

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
(614) 387-9370 (888) 664-8345 FAX: (614) 387-9379
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2009-4

Issued June 12, 2009

[Note the erratum on page 3, paragraph 2, where the sentence beginning with “The family mediator assists communication” is stated twice instead of once.]

SYLLABUS: Upon conclusion of domestic relations mediation, a lawyer-mediator may not, pursuant to Prof. Cond. Rule 1.7(c)(2), prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of *both* of the parties in a domestic relations proceeding. Upon conclusion of domestic relations mediation, a lawyer-mediator may prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of *one* of the parties to a domestic relations proceeding, provided the following conditions are met. First, as required by Prof. Cond. R. 1.12(b), during mediation, a lawyer-mediator must not negotiate to subsequently represent one of the parties. Second, as required by Prof. Cond. R. 1.12(a), both parties must give informed consent, confirmed in writing to a lawyer-mediator’s subsequent representation of one of the parties. Third, as required by R.C. 102.03(A)(1) and through application of Prof. Cond. R. 1.7(c)(1), during employment or for one year after employment with the court, a lawyer-mediator who is a court employee must not undertake a representation in a matter in which he or she personally participated. Fourth, as required by Prof. Cond. R. 4.3, if one party is unrepresented, a lawyer-mediator who subsequently represents the other party, must properly deal with the unrepresented party. Fifth, a lawyer-mediator who undertakes a subsequent legal representation must comport with any applicable standards of practice for mediators.

OPINION: This opinion addresses a question regarding the ethical propriety of a lawyer-mediator at the conclusion of a domestic relations mediation drafting legal documents for one or both parties in a domestic relations proceeding.

Upon conclusion of domestic relations mediation, may a lawyer-mediator, in addition to preparing a mediation report, prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of one or both of the parties in a domestic relations proceeding?

Introduction

This opinion addresses only the conduct of a lawyer-mediator in domestic relations mediation. The opinion applies to a lawyer-mediator employed by a court or to whom the court makes referrals, but also is applicable to a lawyer-mediator in private practice who provides mediation prior to a court's involvement in a domestic relations matter.

For purposes of this opinion, domestic relations mediation is a general reference to mediation ordered by a court in connection with a proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities; or to mediation concerning divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities that is entered into prior to the filing of any court proceedings.

Domestic relations mediation has strong roots in both Ohio law and Ohio court rules. Ohio law provides in R.C. 3109.052 that “[i]f a proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of a child involves one or more children, if the parents of the children do not agree upon an appropriate allocation of parental rights and responsibilities for the care of their children or do not agree upon a specific schedule of parenting time for their children, the court may order the parents to mediate their differences on those matters in accordance with the mediation procedures adopted by the court by local rule.”¹

The Rules of Superintendence for the Courts of Ohio require that “[a] division of a court of common pleas, municipal court, and county court shall consider, and may adopt, a local rule providing for mediation.”² Accordingly, local court rules for domestic relations mediation abound.³

A domestic relations mediator may be either a lawyer-mediator or a non-lawyer mediator. The general qualifications and training of a domestic relations mediator are set forth in the superintendence rules and must be included in the adoption of any local court rule.⁴

Domestic relations lawyer–mediator is a third party neutral, not legal counsel

¹ Ohio Rev. Code Ann. § 3109.052 (West 2005).

² Sup.R. 16(A)

³ See e.g., Loc.R. 32 of the Cuyahoga County Common Pleas Court Domestic Relations Division; Loc.R. 22 of the Franklin County Common Pleas Court Domestic Relations Division; Loc.R. 2.8 of the Hamilton County Common Pleas Court Domestic Relations Division; Loc.R. 14 of the Lake County Common Pleas Court Domestic Relations Division; Loc. R. 18 of the Lucas County Common Pleas Court Domestic Relations Division; Loc. R. 37 of the Mahoning County Common Pleas Court Domestic Relations Division.

