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ETHICAL RULES GOVERNING THE LAWYER-MEDIATOR IN MASSACHUSETTS

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Introduction

Would an understanding of the rules that apply to lawyers as third-party neutrals enlighten the lawyer-mediators' decision-making as to disclosures, drafting the separation agreement, and acceptable and unacceptable post-mediation services? Let's find out! Using divorce mediation as a context, this article explores the ethical rules governing lawyers when they serve as third-party neutrals (lawyer-mediators) in Massachusetts, namely, Mass. R. Prof. C. 2.4 and Mass. R. Prof. C. 1.12[1]. The article opens with the text of Rule 2.4: Lawyer Serving as Third-Party Neutral to highlight a lawyer's basic ethical obligations. Then, it sheds light on a lawyer's compliance with these duties when making disclosures about their role as a mediator or when deciding whether to draft the separation agreement. Later, it discusses Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral and its comments to address the conflict issues that arise when, following a mediation, a mediator is asked to serve as counsel to one of the parties. Each section offers some key takeaways for lawyer-mediators to analyze whether they are compliant with the obligations in both rules. The article concludes with a summary of two instructive disciplinary matters from other states.

Mass. R. Prof. C. 2.4 Lawyer Serving as Third-Party Neutral

In March 2015, Massachusetts adopted the language and comments of the American Bar Association Model Rule 2.4 into its Rules of Professional Conduct. Mass. R. Prof. C. 2.4 reads:

> **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.
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> (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

[1] The Supreme Judicial Court Rule 1:18: Uniform Rules on Dispute Resolution, Rule 9: Ethical Standards are not covered in this article. Lawyers who act as third-party neutrals in court-ordered mediation have additional ethical obligations of which they should be aware.

difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. [2]

While the language of this rule is relatively straightforward, a lawyer's compliance with its requirements is not as intuitive.

Ethical Caution Lights

From the moment a lawyer is engaged as a third-party neutral, the lawyer's ethical obligations regarding impartiality are ongoing. Can a lawyer-mediator remain impartial and protect the integrity of the mediation process throughout? The *Mediation: Law, Policy, and Practice* [3] treatise insinuates that lawyer-mediators will find it difficult to remain totally neutral and may find themselves "vulnerable to [ethical] charges."[4] It notes that, because lawyer-mediators are accustomed to representing clients in the adversarial process, they may "[have] some reason to favor one side or [may fail] to exercise care in giving accurate information [during the mediation]," which could result in harm to one or both of the mediating parties. [5]

Therefore, questions often arise about the appropriate type and level of interaction the lawyer-mediator should have with the mediating parties in order to assist them in reaching an agreement, but in a manner that does not threaten to cross over into advocacy on behalf of either side. If the parties are unrepresented, how does the lawyer-mediator properly inform them about the benefits and risks of mediation and what the process entails? If the parties reach an agreement on all disputed issues, can the lawyer draft the separation agreement, or represent one of the parties in presenting the agreement to the court (or in post-divorce proceedings to enforce provisions of the agreement)? If the parties *fail* to reach an agreement on some or all of the issues being mediated, can the lawyer represent either of them in ensuing court proceedings involving the same issues? A lawyer who knows and understands how to analyze these questions will be better equipped to avoid ethical misconduct when serving as a neutral.

Satisfying Rule 2.4 Disclosure Requirements

Because most parties employ lawyers in their traditional role as advocates in an adversarial process, when they encounter lawyers serving as third-party neutrals, parties may not understand how this neutrality changes the lawyer's obligations to them. For instance, an unrepresented party may not realize that the information shared during mediation will not be protected in the same way as it would if the party had the benefit of attorney-client privilege. Therefore, disclosure requirements in Rule 2.4 (b) instruct lawyer-mediators that, at minimum, they should explain how their role as a third-party neutral facilitating a mediation is different from the traditional role of a lawyer representing clients in adversarial proceedings. Comment [3] notes that

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[2] https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-24-lawyer-serving-as-third-party-neutral; Adopted March 26, 2015, effective July 1, 2015.

