

American Bar Association February 2002 Resolution on Mediation and the Unauthorized Practice of Law

ABA Section of Dispute Resolution on Mediation and the Unauthorized Practice of Law Adopted by the Section on February 2, 2002

The ABA Section of Dispute Resolution has noted the wide range of views expressed by scholars, mediators, and regulators concerning the question of whether mediation constitutes the practice of law. The Section believes that both the public interest and the practice of mediation would benefit from greater clarity with respect to this issue in the statutes and regulations governing the unauthorized practice of law (UPL). The Section believes that such statutes and regulations should be interpreted and applied in such a manner as to permit all individuals, regardless of whether they are lawyers, to serve as mediators. The enforcement of such statutes and regulations should be informed by the following principles:

Mediation is not the practice of law. Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.

Mediators' discussion of legal issues. In disputes where the parties' legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

Drafting settlement agreements. When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

Mediators' responsibilities. Mediators have a responsibility to inform the parties in a mediation about the nature of the mediator's role in the process and the limits of that role. Mediators should inform the parties: (a) that the mediator's role is not to provide them with legal representation, but rather to assist them in reaching a voluntary agreement; (b) that a settlement agreement may affect the parties' legal rights; and (c) that each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing a settlement agreement.

Comments

1. *Mediation and the practice of law.* There is a growing consensus in the ethical opinions addressing this issue that mediation is not the practice of law. See, e.g., Maine Bar Rule 3.4(h)(4) (The role of mediator does not create a lawyer-client relationship with any of the parties and does not constitute representation of them); Kentucky Bar Association Ethics Opinion 377 (1995) (Mediation is not the practice of law); Indiana Ethics Opinion 5 (1992) (same); Washington State Bar Association, Committee to Define the Practice of Law, Final

Report (July 1999), adopted by Washington State Bar Association Board of Governors, September 1999 (same). *But see* New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 676 (1994) (holding that when a lawyer serves as a third party neutral, he or she is acting as a lawyer). Essential to most of the common definitions of the practice of law is the existence of an attorney-client relationship. Because mediators do not establish an attorney-client relationship, they are not engaged in the practice of law when they provide mediation services. The Section recognizes that in some very extraordinary situations it might be possible for a mediator to inadvertently create an attorney-client relationship with a party in mediation. For example, if the parties were unrepresented, and the mediator did not clarify his/her role, it is possible that a party in mediation could mistakenly assume that the mediator's role was to advise and protect solely that party's interests. In mediations where the parties are represented by counsel or where the mediator properly explains (and preferably documents) his/her role, it would appear unlikely that either party in mediation could ever reasonably assume that the mediator was that person's attorney.

2. *Ethical rules governing mediators.* There is a growing body of ethical principles and standards governing the practice of mediation. Accordingly, even if a mediator's conduct is not inconsistent with state UPL statutes or regulations, there may be other sources of authority governing the mediator's conduct. *See, e.g.,* Mass. Uniform Rules on Dispute Resolution 9(c)(iv) (A neutral may use his or her knowledge to inform the parties. deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process).

3. *Ethical rules governing lawyers.* An important, but still partly unresolved question concerning the ethical rules applicable to lawyers is whether, and to what extent, the rules governing the conduct of lawyers apply to lawyers when they are serving as mediators and not engaged in the practice of law. If such rules were applied, in whole or in part, they would raise a host of imponderable issues for lawyer-mediators, including who is the client and how to discharge many of the traditional duties lawyers owe to clients. Recent amendments to the ABA Model Rules of Professional Conduct, when enacted in various jurisdictions, would address this issue. The new rule states:

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 disputes that have arisen between them. Service as a third-party neutral may include service as an arbitrator, mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve their dispute.

(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 the lawyer's role as one who represents a client.

Further, the ABA has modified the Preamble to the Model Rules as follows: "[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals." *See, e.g.,* Rules 1.12 and 2.4.

4. *UPL and multi-jurisdictional practice of lawyer-mediators.* Lawyer-mediators should be aware that, unless they are admitted to the bar in every state, they too are potentially affected by the issue of UPL and mediation. Many lawyer-mediators provide mediation services in more than one jurisdiction. If mediation is considered the practice of law, lawyer-mediators could be accused of violating UPL statutes when they serve in a jurisdiction in which they are not admitted to the bar. Although a lawyer may petition for temporary admission, requiring such admission substantially and unnecessarily burdens the practice of mediation outside of the mediator's local area. This problem is compounded for lawyer-mediators who have ceased practicing law, serve only as a neutral, and later relocate to different states. These lawyer-mediators may face difficult bar admission issues, as a state may require a certain minimum years of active engagement in the practice of law to qualify for admission to the bar without examination. This problem arises because bar regulators' definitions of the active practice of law may not include the activities typical of mediation, whereas the regulators who enforce UPL statutes (typically the state Attorney General, local district attorneys, or a bar committee) may include such activities as the practice of law in their interpretation of UPL statutes. It would seem to be a perverse result if transplanted lawyers clearly engaged in the practice of law could do so without proving their command of their new jurisdiction's laws, while a mediator who has no intention of practicing law would be required to take the new jurisdiction's bar exam. The ABA's Commission on Multijurisdictional Practice is currently considering proposals for modification of the Model Rules of Professional Conduct that would, if adopted by the ABA and enacted by the states, eliminate, or at least reduce, concerns about lawyer-mediators engaging in a multi-jurisdictional practice.

