

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-335
Issued: July 1989

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), especially Rules 7.01-7.50 and the Attorneys' Advertising Commission Regulations, before relying on this opinion.

Question: May Kentucky lawyers participate in "Divorce Mediation?"

Answer: Yes.

References: Model Rules 2.2 and 7.2; Standards of Practice for Divorce and Family Mediation of the American Bar Association (1984).

OPINION

Several inquiries have been made regarding the propriety of a Kentucky lawyer's participation in divorce mediation, either in the role of mediator or independent counsel for a party engaged mediation.

In KBA E-290 (1984) we noted the conventional wisdom that a lawyer should not attempt to serve as advocate for both spouses in a divorce. However, the opinion reserved the possibility that a lawyer might serve as a mediator in this setting. Indeed, Model Rule 2.2 provides that a lawyer may serve as mediator (as opposed to advocate) if the conditions imposed by the Rule are met. The ABA has also promulgated Standards of Practice for Divorce and Family Mediation. These detailed guidelines (33 pages) are available from the ABA Press. They should provide concrete answers to specific questions concerning the ethical implications of mediation. We include a brief statement of the Standards (without the Commentary) for your convenience .

One organization that contemplates offering mediation services plans to encourage participants to consult independent counsel before engaging in mediation, and again before the parties formalize any mediated agreement. Of course, independent counsel must bring to bear their independent professional judgment in regards to the benefits and risks of mediation, and the adequacy of any settlement. This is consistent with the ABA Standards.

The organization also asks if it may provide interested parties with a list of lawyers in the particular community that have manifested an interest and familiarity with the mediation process. The parties would not be limited to the selection of mediators or lawyers from such a list. Such a list may be provided so long as any use of the list complies with the rules governing advertising and specialty disclaimer, and so long as the listed lawyer does not have to pay the organization for the listing. See Model Rule 7.2.

Appendix of Standards:

PREAMBLE AND STANDARDS

Preamble

For the purposes of these standards, family mediation is defined as a process in which a lawyer helps family members resolve their disputes in an informative and consensual manner. This process requires that the mediator be qualified by training, experience and temperament; that the mediator be impartial, that the participants reach decisions voluntarily; that their decisions be based on sufficient factual data; and that each participant understands the information upon which decisions are reached. While family mediation may be viewed as an alternative means of conflict resolution, it is not a substitute for the benefit of independent legal advice.

Standard I

The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.

Before the actual mediation sessions begin, the mediator shall conduct an orientation session to give an overview of the process and to assess the appropriateness of mediation for the participants. Among the topics covered, the mediator shall discuss the following:

- A. The mediator shall define the process in context so that the participants understand the differences between mediation and other means of conflict resolution available to them. In defining the process, the mediator shall also distinguish it from therapy or marriage counseling.
- B. The mediator shall obtain sufficient information from the participants so they can mutually define the issues to be resolved in mediation.
- C. It should be emphasized that the mediator may make suggestions for the participants to consider, such as alternative ways of resolving problems and may draft proposals for the participants' consideration, but that all decisions are to be made voluntarily by the participants themselves, and the mediator's views are to be given no independent weight or credence.
- D. The duties and responsibilities that the mediator and the participants accept in the mediation process shall be agreed upon. The mediator shall instruct the participants that either of them or the mediator has the right to suspend or terminate the process at any time.
- E. The mediator shall assess the ability and willingness of the participants to mediate. The mediator has a continuing duty to assess his or her own ability and willingness to undertake mediation with the particular participants and the issues to be mediated. The mediator shall not continue and shall terminate the process, if in his or her judgment, one of the parties is not able or willing to participate in good faith.
- F. The mediator shall explain the fees for mediation. It is inappropriate for a mediator to charge a contingency fee or to base the fee on the outcome of the mediation process.
- G. The mediator shall inform the participants of the need to employ independent legal counsel for advice throughout the mediation process. The mediator shall inform the participants that

the mediator cannot represent either or both of them in a marital dissolution or in any legal action. The mediator cannot act as lawyer for either party or for them jointly and should make that clear to both parties.

- H. The mediator shall discuss the issue of separate sessions. The mediator shall reach an understanding with the participants as to whether and under what circumstances the mediator may meet along with either of them or with any third party.
- I. It should be brought to the participants' attention that emotions play a part in the decision-making process. The mediator shall attempt to elicit from each of the participants a confirmation that each understands the connection between one's own emotions and the bargaining process.