⁴ Sup.R. 16(C)(1)

In domestic relations mediation, a domestic relations lawyer-mediator is not legal counsel to either or both parties to the mediation. A domestic relations lawyer-mediator is an impartial facilitator.

The Model Standards of Practice for Family and Divorce Mediation as appended to Sup R. 16 explain that “[f]amily and divorce mediation (‘family mediation’ or ‘mediation’) is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator helps the participants to explore options, make decisions and reach their own agreements. . . . Family mediation is neither a substitute for the need for family members to obtain independent legal advice or counseling or therapy, nor is it appropriate for all families.”

Sup. R. 16(B)(1)(c) requires that a court’s local mediation rule provides procedures for encouraging appropriate referrals to legal counsel. Additionally, Sup. R. 16(D) is an aspirational standard suggesting, among other things, that each court division that adopts a local rule for domestic relations mediation shall encourage a mediator’s compliance with the Model Standards of Practice for Family and Divorce Mediation as appended to the rule. Standard III(A)(4) reminds a family mediator that before mediation begins, a mediator shall inform participants they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process.

The Ohio Rules of Professional Conduct acknowledges, in Prof. Cond. Rule 2.4, the role of a lawyer-mediator as a third party neutral. Prof. Cond. Rule 2.4(b) requires a lawyer-mediator to inform unrepresented clients that the lawyer-mediator does not represent them.

RULE 2.4: LAWYER SERVING AS ARBITRATOR, MEDIATOR, OR 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.

Preparation of a mediation report

The ethical propriety of a lawyer-mediator in a domestic relations mediation preparing and filing a mediation report is not in dispute. A mediation report is an acknowledged part of a mediation process. A mediation report provides a summary of the contents and details of an agreement if reached. But, a court is not bound by such agreement.

R.C. 3109.052(B) requires that if a mediation order is issued by a court and the order requires the parents to file a mediation report, "the mediator and each parent who takes part in mediation in accordance with the order jointly shall file a report of the results of the mediation process with the court that issued the order under the division. A mediation report shall indicate only whether the agreement has been reached on any of the issues that were the subject of the mediation, and, if agreement has been reached, the content and details of the agreement. No mediation report shall contain any background information concerning the mediation process or any information discussed or presented in the process. The court shall consider the mediation report when it allocates parental rights and responsibilities for the care of children under section 3109.04 of the Revised Code and when it establishes a specific schedule of parenting time under section 3109.51 of the Revised Code. The court is not bound by the mediation report and shall consider the best interest of the children when making that allocation or establishing the parenting time schedule."⁵

Local court rules also provide for the preparation of a mediation report, although the report is sometime referred to in different terms, such as mediator report, summary of agreement, or agreement.⁶ Some local court rules explicitly provide

⁵ Ohio Rev. Code Ann. § 3109.052(B) (West 2005).

⁶ See e.g. Loc.R. 32(C) of the Cuyahoga County Common Pleas Court Domestic Relations Division ("Within seventy (70) days of date of order referring the parties to mediation or upon the termination of mediation, whichever is sooner, the parties and the mediator shall jointly file a mediation report pursuant to Section 3109.052(b) O.R.C. Any agreement reached during mediation shall not be binding upon the parties until approved by the Court, which shall consider the best interests of the children when allocating parental rights and responsibilities and establishing a possessory schedule."); Loc.R. 22 of the Franklin County Common Pleas Court Domestic Relations Division ("Upon conclusion of the mediation, the mediator shall notify Mediation Services whether the mediation occurred or was terminated, the parties reached an agreement on all or some issues, and the attendance of the parties."); Loc.R. 2.8(C)(9) of the Hamilton County Common Pleas Court Domestic Relations Division ("Mediator Report—At the conclusion of the mediation, the mediator shall inform the court of the status of the mediation including all of the following: Whether the mediation occurred or was terminated; Whether an agreement was reached on some, all or none of the issues; and Attendance of the Parties.").

for the mediation report, upon approval, to become incorporated into an Entry or an Order of the court.⁷

Preparation of other necessary legal documents for filing in a domestic relations proceeding

At issue is whether upon completion of a domestic relations mediation and preparation of a mediation report, a lawyer-mediator may prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of one or more of the parties to a domestic relations proceeding. Examples of these documents might be a Separation Agreement, Shared Parenting Plan, Petition for Dissolution of Marriage and Decree for Dissolution of Marriage, Ohio Child Support Guidelines Worksheets.