5. *Guidelines on legal advice.* The Virginia Guidelines on Mediation and the Unauthorized Practice of Law, drafted by the Department of Dispute Resolution Services of the Supreme Court of Virginia, and the North Carolina Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law, adopted by the North Carolina Bar in 1999, articulate a UPL standard for mediators that differs from the standard articulated in this Resolution. According to those Guidelines, a mediator may provide the parties with legal information but may not give legal advice. The Guidelines define legal advice as applying the law to the facts of the case in such a way as to (a) predict the outcome of the case or an issue in the case, or (b) recommend a course of action based on the mediator's analysis. The Section believes that adoption of the Virginia and North Carolina standards in other jurisdictions would be harmful to the growth and development of mediation. It is important that mediators who are competent to engage in discussion about the strengths and weaknesses of a party's case be free to do so without running afoul of UPL statutes. Indeed, many parties, and their counsel, hire mediators precisely to obtain feedback about their case. Even though mediators who engage in these discussions do sometimes aid the parties by discussing possible outcomes of the dispute if a settlement is not reached and providing evaluative feedback about the parties' positions, this conduct is not the practice of law because the parties have no reasonable basis for believing that the mediator will provide advice solely on behalf of any individual party. This is the important distinction between the mediator's role and the role of an attorney. Parties expect their attorney to represent solely their interests and to provide advice and counsel only for them. On the other hand, a mediator is a neutral, with no duty of loyalty to the individual parties. (Thus, for example, when a judge conducts a settlement conference, acting in a manner analogous to that of a mediator and providing evaluation to the parties about their case, no one suggests that the judge is practicing law.)

6. *Discussion of legal issues.* This Resolution seeks to avoid the problem of a mediator determining, in the midst of a discussion of relevant legal issues, which particular phrasings would constitute legal advice and which would not. For example, during mediation of a medical

malpractice case, if a mediator comments that the video of the newborn (deceased shortly after birth) has considerable emotional impact and makes the newborn more real, is this legal advice or prediction or simply stating the obvious? In context, the mediator is implicitly or explicitly suggesting that it may affect a jury's damage award, and thus settlement value. S/he is raising, from the neutral's perspective, a point the parties (presumably the defendants) may have missed, which may distinguish this case from others (e.g., cases in which a baby died *in utero* or where there was no video of the newborn) in which lower settlement amounts were offered and accepted. Is the mediator absolved if s/he phrases the point as a probing question?

In their article, "A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law" (6 *Dispute Resolution Magazine* 20 (Winter 2000)), authors David A. Hoffman and Natasha A. Affolder illustrate this problem across a broader mediation context, setting out numerous alternative ways a mediator might phrase a point. They note that there would likely be very little professional consensus about which phrasings would constitute the practice of law and which would not. Even if mediators could agree as to where the line would be drawn among suggested phrasings, the intended meaning and impact of any particular statement might vary with the context and how the statement was delivered. Because mediation is almost always an informal and confidential process, it is virtually impossible without an audio or video recording of a mediation for regulators to police the nuances of the mediator's communications with the parties. Such recording would clearly be anathema to the mediation process.

7. *Settlement agreements.* The Virginia and North Carolina Guidelines' approach to the drafting of settlement agreements by a mediator is similar to the approach outlined in this Resolution. See Guidelines on Mediation and the Unauthorized Practice of Law, Department of Dispute Resolution Services of the Supreme Court of Virginia, at 27-28 ("Mediators who prepare written agreements for disputing parties should strive to use the parties' own words whenever possible and in all cases should write agreements in a manner that comports with the wishes of the disputants. . . . Unless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.") Ethics opinions in some states have approved the drafting of formal settlement agreements by mediators who are lawyers, even where the mediator incorporates language that goes beyond the words specified by the parties, provided that the mediator has encouraged the parties to seek independent legal advice. See, e.g., Massachusetts Bar Association Opinion 85-3 (attorney acting as mediator may draft a marital settlement agreement but must advise the parties of the advantages of having independent legal counsel review any such agreement and must obtain the informed consent of the parties to such joint representation).

8. *Resources.* A number of articles addressing the question of whether mediation is the practice of law have been published in recent years. In addition to the articles cited above, see generally, Symposium, "Is Mediation the Practice of Law?", *Forum*, Number 33 (NIDR, June 1997); Carrie Menkel-Meadow, "Is Mediation the Practice of Law?", *Alternatives*, May 1996, at 60; Bruce E. Meyerson, "Mediation Should Not Be Considered the Practice of Law," 18 *Alternatives* 122-123 (CPR Institute for Dispute Resolution, June 1996); Andrew S. Morrison, "Is Divorce Mediation the Practice of Law? A Matter of Perspective," 75 *California Law Review* 1093 (1987).