Standard II

The mediator shall not voluntarily disclose information obtained through the mediation process without the prior consent of both participants.

- A. At the outset of mediation, the participants should agree in writing not to require the mediator to disclose to any third party any statements made in the course of mediation. The mediator shall inform the participants that the mediator will not voluntarily disclose to any third party of the information obtained through the mediation process, unless such disclosure is required by law, without the prior consent of the participants. The mediator shall also inform the participants of the limitation of confidentiality such as statutory or judicially mandate reporting.
- B. If subpoenaed or otherwise noticed to testify, the mediator shall inform the participants immediately so as to afford them an opportunity to quash the process.
- C. The mediator shall inform the participants of the mediator's inability to bind third parties to an agreement not to disclose information furnished during the mediation in the absence of any absolute privilege.

Standard III

The mediator has a duty to be impartial.

- A. The mediator shall not represent either party during or after the mediation process in any legal matters. In the event the mediator has represented one of the participants beforehand, the mediator shall not undertake the mediation.
- B. The mediator shall disclose to the participants any biases or strong views relating to the issues to be mediated, both in the orientation session, and also before these issues are discussed in mediation.
- C. The mediator must be impartial as between the mediation participants. The mediator's task is to facilitate the ability of the participants to negotiate their own agreement, while raising questions as to the fairness, equity and feasibility of proposed options for settlement.
- D. The mediator has a duty to ensure that the participants consider fully the best interests of the children, that they understand the consequences of any decision they reach concerning the children. The mediator also has a duty to assist parents to examine the separate and individual needs of their children and to consider those needs apart from their own desires for any particular parenting formula. If the mediator believes that the proposed agreement

of the parents does not protect the best interests of the children, the mediator has a duty to inform them of this belief and its basis.

- E. The mediator shall not communicate with either party alone or with any third party to discuss mediation issues without the prior written consent of the mediation participants. The mediator shall obtain an agreement from the participants during the orientation session as to whether and under what circumstances the mediator may speak directly and separately with each of their lawyers during the mediation process.

Standard IV

The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.

- A. The mediator shall assure that there is full financial disclosure, evaluation and development of relevant factual information in the mediation process, such as each would reasonably receive in the discovery process, or that the parties have sufficient information to intelligently waive the right to such disclosure.
- B. In addition to requiring this disclosure, evaluation and development of information, the mediator shall promote the equal understanding of such information before any agreement is reached. This consideration may require the mediator to recommend that either or both obtain expert consultation in the event that it appears that additional knowledge or understanding is necessary for balanced negotiations.
- C. The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation. The mediator shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process.

Standard V

The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants.

- A. If the mediator believes that the participants are unable or unwilling to meaningfully participate in the process or that reasonable agreement is unlikely, the mediator may suspend or terminate mediation and should encourage the parties to seek appropriate professional help. The mediator shall recognize that the decisions are to be made by the parties on the basis of adequate information. The mediator shall not, however, participate in a process that the mediator believes will result in harm to a participant.
- B. The mediator shall assure that each person has had the opportunity to understand fully the implications and ramifications of all options available.
- C. The mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques utilized by either of the participants.
- D. If the mediator has suspended or terminated the process, the mediator should suggest that the participants obtain additional professional services as may be appropriate.

Standard VI

The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.

- A. Each of the mediation participants should have independent legal counsel before reaching final agreement. At the beginning of the mediation process, the mediator shall inform the participants that each should employ independent legal counsel for advice at the beginning of the process and that the independent legal counsel should be utilized throughout the process and before the participants have reached any accord to which they have made an emotional commitment. In order to promote the integrity of the process, the mediator shall not refer either of the participants to any particular lawyers. When an attorney referral is requested, the parties should be referred to a Bar Association list if available. In the absence of such a list, the mediator may only provide a list of qualified family law attorneys in the community.
- B. The mediator shall inform the participants that the mediator cannot represent either or both of them in a marital dissolution.
- C. The mediator shall obtain an agreement from the husband and wife that each lawyer, upon request, shall be entitled to review all the factual documentation provided by the participants in the mediation process.
- D. Any memo of understanding or proposed agreement which is prepared in the mediation process should be separately reviewed by independent counsel for each participant before it is signed. While a mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement which has not been so reviewed. If the participant, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved in not being represented, including where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonable in light of both parties' legal rights or may not be binding on them.

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 (or its predecessor rule). The Rule provides that formal opinions are advisory only.