

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

Opinion 1178 (12/13/2019)

Modifies NY State 678 (1996)

Topic: Lawyer as third-party neutral

Digest: A lawyer-mediator engaged in providing third-party neutral services is subject to Rule 2.4 but not the Rules that govern the representation of clients. As such, the lawyer-mediator is generally free to conduct the mediation in the way the lawyer thinks best, and to charge whatever fee may be appropriate, provided always that the lawyer fully discloses to the parties that the lawyer is acting as a disinterested mediator and not as counsel to any party, including the consequences of that difference. In the event of an agreement, the lawyer-mediator may memorialize the parties' understanding in a document and may appear as counsel for one party (but not both) in filing a divorce action if the other party gives informed consent confirmed in writing.

Rules: 1.5, 1.6, 1.7, 1.12, 2.4, 5.7

FACTS

1. The inquiring lawyer intends to become a mediator and plans to focus on mediating cases involving parties who would otherwise seek a contested divorce. The lawyer-mediator anticipates that the parties may find that meeting individually to discuss the issues that need to be resolved in order to submit their agreement to the court would be beneficial given the antagonistic position between them.

2. The lawyer-mediator intends to charge an upfront, flat rate for the mediation services. The goal of those services is for the parties to resolve all of the issues necessary for the parties to be in a position to submit an uncontested divorce package. In the event that the parties discontinue using the lawyer as a mediator before all of the issues are resolved, the contract will provide that the parties will pay the lawyer-mediator an hourly rate for the services performed, charged against the upfront payment with any unused amount returned to the parties.

QUESTIONS

3. In connection with setting up a mediation practice, the inquiring lawyer poses several questions:

- (a) May the lawyer-mediator meet with the parties individually to inform them of the various issues that need to be resolved in order to have a divorce granted in New York?
- (b) May the lawyer-mediator enter into a contract with the parties to provide mediation services? If so, may the contract provide for the payment of a flat rate by the parties

in the event resolution is reached that results in an uncontested divorce packet but otherwise provides for the payment by the parties on an hourly basis if the parties discontinue the lawyer-mediator's services before all issues can be resolved?

- (c) What disclosures does the lawyer-mediator have to provide to parties to the mediation concerning her role as mediator?
- (d) May the lawyer-mediator prepare documents, including a divorce action representing the parties, if the parties reach agreement?

OPINION

4. Generally, lawyer-mediators are not engaged in the representation of a client and are not providing legal services to the parties to the mediation. *See* N.Y. State 999 ¶ 2 (2014); N.Y. State 1026 ¶ 6 (2014). Thus, the N.Y. Rules of Professional Conduct (the "Rules") that apply when a lawyer represents a client do not necessarily apply in the context of a lawyer providing mediation services, including Rule 1.5 concerning fees, Rule 1.6 concerning confidentiality, and Rule 1.7 concerning conflicts, although lawyer-mediators should be aware that certain rules will continue to apply even in the absence of an attorney-client relationship. *See* Rule 5.7, Cmt. [4].

5. Instead, Rule 2.4 is directed to lawyers acting as third-party neutrals and provides:

- (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.
- (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.

6. In terms of the required disclosure under Rule 2.4(b) stated above, we have noted that "[t]he 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." *See* N.Y. State 878 (2011). Comment [3] to Rule 2.4 provides some guidance:

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 the 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 the 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. "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." *See* N.Y. State 878 (2011).

8. There may also be times when it is not possible for the lawyer-mediator to provide an effective explanation regarding the difference between the role as a lawyer-mediator compared to a lawyer's role when representing a client. As we noted in N.Y. State 736 (2001), matrimonial mediation may be undertaken in many circumstances, but sometimes "the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions, and the inequality in bargaining power resulting from differences in personalities or sophistication of the parties make it virtually impossible to achieve a result free from later recriminations or bias or malpractice, unless both parties are represented by separate counsel. In the latter circumstances, informing the parties that the lawyer 'represents' neither and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances, may be illusory."

9. In addition, even though the confidentiality provisions of Rule 1.6 would not apply, a lawyer-mediator may be governed by other confidentiality obligations found in substantive laws (such as statutes or court rules) or private sources (such as ethics codes promulgated by mediation groups). *See* Rule 2.4, Cmt. [2] ("the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics"); Rule 1.12, Cmt. [3] (lawyers who serve as third-party neutrals "typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals"); N.Y. State 1026 ¶ 7 (2014).

10. Accordingly, as long as the lawyer-mediator follows Rule 2.4 (and any other applicable rules or laws), the lawyer-mediator would be free to conduct the mediation in the way the lawyer-mediator thinks best, including meeting with the parties separately, and contracting for and structuring her fee however the lawyer-mediator would like.

11. We also note that the lawyer-mediator may assist the parties with memorializing in writing the terms to which they agree during the mediation. Such an *aide memoire* or Memorandum of Understanding is a common product of the mediation process.

12. Beyond this, however, that lawyer-mediator may not cross the line between acting as a neutral arbiter and acting as counsel to the parties. N.Y. State 1026 ¶ 10 (the lawyer performs legal services when the lawyer drafts and files divorce papers in court on behalf of the parties). In that event, all of the mediation services would then be covered by the Rules as the non-legal

mediation services would not be distinct from the legal services. *See* Rule 5.7. Nevertheless, Rule 1.12(b) expressly permits the lawyer-mediator, at the conclusion of the mediation, in the event of an agreement between the parties, to represent one of the parties in filing a divorce action in court, provided the other party gives informed consent, confirmed in writing. At that point, the erstwhile mediator owes all the duties accompanying the attorney-client relationship under the Rules to the represented party. Rule 1.7(b)(3) forbids a lawyer from representing adverse parties in a proceeding, even with informed consent, and so the lawyer-mediator may not represent both parties in the filing of a divorce action.

13. In so concluding, we expressly supersede N.Y. State 678 (1996) insofar as that opinion says that the provision of mediation services by lawyers constitutes the practice of law. That opinion was issued before adoption of Rule 2.4, which specifically governs a lawyer's provision of neutral services and which had no equivalent in the predecessor N.Y. Code of Professional Responsibility. We have earlier so hinted: Following adoption of the Rules, we noted the possibility that our conclusion under the Rules might change on this issue. In N.Y. State 979 (2013), we said that there were conflicting opinions concerning whether the provision of mediation services was the practice of law and that "[t]he case that such services are not the practice of law was arguably bolstered by New York's adoption of the Rule specifically governing a lawyer's service as a mediator." We now make explicit that Rule 2.4 ousts our conclusion in N.Y. State 678 that the provision of mediation services invariably constitutes the practice of law. Only when a lawyer-mediator engages in services beyond providing neutral services, such as filing papers in court, does the lawyer-mediator cross the line into providing legal services.

CONCLUSION

14. A lawyer-mediator engaged in providing third-party neutral services is subject to Rule 2.4 but not the Rules that govern the representation of clients. As such, the lawyer-mediator is generally free to conduct the mediation in the way the lawyer-mediator thinks best and to charge whatever fee the lawyer-mediator thinks appropriate and must provide disclosure to the parties concerning the lawyer-mediator's role as a mediator compared to that of a lawyer representing a client. If, however, the lawyer-mediator engages in an activity that constitutes a legal service, that legal service would not be distinct from the non-legal mediation services and the Rules would then apply to both the legal and non-legal services provided by the lawyer-mediator. At the conclusion of the mediation, the lawyer may represent one (but not both) of the parties in filing a divorce action, provided the other party gives informed consent, confirmed in writing.

(08-19)