A domestic relations lawyer-mediator who goes beyond preparing the mediation report, which is required of the mediator by law and rule, into the preparation of necessary legal documents for filing by or on behalf of the parties to a domestic relations proceeding is engaging in a legal representation subsequent to the mediation.

A lawyer-mediator's subsequent legal representation of a party to mediation is addressed in the Ohio Rules of Professional Conduct, generally in Comment [4] to Prof. Cond. Rule 2.4, and specifically in Prof. Cond. R. 1.12.

Comment [4] to Prof. Cond. Rule 2.4 explains that "[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."

⁷ See e.g. Loc.R. 14.03(A) and (B) of the Lake County Common Pleas Court Domestic Relations Division (Under 14.03(A), "[a]n agreement reached in mediation shall be reduced to writing by the mediator and signed by the parties. Any agreement reached during mediation shall not be binding upon the parties until approved by the Court, which shall consider the best interests of the children." Under 14.03(B), "[i]f the agreement is approved by the attorneys and adopted by the Court, counsel for Plaintiff or movant (if post decree), or the Plaintiff or movant if unrepresented, shall submit an Entry to the Court incorporating the agreement and containing all language required to conform with the Local Rules of Court. The Entry may be in the form of a Final Decree or a separate Agreed Judgment Entry. . . . If no agreement is reached, the mediator shall issue a report stating only that no agreement was reached."); Loc. R. 18.01 and 18.02 of the Lucas County Common Pleas Court Domestic Relations Division (Under 18.01(B)(2) the mediator shall "[p]rovide to the parents and their attorneys a summary of any agreement reached or a statement that the mediation has been terminated without an agreement." Under 18.02, "Mediation Agreements become an Order of the Court after review and approval of each party's attorney, if applicable, and journalization by the Court.); Loc. R. 37.01 and 37.03 of the Mahoning County Common Pleas Court Domestic Relations Division (Under 37.01 the mediator shall "[p]rovide to the parties and their attorneys a summary of any agreement reached or a statement that the mediation has been terminated without agreement" Under 37.03, "[a]greements reached by the parties during mediation shall become an order of the Court after review and approval by each parties' attorney and journalization by the Court.")

Prof. Cond R. 1.12 sets the ethical boundaries of subsequent representation by a mediator.

**RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR,
OR OTHER THIRD-PARTY NEUTRAL**

(a) Except as stated in division (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and *substantially* as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give *informed consent, confirmed in writing*.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and *substantially* as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and *substantially*, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in the matter unless both of the following apply:

(1) the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom;

(2) *written* notice is promptly given to the parties and any appropriate *tribunal* to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

By application, Prof. Cond. Rule 1.12 does not bar a lawyer-mediator, after completion of mediation and submission of mediation report to the court, from subsequent legal representation of a party provided that during the mediation the lawyer-mediator did not negotiate for the employment and both parties give

informed consent, confirmed in writing; however, Prof. Cond. Rule 1.7(C) and Ohio Ethics Law provide applicable restrictions that must be heeded.

Rule 1.7(C)

Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

- (1) the representation is prohibited by law;
- (2) the representation involves the assertion of a claim by one client against another client represented in the same proceeding.

Under Prof. Cond. Rule 1.7(C)(2), a lawyer-mediator, upon completion of a mediation, is prohibited from providing private legal representation to *both* parties in the same domestic relations proceeding.