[3] Sarah R. Cole, Craig A. McEwen, et. al., § 10:2. The lawyer-mediator's ethical responsibilities, 1 Mediation: Law, Policy and Practice § 10:2 (January 2024).

[4] *Id.*

[5] *See id.* at § 10:4.

> [t]he potential for confusion is significant when the parties are unrepresented in the [mediation]. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. … 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 the attorney-client evidentiary privilege.

As the comment points out, parties who are using mediation for the first time will likely need a lawyer-mediator to provide more details about the distinction and how it might affect their interactions with, and the information provided to, the lawyer-mediator and the other party.[6] Parties should understand clearly that the lawyer-mediator must remain impartial and cannot provide legal advice to either party. The duty of impartiality may also limit the lawyer-mediator's ability to share legal information if that information would appear to favor one party over the other.[7] For example, if the lawyer-mediator were to weigh in on the tax implications of alimony or child support, that information could appear to favor one party. When facilitating mediations, a lawyer-mediator must be vigilant not to succumb to the natural tendency to be an advocate that favors one side over the other. Imprudent words or actions may put them in the position of giving legal advice, which runs counter to Rule 2.4.

Before the Commonwealth's adoption of the ABA Model Rule, the Massachusetts Bar Association (MBA) Ethics Opinion 85-3[8] provided useful guidance to lawyer-mediators tasked with explaining their roles as a third-party neutral. Acknowledging that parties select lawyers to facilitate mediation because of their legal knowledge and training, the MBA opinion advised lawyers who accept neutral roles to explain thoroughly the restriction on providing legal advice, the limits on the legal information they can provide, the difference between mediation and the adversarial process, and the risks of each party not having their own attorney.

Lawyer-mediators should exercise good judgment when distinguishing their role as a neutral from the traditional attorney-client relationship to avoid their mediation work being deemed "law-related services" pursuant to Rule 5.7: Responsibilities Regarding Law-Related Services. The rule warns lawyers to take reasonable measures to ensure that parties understand when the services a lawyer is providing are not legal services. Section (a)(2) of Rule 5.7 requires lawyers to notify parties in writing when the services being rendered are *not* legal services in order to alert them to the fact that the ethical rules governing an attorney-client relationship will not apply to the engagement.[9] In the case of mediation, if the lawyer fails to give the required notification, the parties may confuse the lawyer's work as a mediator with the lawyer's traditional role as an advocate for one of the litigating parties. [10] Thus, by operation of Rule 5.7, the lawyer could be subject to the full slate of obligations in the Rules of Professional Conduct.

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[6] *See* Mass. R. Prof. C 2.4, Comment [3]

[7] *See* NY Eth. Op. 1178, TOPIC: LAWYER AS THIRD-PARTY NEUTRAL, N.Y.St.Bar.Assn.Comm.Prof.Eth. (2019)

[8] Mass. Bar Assoc. Ethics Op. 85-3 (Dec. 31, 1985)

[9] See also, Comment [4] of Rule 5.7 (providing additional guidance on the disclosure and written consent requirement of the rule.

[10] When evaluating whether to accept the role of third-party neutral, a lawyer may want to keep in mind Ethics Opinion 1178 from the New York State Bar Association Committee on Professional Ethics. *See*, NY Eth. Op.

Drafting the Settlement Agreement

Naturally, access-to-justice interests favor permitting a lawyer-mediator to put into writing whatever oral agreements emerge from the divorce mediation.[11] In *The Scrivener's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, Robert K. Collins, commented that "as a practical matter, the mediator has been personally involved in the negotiation of all the details of the settlement, and remains in the best position to record on paper precisely what the couple had decided to do. Clarity as to the conclusions reached is an obligation owed by mediators to their clients, and 'it remains the mediator's duty to be sure that the participants do not leave the mediation without a complete understanding of the details of their agreement.[12]'" The Boston Bar Association in Ethics Committee Opinion 78-1 (1978)[13] also endorsed lawyer-mediators drafting separation agreements.

