

Formal Ethics Opinion

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-438

Issued: January 16, 2015

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/?opinsethics>), before relying on this opinion.

The Lawyer-Mediator and Representation After a Domestic Relations Mediation

Question 1

Upon the conclusion of a domestic relations mediation in which the parties to the mediation are not represented by counsel, may the lawyer who served as mediator in the matter assist the parties to the mediation in the preparation of the agreement reached during the mediation conference?

Answer

Yes.

Question 2

After the conclusion of a domestic relations mediation in which the parties to the mediation are not represented by counsel, may the lawyer who served as mediator in the matter assist one or both of the parties in the preparation of ancillary documents?¹

Answer

No.

Question 3

Upon the conclusion of a domestic relations mediation in which the parties to the mediation are not represented by counsel, may the lawyer who served as mediator in the matter assist one or both of the parties to the mediation in the preparation of ancillary documents but with the understanding that the lawyer-mediator does not represent anyone regarding the document preparation?

Answer

No.

References

¹ For purposes of this opinion, ancillary documents are documents necessary for the complete resolution of the matter other than the agreement reached during the mediation conference.

SCR 3.020; SCR 3.130(1.0(e) &(b)) & Comments 6 & 7; SCR 3.130(1.1); SCR 3.130(1.2(c))& Comment 7; SCR 3.130(1.7(b(1) &(4))) & Comments 14 & 15; SCR 3.130(1.8(h(1))); SCR 3.130(1.12(a), (b), & (d)); SCR 3.130(2.4); Kentucky Supreme Court Model Mediation Rule 11; Mediation Guidelines for Court of Justice Mediators, Administrative Procedures, AP XII, §3; KBA E-377(1995); KBA E-361(1993); KBA E-335(1989); Model Standards of Practice for Family and Divorce Mediation Standard VI.E. (2000); Mich. Eth. Op. RI-351 (2011); Ohio Eth. Op. 2009-4(2009); Tex. Eth. Op. 583 (2008); Mich. Eth. Op. RI-278 (1996); Ind. Eth. Op. 5 (1992).

Discussion

Mediation is an accepted and regular practice in domestic relations matters. As in other subject areas, lawyers often serve as mediators in domestic relations matters. Unfortunately, significant uncertainty surrounds the assistance a lawyer-mediator may render unrepresented parties to a domestic relations mediation at the conclusion of the mediation in the form of document preparation. This opinion seeks to clarify the lawyer-mediator's role regarding post-mediation document preparation with regard to the Kentucky Rules of Professional Conduct.

Note that lawyers who wish to be approved mediators on the Court of Justice's "roster" of approved mediators must agree to adhere to the Mediation Guidelines for Court of Justice Mediators, Administrative Procedures, AP XII, §3(the "Guidelines"). This opinion expresses no opinion about the requirements of the Guidelines, but notes that the Guidelines may require action other than or beyond what the Kentucky Rules of Professional Conduct require.

Question 1: Preparation of the Agreement Reached During the Mediation Conference

There is no dispute that a lawyer in private practice may also be a mediator. See KBA E-361(1993). Kentucky Supreme Court Rule (SCR) 3.130(2.4) confirms this. Rule 2.4 states:

- (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.

Mediation in domestic relations matters is an accepted method of resolving issues. See KBA E-335(1989). A mediator in the traditional role of mediator does not engage in the practice of law as that practice is defined in SCR 3.020. See KBA E-377(1995). See also Indiana Op. 5 (1992).

The preparation of the agreement reached during the mediation conference is a part of the mediation process and thus may be done by a mediator in that role whether or not the mediator is a lawyer. The Kentucky Supreme Court's Model Mediation Rules provide in Rule 11 that an agreement reached in a mediation conference must be reduced to writing. Rule 11 continues, "The parties shall be responsible for the drafting of the agreement, although the mediator may assist in the drafting of the agreement with the consent of the parties." Likewise, the Guidelines Section 3(15) states: "The parties are responsible for the drafting of the agreement, although the mediator may assist in the drafting of the agreement with the consent of the parties."

The Model Standards of Practice for Family and Divorce Mediation (2000), approved by the ABA, the Association of Family and Conciliation Courts, and the Association for Conflict Resolution, state in Standard VI.E.:

With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.

Thus, a lawyer-mediator may assist the parties to the mediation in the preparation of the agreement reached during the mediation conference. See also Ohio Ethics Op. 2009-4(2009) ("The ethical propriety of a lawyer-mediator in a domestic relations mediation preparing and filing a mediation report is not in dispute."); Mich. Eth. Op. RI-278(1996) ("Upon tentative resolution of the dispute, it is not inappropriate for a mediator to suggest that the parties memorialize their understandings in a written document. The lawyer, in the role of neutral mediator, is not per se prohibited from preparing the document.").

Question 2: Assisting in Ancillary Document Preparation at the Conclusion of the Mediation

A lawyer-mediator may not assist the parties in the preparation of ancillary documents at the conclusion of a domestic relations mediation.

The preparation of ancillary documents is the practice of law under SCR 3.020, which defines the practice of law as follows:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor. An appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice of law.

Other ethics bodies have agreed that preparation of ancillary documents is the practice of law. See Mich. Eth. Op. RI-351 (2011)(drafting documents necessary to effectuate the divorce is providing legal service); Ohio Eth. Op. 2009-4(2009)("A domestic relations lawyer-mediator who goes beyond preparing the mediation report, ..., into the preparation of necessary legal documents for filing by or on behalf of the parties to a domestic relations proceeding is engaging in a legal representation subsequent to the mediation."); Tex. Eth. Op. 583 (2008) ("the preparation of documents to implement an agreement for divorce reached in a mediation clearly involves the provision of legal services by the lawyer/mediator).

