquirer may make the referral to the attorney inquirer’s psychiatrist spouse subject to the cautions identified above.

35-13