Even so, it's worth noting that, in 2021, the Middlesex Superior Court decision in *Reid v. Kroll*[14] seemed to call into question this well-established practice in Massachusetts.[15] The controversy in *Reid* stemmed from the lawyer-mediator's drafting of the *pro se* divorcing parties' separation agreement. The husband filed a legal malpractice claim against the lawyer-mediator for an alleged drafting error that, the husband argued, made the agreement more favorable to the wife. The court in *Reid* reiterated that mediation is not the practice of law in Massachusetts and thus the claim did not constitute legal malpractice as such. However, it denied the mediator's motion to dismiss the claim. In so doing, the court sent a warning to lawyer-mediators that certain conduct, including the drafting of a divorce settlement agreement, might expose them to civil liability despite the fact that they are acting as third-party neutrals rather than as counsel for either party.[16]

After *Reid v. Kroll,* well-known mediator, arbitrator, and founder of the Boston Law Collaborative, David Hoffman, opined on the drafting of separation agreements in divorce mediations. [17] In his Massachusetts Lawyers Weekly Opinion column, he noted that the lawyer-mediator's ability to memorialize the terms upon which the divorcing parties agreed has been a long-standing practice in the Commonwealth. Hoffman pointed out that, similar to the Reids, in about two-thirds of divorce cases in Massachusetts, one or both parties do not have an attorney and do not retain an attorney to review the separation agreement before filing it with the court.[18] Therefore, to avoid ethical (or legal) issues that could arise from drafting the agreement, Hoffman suggested either that the lawyer-mediator ask unrepresented parties to sign a joint engagement agreement before

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1178, TOPIC: LAWYER AS THIRD-PARTY NEUTRAL, N.Y.St.Bar.Assn.Comm.Prof.Eth. (2019) (noting that the complexity of the issues being mediated or the imbalance of the bargaining positions of the parties may deem any amount of information insufficient for the parties to grasp the ramifications of proceeding with mediation without their own attorney to protect their interest.)

[11]Robert Kirkman Collins, *The Scrivener's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, 17 Cardozo J. Conflict Resol. 691 (Yeshiva University: Spring 2016)

[12] *Id.* at 710 [quoting Kimberlee K. Kovach, Mediation in a Nutshell 207 (Thomson-West 2003)].

[13] David A. Hoffman, *Op-Ed., Should mediators draft settlement agreements in wake of 'Reid'?*, Massachusetts Lawyers Weekly, 39 (March 14, 2022); Boston Bar Assoc. Ethics Op. 78-1 (1978)

[14] *Reid v. Kroll*, Middlesex Superior Court, No. 2181CV00769 (November 2021)

[15] *See* Boston Bar Association Ethics Committee, Opinion 78-1; Massachusetts Bar Association Ethics Committee, Opinion 85-3

[16] *Reid v. Kroll* at 2.

[17] *See* Hoffman, *supra* note 12, at 39.

[18] *Id.* at 40.

any drafting happens or that the lawyer-mediator inform the parties that they will not draft the separation agreement unless each party agrees to hire their own lawyer to review the agreement before signing it.[19]

MBA Ethics Op. 85-3 advocated for a more measured approach to determining whether it is appropriate for a lawyer-mediator to draft the separation agreement.[20] It cautioned lawyer-mediators that drafting the separation agreement may be considered "dual representation."[21] Therefore, the MBA recommended that lawyer-mediators examine their ability to comply with Rule 1.7(a) including the ability to satisfy the prerequisites for a valid conflict waiver under 1.7(b), if applicable.[22] As the MBA opinion noted, drafting involves the attorney choosing language, allocating risk, and other decisions that could inadvertently give an advantage to one party.[23] Because of this, in some matters, the standard of Rule 1.7(b) will be difficult (if not impossible) to meet.[24] Thus, the lawyer-mediator who purports to represent both parties in drafting the agreement potentially could face discipline for engaging in an un-waived conflict of interest. The obligations in Rule 1.7 are discussed in the next section.