The Rules of Professional Conduct would in theory allow a circumscribed representation such as the preparation of ancillary documents presents. SCR 3.130(1.2(c)) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Thus, a lawyer-mediator, theoretically, could agree to limit the representation of the parties to preparing the ancillary documents and the advice the lawyer-mediator renders regarding that activity. The lawyer would not represent the parties with regard to any other aspect of the matter. As to those aspects, the parties would be unrepresented. Of course,

such an arrangement may not be reasonable in a particular situation as SCR 3.130(1.2(c)) requires, and so such a representation may not be possible.

In providing limited representation with regard to ancillary document preparation, the lawyer-mediator would owe all professional responsibility duties to the parties. For example, Comment 7 to SCR 3.130(1.2) emphasizes that the lawyer must provide competent representation as required by SCR 3.130(1.1). While such a limited representation is possible in general, and may be ethical in certain other situations, a lawyer who plans to serve, is serving, or has served as a mediator in a domestic relations matter cannot undertake any post-mediation representation of unrepresented parties to the mediation with regard to the mediated matter.

A lawyer-mediator cannot negotiate with unrepresented parties before or during a domestic relations mediation to be a mediator for purposes of the mediation and a lawyer for purposes of preparation of ancillary documents after the mediation. SCR 3.130(1.12(b)) provides in part:

A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. This rule does not prohibit an arbitrator, mediator, or third-part neutral from negotiating future cases.

The Professional Ethics Committee for the State Bar of Texas, in Opinion 583 (2008), concluded that a similar version of Rule 1.12(b) prohibited a lawyer-mediator from entering into an engagement agreement that provided for both mediation services and the preparation of ancillary documents. See Tex. Eth. Op. 583 (2008). The Texas view is the wise one. Rule 1.12(b) exists to prohibit a situation in which the lawyer-mediator might have incentive to be less than completely unbiased. Consistent with this notion, Rule 1.12(b) prohibits a lawyer-mediator from negotiating for future employment with the parties of the mediation before or during the mediation since the danger of bias creation is present in either scenario.

Upon the conclusion of a domestic relations mediation, the unrepresented parties to the mediation may desire that the lawyer-mediator assist them in the preparation of ancillary documents. Because the preparation of ancillary documents is the provision of a legal service, as established above, the lawyer-mediator would be providing a legal service in preparing ancillary documents.

Even if the lawyer-mediator does not discuss legal representation with the unrepresented parties to the domestic relations mediation until the mediation has concluded, the lawyer-mediator cannot represent either or both of the parties by assisting with the preparation of ancillary documents. SCR 3.130(1.12(a)) states:

Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

The exception in paragraph (d) to which SCR 3.130(1.12(a)) refers, relates to partisan arbitrators and thus is irrelevant here. "Informed consent" requires

the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

SCR 3.130(1.0(e)). SCR 3.130(1.0(b)) explains the requirement that the informed consent be “confirmed in writing” as follows:

“Confirmed in writing” when used in reference to the informed consent of a person denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of an informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Thus, SCR 3.130(1.12(a)) generally allows a lawyer who “participated personally and substantially” as a mediator in a matter to later represent a party “in connection with” that matter if all parties give informed consent confirmed in writing. Yet, when the matter of the mediation and the document preparation is a domestic relations matter and the parties are unrepresented in the mediation and otherwise, the appropriate disclosures and explanation to obtain informed consent are simply not possible in light of the complex nature of a domestic relations mediation and the confidentiality obligations involved in these mediations. See Comments 6 and 7 to SCR 3.130(1.0). If the lawyer seeks to represent both parties, there would be a conflict of interest under SCR 3.130(1.7) and, again, consent would not be possible under the consentability standard of SCR 3.130(1.7(b(1) and (4))). See also Comments 14 and 15 to SCR 3.130(1.7).

Question 3: Preparation of Ancillary Documents with an Agreement that the Lawyer-Mediator Represents No One

As established in the discussion accompanying Question 2, preparation of ancillary documents at the conclusion of mediation is an activity within the definition of the practice of law. The question arises as to whether a lawyer-mediator may obtain the parties’ agreement that the lawyer-mediator does not represent either party in preparing the ancillary documents. By so doing, the lawyer-mediator seeks to avoid all duties owed to a client and all conflict implications arising from client representation.

A lawyer-mediator may not do this. Comment 7 to SCR 3.130(1.2) emphasizes that the lawyer must provide competent representation as required by SCR 3.130(1.1) in the context of the limited representation. A lawyer may provide a limited representation but that representation carries with it all the professional responsibilities a lawyer owes to any client. A lawyer-mediator preparing ancillary documents at the conclusion of a mediation owes the clients all the professional responsibility duties regarding the preparation of those documents and the advice rendered surrounding them.

By seeking the agreement of the mediation parties that the lawyer-mediator will prepare documents ancillary to the mediation but represent no one, the lawyer-mediator seeks to negate all professional responsibility duties owed to clients. SCR 3.130(1.8(h)) provides in part:

A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

The proposed arrangement violates SCR 3.130(1.8(h(1))) because the lawyer-mediator seek a prospective limit of liability though the mediation party or parties are not independently represented with regard to the engagement agreement. Accord Mich. Eth. Op. RI-351 (2011) (“Under these circumstances, seeking to abrogate the responsibilities of a lawyer to a client through a prospective agreement that either asserts the lawyer does not represent either party or requires the parties to acknowledge that the lawyer represents neither party violates MRPC 1.8(h)(1) by constructively seeking to prospectively limit the lawyer’s liability for malpractice.”).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.