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New York State Bar Association
Committee on Professional Ethics

Opinion 979 (8/8/13)

Topic: Lawyer-mediator group; payment for referrals

Digest: A group of lawyer-mediators, though not associated in a firm, may place joint advertisements and maintain a website that lists the varied experience and biographies of its members, allowing those seeking mediation services to contact a particular member of the group by visiting a website maintained by the group or calling a telephone number listed for the group as a whole.

Rules: 2.4; 5.7(a); 7.2(a)

FACTS

1. The inquirer is a lawyer who, with another lawyer, has been organizing a group of lawyer-mediators with varied areas of experience. The group has a name, and a website that lists the names, areas of experience, and detailed biographies of each member. The group plans to place advertisements. Members of the group will pay its operating costs, including the price of the advertisements.

2. A legal assistant employed by the inquirer will answer calls to a telephone number listed on the website, but will not recommend specific members of the group to the caller. Instead, those seeking mediation services from the group will be expected to pick the appropriate lawyer-mediator based on the information about each member contained on the website. The inquirer has asked whether this arrangement would constitute a referral arrangement prohibited under the authority of N.Y. State 678 (1996).

QUESTION

3. May a group of lawyer-mediators, though not associated in a firm, place joint advertisements, maintain a website that lists the varied experience and biographies of its members, and maintain a phone line available to callers seeking a particular lawyer-mediator?

OPINION

4. The New York Rules of Professional Conduct generally do not allow lawyers to pay for referrals of clients. Subject only to certain exceptions not relevant to this inquiry, "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in

employment by a client." Rule 7.2(a). However, this prohibition is not meant to keep "a lawyer

from paying for advertising and communications permitted by the[] Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, … and group advertising." Rule 7.2, Cmt. [1].

5. We consider two threshold questions as to the applicability of Rule 7.2. The first asks which of the Rules apply (and in particular whether Rule 7.2 applies) to the kind of mediation services contemplated by this inquiry. One that would clearly apply is the Rule specific to service as a third-party neutral.[1] Some other Rules apply to lawyers at all times, irrespective of whether they are providing legal services.[2]

6. The applicability of other Rules, including Rule 7.2, presents a more complicated question that requires consideration of whether mediation services constitute legal services. A service that can lawfully be performed only by lawyers is clearly a legal service, but nonlawyers can lawfully serve as mediators. We nonetheless concluded in N.Y. State 678 (1996) that "lawyers who serve as mediators should be presumed to be rendering a legal service," and thus, at least presumptively, "are engaged in the practice of law."[3] If that conclusion is correct today, then mediation services by a lawyer are presumptively governed by the Rules. *See* Rule 5.7, Cmt. [4] (lawyer or law firm rendering legal services "is always subject to these Rules").

7. There is, however, controversy on this point. Some authorities have concluded that mediation services by a lawyer do not constitute the practice of law and are not subject to the full

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[1] Rule 2.4 ("Lawyer Serving as Third-Party Neutral") applies to lawyers serving as mediators and in other neutral capacities. Moreover, a lawyer who serves as a third-party neutral "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," as well as various codes of ethics. Rule 2.4, Cmt. [2]. We express no opinion on the applicability or import of any such constraints outside the Rules of Professional Conduct. *See, e.g.,* N.Y. State 900 ¶19 (2011).

[2] Rule 5.7 determines when the Rules are generally applicable to lawyers who are providing "nonlegal services," but a comment to the rule explains that some Rules apply in all circumstances: "Although a lawyer may be exempt from the application of these Rules with respect to nonlegal services on the face of [Rule 5.7(a)], the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or client-lawyer relationship. Other Rules, such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer not covered by [Rule 5.7(a)]." Rule 5.7, Cmt. [4].

[3] We reasoned in part: "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." We did not treat this as a *per se* rule: "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." N.Y. State 678 (1996).

range of legal ethics rules.[4] Other authorities have endorsed the approach of N.Y. State 678.[5] And some have taken a middle position in which a lawyer-mediator may or may not be practicing law, and may or may not be generally subject to the rules of legal ethics, depending on the circumstances.[6] In any event, the current inquiry does not require, and we do not now undertake, a reconsideration of N.Y. State 678.[7]

8. The other threshold question has to do with the status of the group of lawyer-mediators. If they were to constitute a law firm, then its members would merely be making financial contributions toward advertising for that very firm. In that case the inquiry would implicate general restrictions on advertising but not the prohibition on paying others for referrals. *See* Rule 7.2, Cmt. [1] (stating that lawyers are not permitted "to pay others" for channeling professional work). On the facts as presented in the inquiry, however, the group of lawyer-mediators does not constitute a law firm as defined by Rule 1.0(h). Rule 7.2 is thus applicable (subject to considerations in the previous paragraph). We also note that joint advertisements must not

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[4] *E.g.*, Indiana Opinion 5 (1992) (because nonlawyers may act as mediators and nature of mediation is substantially different from practice of law, lawyer-mediator was not generally bound by legal ethics rules on trade names and solicitation); Kentucky Opinion KBA E-377 (1995) (corporation formed by attorney to provide mediation services not subject to legal ethics rule on trade names, though advertisement of mediation services which identifies any participant as a lawyer must comply with ethics rules on advertising). The 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. In relevant part the Rule provides: "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." Rule 2.4(a).