Because no Massachusetts attorney has been disciplined for misconduct when serving as a third-party neutral, there is little formal guidance available as to whether, and to what extent, a lawyer-mediator may be inviting disciplinary scrutiny by reducing the parties' negotiated terms to writing at the conclusion of a mediation. Accordingly, bar counsel would urge lawyer-mediators to exercise caution in undertaking this responsibility. Bar counsel would suggest that, when drafting the agreement, the lawyer-mediator should memorialize only those terms that the parties expressly agreed upon during the actual mediation session. As a general matter, the lawyer-mediator should neither solicit nor accept follow-up input or revisions concerning the contents or language of the agreement from either party outside the presence of the other. At the drafting stage, the lawyer-mediator should reiterate in writing to the parties that the lawyer-mediator does not represent either of them as counsel; and therefore, each party should choose their own counsel to review the agreement before signing it.

Representing One of the Parties After the Mediation

It is widely debated whether a lawyer-mediator can take off his third-party neutral hat and represent one of the parties in a *post-mediation* matter involving the same issues. Despite the guidance from bar ethics opinions and the courts, jurisdictions still wrestle with this issue, says Cole & McEwen, et. al.[25] Their mediation treatise notes that "[bar ethics authorities and courts] weigh the need to protect attorneys from an appearance of impropriety, the need to maintain a perception of mediator neutrality, the need to protect confidential information, and the recognition that unduly restrictive provisions will inhibit development of mediation." Considering these issues together, most

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[19] *Id.* at 39.
[20] *See* Mass. Bar Assoc. Ethics Op. 85-3 (Dec. 31, 1985)
[21] *Id.*
[22] The Mass. Bar Assoc. Ethics Op. 85-3 cites former rule DR 105(C) and refers to this notion as the "obviousness test." The former rule embodies the same principles of the current Mass. R. Prof. C. 1.7.
[23] *See* Mass. Bar Assoc. Ethics Op. 85-3 (Dec. 31, 1985)
[24] *Id.*
[25] *See* Cole and McEwen, et. al, *supra* note 3, at § 10:6.

jurisdictions outside of Massachusetts that have addressed the issue in a formal ethics opinion permit post-mediation representation, as long as effective screening mechanisms are in place.[26]

In Massachusetts, a lawyer-mediator can only provide post-mediation representation to one of the parties if both parties consent. Mass. R. Prof. C. 1.12 provides that, when a "lawyer [has] participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral, or law clerk" in a matter, the lawyer is prohibited from representing anyone in connection with that matter unless the lawyer gets informed consent in writing from both parties. Of further note, Rule 1.12 restricts other lawyers within the lawyer-mediator's firm from representing any of the parties unless the lawyer-mediator is timely screened out, does not receive any fees from the matter, and the parties and tribunal are given written notice (presumably to enable them to assert any objections).[27]

In order to request the waiver contemplated by Rule 1.12, lawyers in Massachusetts must establish that the conflict is in fact waivable under Rule 1.7 of the Rules of Professional Conduct, specifically, Mass. R. Prof. C. 1.7(b). Mass. R. Prof. C. 1.7(a) states that a lawyer shall not represent parties who are "directly adverse" or where "there is a significant risk that the representation of one or more [parties] will be materially limited by the lawyer's responsibilities to [the other party, etc.]," unless the lawyer can satisfy the exception in 1.7(b). Rule 1.7(b) requires (among other things) that the lawyer be able to competently and diligently represent the interest of the party despite the competing duty or obligation. As always, any conflict waiver must be both *informed* and *in writing*.

