

Rule 2.4: Lawyer Serving as Third-Party Neutral

1. Current Kentucky Rule with Official Comments:

The current Kentucky Rules of Professional Conduct do not have a Rule 2.4.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(2.4) Lawyer serving as third-party neutral

(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.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court Rules or other law that apply 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, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of

the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] A lawyer serving as a third-party neutral 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 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 third-party neutral and a lawyer's role as a client representative, including the inapplicability of client confidentiality and the attorney-client privilege. The extent of 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.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) MR 2.4 is a new MR that the Committee proposes as KRPC 2.4. The Committee made two changes to Comment [3]. It deleted language that was considered surplusage and added client confidentiality as a matter on which an unrepresented party should be informed.

(2) The ABA Reporter's Explanation of Changes to the new MR 2.4 expresses the Committee's view. It is adopted by the Committee for purposes of explaining the recommended new Rule and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 2.4

TEXT:

The role of third party neutral is not unique to lawyers, but the Commission recognizes that lawyers are increasingly serving in these roles. Unlike nonlawyers who serve as neutrals, lawyers may experience unique ethical problems, for example, those arising from possible confusion about the nature of the lawyer's role. The Commission notes that there have been a number of attempts by various organizations to promulgate codes of ethics for neutrals (e.g., aspirational codes for arbitrators or mediators or court enacted Rules governing court sponsored mediators), but such codes do not typically address the special problems of lawyers. The Commission's proposed approach is designed to promote dispute resolution parties' understanding of the lawyer neutral's role.

1. Paragraph (a): Define "third party neutral"

Paragraph (a) defines the term "third party neutral" and emphasizes assistance at the request of the parties who participate in the resolution of disputes and other matters.

2. Paragraph (b): Inform parties of nature of lawyer's role

Paragraph (b) requires the lawyer serving as a third party neutral to inform unrepresented parties in all cases that the lawyer does not represent them. The potential for confusion is sufficiently great to mandate this requirement in all cases involving unrepresented parties. Consistent with the standard of Rule 4.3, paragraph (b) requires the lawyer to explain the differences in a lawyer's role as a third party neutral and the role of a lawyer representing a party in situations where the lawyer knows or reasonably should know that the unrepresented party does not understand the lawyer's role as a third party neutral.

COMMENT:

[1] This introductory Comment describes dispute resolution processes and notes that the specific role of the third party neutral may depend on whether the process is court annexed or private.

[2] This Comment cross references other law and ethics codes applicable to lawyers serving as third party neutrals. The Commission believes the referenced material will be helpful to lawyers unfamiliar with existing standards in this area.

[3] This Comment explains the rationale for the requirement of paragraph (b) that lawyers inform unrepresented parties that the lawyer is not representing them and, in some cases, explain the differences between the lawyer's role as neutral and the role of a lawyer representing a party.

[4] This Comment cross references Rule 1.12, which addresses the conflicts of interest that arise when a lawyer neutral or that lawyer's firm is asked to represent a client in a matter that is the same as a matter in which the lawyer served as a third party neutral.

[5] This Comment distinguishes between the lawyer's duty of candor in an arbitration and in other dispute resolution proceedings. Because a binding arbitration is a "tribunal" as defined in Rule 1.0(m), the lawyer's duty of candor in such a proceeding is governed by Rule 3.3. In other dispute resolution proceedings, the lawyer's duty of candor toward the third party neutral and the other parties is governed by Rule 4.1.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

Other than the changes made to Comment [3] noted above, there is no variance in the proposed KRPC 2.4 from MR 2.4.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.