

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-361

Issued: July 1993

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 2.2, which was deleted. It was replaced by Rule 2.4, entitled "Lawyer serving as third-party neutral." Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Are lawyers in private practice disqualified from serving as mediators in voluntary or court-annexed divorce mediation?

Answer: No.

References: Rule of Professional Conduct 2.2; KBA E-335 (1989); ABA Standards of Practice for Divorce Mediation (1984), Standard III [ABA Standards]; Ethical Standards of the Society of Professionals in Dispute Resolution (1986), Standards 1 and 4 [SPIDR Standards]; Code of Ethics of the American Arbitration Association (1977) Canon I D and Canon II [AAA Standards]; J. Dzienkowski, Lawyers as Intermediaries, 1992 U. Ill. L.Rev. 741-817 (1993).

OPINION

In KBA E-335 the Committee opined that a Kentucky lawyer may participate in "divorce mediation," either as a mediator or as a lawyer for a party who is engaged in mediation. The question presented is whether a lawyer who practices domestic relations/divorce cases can serve as a mediator, or whether there is some automatic disqualification.

The Committee is of the view that there is no per se rule of disqualification. Indeed, we start with the assumption that it would be highly desirable for domestic relations mediators to be trained in the law and be experienced in the field of domestic relations law. While a stricter rule may apply for Trial Commissioners and part-time prosecutors, we see no reason why a lawyer in private practice should be precluded from serving as a mediator from time to time.

On the other hand, a mediator has a duty to be impartial. ABA Standard III; SPIDR Standard 1. If the lawyer mediator has represented one of the parties in the past it may be difficult for the mediator to be impartial. ABA Standard III A. Certainly, one might question the impartiality of the mediator if one of the parties is a present client of

the lawyer or of his or her firm [or for that matter, in any professional, business or personal relationship with a party]. ABA Standard III A; AAA Canon II (disclosure of interests). A person who serves in such a role should avoid entering into any such relationship if this might create the appearance that the intermediary had been influenced by the anticipation or expectation of that relationship or interest. Cf. ABA Standard III A; AAA Canon I D. Compare Rules 1.12 (former judge or arbitrator) and 2.2 (lawyer as mediator). In the absence of consent by all affected parties, the mediator should not represent any party in the same or a substantially related matter.

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.