

**Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION**

Ethics Opinion KBA E-449

Issued: March 14, 2019

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/237>), before relying on this opinion.

Subject: Lawyers as Third-Party Neutrals and the Practice of Law

Question 1: May Lawyers Serve as Third Party Neutrals (Mediators, Arbitrators, Facilitators, and Like Services) as Part of Their Overall Law Practice?

Answer: Yes.

Question 2: May Lawyers Conduct Third Party Neutral Services (Mediators, Arbitrators, Facilitators, and Like Services) on Their Law Practice Premises?

Answer: Yes.

Question 3: May Lawyers Engaged in Third Party Neutral Services (Mediation, Arbitrations, Facilitation, and Like Services) on Their Law Practice Premises Utilize Non-Lawyer Staff in Mediations?

Answer: Yes.

Discussion

Question 1: May Lawyers Serve as Third Party Neutrals (Mediators, Arbitrators, Facilitators, and Like Services) as Part of Their Overall Law Practice?

The Rules of Professional Conduct Contemplate that lawyer may provide services as an arbitrator, a mediator, or other third-party neutral. SCR 3.130(Rule 2.4) 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 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.

The Comments¹ to Rule 2.4 clarify that the nature and extent of the lawyer's role as a mediator, arbitrator, or other third-party neutral is defined by the situation: It may involve a voluntary or court ordered mediation, may be undertaken upon the parties' agreement as the chosen method of resolving the disputed issues, occur as a result of a contract to pursue arbitration, or come about through some other form of alternative dispute resolution procedure. As noted below, service as a mediator, arbitrator, or a third-party neutral is not limited to lawyer.

Additionally, Comment 2 to Rule 2.4 recognizes that in some alternate dispute resolution systems, there are other rules or Codes of Ethics that may apply to the lawyer, (or non-lawyer for that matter) serving as a mediator, arbitrator, or other neutral facilitator.² The Mediation Guidelines For Court of Justice Mediators, Administrative Procedures of the Court of Justice, Rule AP XII, contains express Ethical Guidelines the conduct of a third-party neutral in the mediation process:

Mediator Conduct

A mediator's duty to protect the integrity and confidentiality of the mediation process commences with the first communication with a party, is continuous in nature, and does not terminate upon the conclusion of the mediation.

Comment (a). A mediator should not use information obtained during the mediation for personal gain or advantage.

¹ SCR 3.130(Rule 2.4) 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. (Emphasis Added).

² SCR 3.130(Rule 2.4) Comment 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.* (Emphasis Added.)

Comment (b). The interests of the parties should always be placed above the personal interest of the mediator.

Comment (c). A mediator should not accept mediations that cannot be completed in a timely manner, or as directed by the court.

Comment (d). Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case to mediate.

Comment (e). A mediator should not mediate a dispute when the mediator has knowledge that another mediator was appointed or selected without first consulting with the other mediator or the parties. If the previous mediation has been concluded, consultation is not necessary.³

Both the Supreme Court of Kentucky⁴ and the Kentucky General Assembly⁵ encourage mediation. By definition, “mediation,” is a voluntary, neutral process in which the mediator assists the parties to resolve their dispute.⁶ Mediation and other alternative dispute resolution also is conducted by non-lawyers and

³ Administrative Procedures of the Court of Justice, Rule AP XII, Sec. 3(2), “Ethical guidelines.”

⁴ Supreme Court of Kentucky Model Mediation Rules, Preamble: “[T]he process known as mediation may provide an efficient and cost-effective alternative to traditional litigation, and, further, that the wise and judicious use of mediation may benefit litigants.”

⁵ KRS 454.011. **Declaration of public policy on encouragement of dispute resolution through negotiation and settlement.**

It is the policy of this Commonwealth to encourage the peaceable resolution of disputes and the early, voluntary settlement of litigation through negotiation and mediation. To the extent it is consistent with other laws, the courts and state governmental agencies are authorized and encouraged to refer disputing parties to mediation before trial or hearing.

⁶ Administrative Procedures of the Court of Justice, Rule AP XII, Sec. 3, “Ethical guidelines”:

(1) **Mediation Defined.** Mediation is an informal process in which a neutral third person, called a mediator, facilitates the resolution of a dispute between two or more parties. The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. Decision-making authority remains with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives. Parties should comply with orders of the court requiring participants in mediation to have settlement authority. *See Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455 (Ky. 2004).

Comment. A mediator's obligation is to assist the parties in reaching a voluntary outcome. The mediator should not coerce a party in any way. A mediator may make suggestions, but the parties make all settlement decisions voluntarily.

Order of Supreme Court of Kentucky, No. 2005-02.

See also, Supreme Court of Kentucky Model Mediation Rules, Rule 2.

Mediation defined.

Mediation is an informal process in which a neutral third person(s) called a mediator facilitates the resolution of a dispute between two or more parties. The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. Decision-making authority remains with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.

is not considered the practice of law.⁷ However, mediators should be qualified by training or experience to conduct the mediation⁸ or other alternative dispute resolution process.⁹

In recommending Rule 2.4 to the Supreme Court of Kentucky as part of the recommended 2009 amendments to the Kentucky Rules of Professional Conduct, the KBA Ethics 2000 Committee incorporated the “ABA Reporter’s Explanation of Changes to the new MR 2.4”:

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.