Under Prof. Cond. Rule 1.7(C)(1) a representation that is prohibited by Ohio Ethics Law or other law is improper. A judicial employee, such as court employed domestic relations lawyer-mediator, is subject to Ohio Ethics Law. R.C. 102.03(A) states that “[n]o present or former public official or employee shall, during public employment or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.” Thus, pursuant to R.C. 102.03(A), during employment and for one year following employment by the court, a court employee domestic relations lawyer-mediator who mediates a domestic relations matter is prohibited from providing legal representation in the domestic relations proceeding connected to the mediation.

A lawyer mediator’s subsequent legal representation of one person to the mediation requires great caution when the other person is unrepresented. Rule 4.3 addresses the ethical requirements.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows* or *reasonably should know* that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make *reasonable* efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer *knows* or *reasonably should know* that the interests of

such a person are or have a *reasonable* possibility of being in conflict with the interests of the client.

Finally, a lawyer-mediator in a domestic relations proceeding should not undertake a subsequent legal representation that does not comport with any applicable standards of practice for mediators.

Advisory opinions outside Ohio

In Arizona, the state bar ethics committee was unable to reach consensus on whether or not attorney-mediators may prepare pleadings for mediation participants.⁸

In Michigan, the state bar ethics committee advised “[t]he lawyer mediator is not per se prohibited from preparing pleadings for purposes of implementation of the memorandum of understanding. However, any activity in this regard would be construed as legal services by a lawyer, not mediation, and would necessarily invoke MRPC 1.7, 2.2, and other ethics duties.”⁹

In Massachusetts, the state bar ethics committee advised that “[a]n attorney may also represent both parties in drafting a separation agreement, the terms of which are arrived at through mediation, 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.”¹⁰

In Maine, the board of overseers of the bar advised “a lawyer-mediator operating under the constraints of Maine Bar Rule 3.4(h) may prepare document ancillary to a settlement agreement, such as a divorce judgment, promissory note, and deed, provided such documents merely reflect the parties’ resolution of the matter and all of the other condition of rule 3.4(h) have been satisfied.”¹¹

In Utah, the state bar ethics committee advised that “[w]hen a lawyer-mediator, after a successful mediation, drafts the settlement agreement, complaint and other pleadings to implement the settlement and obtain a divorce for the parties, the lawyer-mediator is engaged in the practice of law and attempting to represent opposing parties in litigation. A lawyer may not represent both parties following a mediation to obtain a divorce for the parties.”¹²

This Board agrees with the advice offered in the Utah opinion.

⁸ Arizona State Bar, Op. 96-01 (1996).

⁹ Michigan Bar, Op. RI 278 (1996).

¹⁰ Massachusetts Bar Assn. Op. 85-3 (1985).

¹¹ Maine, Bd of Overseers of the Bar, Op. 137 (1993).

¹² Utah State Bar, Op. 05-03 (2005).

Conclusion

In conclusion, this Board advises as follows. Upon conclusion of domestic relations mediation, a lawyer-mediator may not, pursuant to Prof. Cond. Rule 1.7(c)(2), prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of *both* of the parties in a domestic relations proceeding. Upon conclusion of domestic relations mediation, a lawyer-mediator may prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of *one* of the parties to a domestic relations proceeding, provided the following conditions are met. First, as required by Prof. Cond. R. 1.12(b), during mediation, a lawyer-mediator must not negotiate to subsequently represent one of the parties. Second, as required by Prof. Cond. R. 1.12(a), both parties must give informed consent, confirmed in writing to a lawyer-mediator's subsequent representation of one of the parties. Third, as required by R.C. 102.03(A)(1) and through application of Prof. Cond. R. 1.7(c)(1), during employment or for one year after employment with the court, a lawyer-mediator who is a court employee must not undertake a representation in a matter in which he or she personally participated. Fourth, as required by Prof. Cond. R. 4.3, if one party is unrepresented, a lawyer-mediator who subsequently represents the other party, must properly deal with the unrepresented party. Fifth, a lawyer-mediator who undertakes a subsequent legal representation must comport with any applicable standards of practice for mediators.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code, the requester of the opinion may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.