[5] *E.g.*, Iowa Opinion 96-30 (1997) (alternative dispute resolution done by nonlawyers "has not been held to be the practice of law … [b]ut when done by a lawyer it becomes the practice of law" and lawyer working as a mediator would be bound by Iowa legal ethics code); Mississippi Opinion 241 (issued 1997, amended 2013) (mediation is a "law related" service which when provided by a lawyer becomes the practice of law and is subject to rules of legal ethics); New Jersey Opinion 711 (2007) (when mediation center advertised that lawyer-mediators would help parties understand legal rights and procedures, attorneys who accept referrals to mediate "are practicing law" by "accepting clients in a form of limited representation … for the sole purpose of serving as a third-party neutral, as contemplated by [New Jersey Rule 2.4]," and their conduct is governed by New Jersey legal ethics rules).

[6] *E.g.*, Oregon Opinion 2005-101 (identifying certain rules of legal ethics that would apply if the mediation service "would involve the practice of law, such as by drafting settlement agreements"); Pennsylvania Opinion 96-167 (mediation appears to be among "nonlegal services" such that Rule 5.7 will determine applicability of other Rules, but "if an attorney-mediator advertises his/her services, he/she must comply with the advertising and solicitation rules").

[7] If – contrary to N.Y. State 678 – mediation services by a lawyer do not constitute legal services subject to the full range of legal ethics rules, then Rule 7.2 would not apply, and the conduct proposed in the inquiry would not be prohibited by the Rules. The other possibility – following N.Y. State 678 – is that mediation services by a lawyer constitute legal services (either always or in particular cases), and Rule 7.2 applies. Even in that case, based on the analysis in the rest of this opinion, the proposed conduct would be permissible. In other words, the outcome would be the same either way and would not turn on whether we would reach the same conclusion if we were deciding N.Y. State 678 today.

misstate the relationship among members of the group. *See* Rule 7.1(c)(2) (advertisements shall not "imply that lawyers are associated in a law firm if that is not the case").

9. We turn to the application of Rule 7.2(a). Some of our prior opinions shed light on the boundary between referrals and group advertising. In one opinion applying the former Code of Professional Responsibility, the Committee concluded 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 geographical 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.

N.Y. State 597 (1989). The Committee found such an arrangement to violate certain provisions, then part of the Code, limiting lawyer referral services.

10. The Committee reached a different conclusion, however, as to an advertisement which "presents in a meaningful fashion" the names and other information of the lawyers or firms participating in the group advertisement "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." The Committee found such a listing permissible if otherwise compliant with the Code and court rules, and we noted that "such joint advertising may be the only way it is economically feasible for a practitioner with a small practice to afford certain forms of advertising." N.Y. State 597.

11. We followed the reasoning of N.Y. State 597 in the context of a divorce mediation service that proposed running ads with an "800" number. Callers would be referred to a participating mediator based on the caller's geographic location. The Committee reiterated that this type of arrangement – in which a potential client calls to get the name of a provider of services rather than to contact a specified individual – would constitute a lawyer referral service. N.Y. State 678 (1996).

12. We believe that the lines drawn by these precedents with respect to certain provisions in the former Code apply equally to the prohibition of payments for referrals that is in the current Rules of Professional Conduct. The proposed conduct does not, like the arrangements that our prior opinions found to be referral services, contemplate that prospective clients will call a number and be given the name of a lawyer. Rather, the members of the inquirer's group will be listed on a website and perhaps other advertisements by name and areas of experience. The website will include a detailed member biography. This format is reasonably designed to encourage the consumer to select the member with the expertise appropriate to the consumer's needs, rather than to trigger a consumer to call for a referral. We rely also on the inquirer's assurance that a caller seeking a referral will not be supplied with the name of a lawyer-mediator, but rather will be directed back to the website to choose a member with appropriate qualifications. Accordingly, in the model proposed, the members of the group would be paying for joint advertising but would not be making payments for referrals as prohibited by Rule 7.2.

13. We note that the inquirer may need to consider various matters of legal ethics beyond Rule 7.2. For example, the inquirer may need to consider ethical constraints on advertising, claims of specialization, trade names and payment arrangements.[8] However, the inquiry neither focuses on these matters nor fully describes the facts surrounding them, and we do not opine as to the permissibility of the proposed conduct in these respects.

CONCLUSION

14. A group of lawyer-mediators, though not associated in a firm, may place joint advertisements and maintain a website identifying the group's members and listing their varied experience, practice areas and biographies, so as to allow a party seeking mediation services to call a single telephone number or visit a single website to contact the lawyer-mediator of that party's choice. The members of the group may pay the group's operating costs as long as the advertising and payment arrangements comply with relevant Rules.

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[8] Limits on advertising, claims of specialization, and trade names are set forth in Rule 7.1, Rule 7.4, and Rule 7.5(b) respectively. As to payment by the lawyer-mediators for advertisements and other operating costs of the group, some arrangements could be problematic and require further analysis. For example, the inquiry mentions that that the amount of each lawyer's payments may be determined as a percentage of fees earned by that lawyer on work brought in through the group's marketing. *See* Rule 1.5(g) (generally prohibiting division of legal fees with a lawyer not associated in same firm); Rule 5.4(a) (generally prohibiting sharing legal fees with a nonlawyer). If we had occasion to reach such issues, the threshold question would be the applicability to the proposed conduct of the Rules cited in this footnote, and that would require consideration of N.Y. State 678 in light of Rule 2.4. *See* paragraphs 6-7 *supra*.