Thus, the lawyer who acts as a third-party neutral is not providing service as a lawyer representing a client in the alternative dispute resolution process, but is nonetheless a lawyer who remains obligated to comply with the Rules of Professional Conduct, both in the resolution process and in the representation of other clients.¹⁰

Question 2: May Lawyers Conduct Third Party Neutral Services (Mediation, Arbitrations, Facilitators, and Like Services) on Their Law Practice Premises?

SCR 3.130 (Rule 2.4) does not require a third-party neutral to conduct the mediation, arbitration or other alternative dispute resolution process either on the lawyers premises or in a business separate and apart from the lawyer’s practice of law. As noted, the lawyer acting as a third party neutral does not represent any party in the process. Subsection 2.4(b) states:

⁷ See KBA Ethics Op. E-377 (1995), “Mediation is not the practice of law, and does not violate SCR 3.020.”

⁸ See Administrative Procedures of the Court of Justice, Rule AP XII, Sec. 2, “Training and Experience.”

See also, Rule AP XII, Sec. 3:

(5) **Mediator Qualifications.** A mediator should inform the participants of the mediator's qualifications and experience.

Comment. A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

Order of Supreme Court of Kentucky, No. 2005-02.

⁹ The descriptive term “Facilitator” is not generally defined, but the Mediation Guidelines For Court of Justice Mediators, Administrative Procedures of the Court of Justice, Rule AP XII, Sec. 3(17) Mediation Styles, describe “Facilitative Mediation” as “a process to assist the parties in reaching a mutually agreeable outcome” and “Evaluative Mediation” as “modeled after settlement conferences held by judges.”

¹⁰ The “Collaborative Law” process is one type of an alternative dispute resolution process which “which encourages parties to cooperate in order to reach an agreement, rather than to engage in acrimonious litigation.” See KBA Ethics Op. E-425, p.2 (2005).

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them.

But if the third-party neutral has reason to believe that a party does not understand the lawyer's role, the attorney must clarify the situation. The Comments confirm the lawyer mediator is not serving in a "lawyer client" relationship while serving as a third-party neutral.¹¹

Yet at the same time, the lawyer neutral still is a lawyer, subject to the Rules of Professional Conduct. In that respect, the lawyer/third party neutral must insure that the mediation, arbitration, or other third-party neutral activities are conducted in a manner that insures that the lawyer's legal practice and representation of law firm clients is conducted confidentially and in the manner required by the Rules of Professional Conduct.

KBA Ethics Op. E-417 (2001) outlines the lawyer's responsibility when the lawyer undertakes to share office space with or otherwise work with non-lawyers. The essence of the opinion is that the Rules of Professional Conduct set the floor on the expected conduct and practice methods of the lawyer. The opinion does not undertake to permit or prohibit any particular office setting or arrangement with non-lawyers—instead, the opinion reminds lawyers that "physical layout and operation" and the manner in which the interaction with non-lawyers in the law office setting must comply with the lawyer's obligations under the Rules of Professional Conduct.

For example, when mediation participants are invited into the law office setting, the lawyer must insure, *inter alia*, that the lawyer protects confidences of clients (Rule 1.6), is aware of the potential for conflicts of interests (Rule 1.7); understands the rules pertaining to post-third-party neutral employment (Rule 1.12);¹² supervises non-lawyer assistants (Rule 5.3); preserves the lawyer's professional independence (Rule 5.4); complies with the prohibition on false or misleading communications (Rule 7.10), appropriately communicates the lawyer's fields of practice (Rule 7.40), and does not engage in misconduct (Rule 8.4).

The underlying tenets of KBA Ethics Op. E-417 (2001) are that the lawyer's clients, the clients' legal matters, and the clients' confidential information are protected.

¹¹ SCR 3.130(Rule 2.4) Comment 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. (Emphasis added).

¹² SCR 3.130(Rule 2.4) Comment 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.

Question 3: May Lawyers Who are Engaged in Third Party Neutral Services (Mediation, Arbitrations, Facilitators, and Like Services) on Their Law Practice Premises Utilize Non-Lawyer Staff in Mediations?

Under SCR 3.130 (Rule 5.3) the lawyer, whether acting as a third-party neutral or in the representation of the client “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; . . .”¹³

The Rules of Professional Conduct do not address specifically the scope of or limits upon participation of non-lawyer assistants, whether administrative, paralegal, or non-lawyer mediator assistants or even non-lawyer mediators. What the Rules do require is that the lawyer employing non-lawyer assistants “shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer”¹⁴ and “shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; . . .”¹⁵ Thus, in the context of work as a third-party neutral, the lawyer must insure that the interaction with the non-clients involved in the alternative dispute resolution process not interfere with the lawyers’ representation of clients and lawyer/client obligations.

Lawyers who employ non-lawyer assistants in the performance of services as third-party neutrals as part of their law practice are subject to SCR 3.130 (Rule 5.4).¹⁶ On the other hand, neither Rule 2.4 nor Rule

¹³ SCR 3.130(Rule 5.3) states:

Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer only if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

¹⁴ SCR 3.130(Rule 5.3(a)).

¹⁵ SCR 3.130(Rule 5.3(b)).

¹⁶ SCR 3.130(Rule 5.4).

Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

5.4 would prohibit a lawyer from entering into an alternative dispute resolution business or enterprise with non-lawyers, but if that route is undertaken, the business must be separate and apart from the lawyer's law practice. See KBA Ethics Op. E-417.

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.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.