Should the lawyer-mediator be able to meet the requirements of the rules and obtain informed consent to the post-mediation representation, then the lawyer-mediator will have changed hats successfully. The lawyer can file divorce pleadings and perform any other tasks necessary to represent their client. Naturally, during the ensuing representation, the lawyer will be subject to all the Rules of Professional Conduct that normally govern the attorney-client relationship.

Discipline Involving Lawyers Serving as Third-Party Neutrals

The Office of Bar Counsel has yet to prosecute a complaint against a lawyer-mediator. In fact, as of this article, Maine and Virginia appear to be the only states to have disciplined a lawyer based on their service as a mediator. Both cases presented facts that clearly supported that the lawyers violated their respective states' rules of professional conduct. In Maine, the lawyer received a public reprimand for violating Rule 1.12 of the Maine Rules of Professional Conduct, which is nearly identical to Rule 1.12 in Massachusetts.[28] While the lawyer was serving as a third-party neutral, he negotiated employment with a firm that was representing one of the parties to the mediation. The Maine Grievance Commission Panel found that the social dinners the lawyer attended with partners of the law firm were for the purpose of recruiting the lawyer, even though there was no formal discussion of his joining the firm at the time. The Commission also found that the lawyer had engaged in "conduct prejudicial to the administration of justice" because his actions

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[26] *Id.*

[27] *See* Mass. R. Prof. C. 1.12; Rule 1.12(d) contains an exception for lawyers who served as an arbitrator on a multimember arbitration panel. *See* Comment [5] for guidance on what the notice should contain.

[28] *Board v. Christopher Causey, Esq.*, GCF#12-251, (September 10, 2013)

caused the mediating parties to question the impartiality of third-party neutrals, which resulted in significant financial harm and inconvenienced the wife, who had to find a new attorney.

The Virginia matter involved an attorney who was retained to represent both the husband and wife after the attorney had mediated their property settlement in anticipation of the divorce.[29] The attorney had the couple sign a document agreeing to waive any conflicts of interest that might arise out of such joint representation. When she filed the divorce pleadings, however, she signed them as attorney for the wife only. The divorce action was later dismissed because of the unexpected death of the husband. The Third District Commission of the Virginia State Bar proceeded to discipline the attorney for violating Rules 2.10(e) and 1.7(a)[30] of the Virginia Rules of Professional Conduct. Virginia's Rule 2.10(e): Third Party Neutral explicitly prohibits a lawyer who served as a third-party neutral from acting on behalf of or representing any of the parties against the other in any legal proceeding related to the matter that was mediated. It offers no exceptions. As discussed above, Mass. R. Prof C. 1.12 likewise prohibits post-mediation representation. However, Massachusetts has an exception that would permit the lawyer-mediator to represent one of the parties, provided they obtain the informed written consent of both parties.

Conclusion

What should a lawyer-mediator do to avoid ethical trouble in Massachusetts? Read the rules. The Massachusetts Rules of Professional Conduct 2.4 and 1.12 (including the comments) offer straightforward guidance on the lawyer's obligations when serving as a third-party neutral and the lawyer's transition back to the traditional role of an advocate in the adversarial process. Hopefully, the relevant issues illuminated in this article will help lawyer-mediators avoid ethical missteps. In addition, lawyers who are uncertain of their ethical obligations, whether in serving as a third-party neutral or in any other practice context, are invited to call bar counsel's Ethics Helpline[31] for guidance.

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[29] *In the Matter of Elizabeth Monroe Hill*, VSB Docket No. 16-031-106219 (August 17, 2017)

[30] Rule 1.7(a) Conflict of Interest: General Rule in Virginia is substantially similar to Mass. R. Prof. C 1.7 Conflict of Interest: Current Clients.

[31] The Helpline is open Mondays, Wednesdays, and Fridays from 2:00 to 4:00 p.m. Contact 617-728-8750.