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Attorney-mediators need to check for conflicts

Ethical obligations increase under two sets of rules when an attorney undertakes mediation

By J. Randolph Evans and Shari L. Klevens, Special to the Daily Report

(File Photo)

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(File Photo)

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Increasingly, attorneys and law firms are looking to different ways of generating income. Seasoned attorneys (and by affiliation their law firms) looking for diversification often start a mediation practice. Of course, not every litigator makes a good mediator. On the other hand, years of experience settling and trying cases can be the perfect background for an effective mediator.

While training and skill are important, appropriate systems for ethics compliance are also critical. The Georgia Supreme Court has adopted ethical rules for individuals serving as neutrals in both private and court-referred alternate dispute resolution. If a lawyer is serving as a neutral in a private dispute resolution, then the Georgia Rules of Professional Conduct dictate the lawyer's responsibilities and limitations. If a case is referred to ADR by a court, then the neutral must be registered by the Georgia Office of Dispute Resolution. The process is governed by the Alternative Dispute Resolution Rules ("Rules").

Although there are separate ethics rules that apply to mediators, the Rules and Regulations of the State Bar of Georgia still apply when an attorney serves as a mediator. This includes conflict of interest rules that can apply to firm clients and mediation participants.

For cases that are referred to ADR by Georgia courts, the ethical standards for mediators, including those relating to conflicts of interest and bias, are set forth in Appendix C to the Alternative Dispute Resolution Rules. These rules are more detailed than the Rules of Professional Conduct for lawyers serving as third-party neutrals. In addition, under these rules a conflict of interest can include the mediator's involvement with the subject matter of the dispute or from any past or present, personal or professional, relationship between the mediator and any mediation participant, that "reasonably raises a question of a mediator's impartiality." The rules further state that "[m]ediators should avoid any dual relationship with a party which would cause any question about the mediator's impartiality."

Sometimes these rules intersect in predictable but unexpected ways. For example, imagine a situation where one of the participants in a mediation is an insured of an insurer client of the law firm where the mediator is employed. The insurer client of the firm might want to know that an attorney with the firm is serving in a capacity to facilitate a settlement, but not on its behalf. The participant in the mediation might want to know that the mediator's firm represents the insurer.

Unfortunately, in many circumstances, no one knows any of the potential issues because the law firm did not check conflicts for the participants in a mediation involving the employed attorney/mediator. Most of the time, there is no problem. Other times, there is. Like many things, however, no one really cares until someone is unhappy.

A settling party with buyer's remorse might think that the mediator pushed them too hard to accept too little because of a conflict in which the mediator was actually looking out for the law firm's insurer client. On the other hand, the party whose case never settled may think that the mediator/attorney did not do enough to get the necessary money to settle because of an undisclosed relationship between the mediator's law firm and an insurer.

On the other hand, it could be that the insurer client of the law firm is unhappy. The insurer might believe the mediator "pushed too hard" to get the offers high enough to get the case settled. Or the mediator/attorney might have raised bad faith, which the insurer thought was inappropriate for a law firm that otherwise represented it. This can create both a legal conflict as well as a client relations conflict. Either way, it is a problem.

The Rules require mediators to "make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context." The commentary for the rules provides an explanation of what may be a "reasonable inquiry" based on practice context. For example, if the mediation involves a complex case that comes through the mediator's law firm, the best practice involves making a firm-wide conflicts check at the pre-mediation phase.

Many attorney/mediators and law firms often ask whether they must do a conflicts check at all since a mediation does not involve the rendition of legal services (unless of course there is a claim and they want coverage from their legal malpractice insurer).

The short answer is "Yes—do the conflicts check."

The important point is that an attorney's ethical obligations do not end when the attorney undertakes a non-legal service, especially when the services are provided by his law practice or law firm. In addition to the Bar Rules, the Mediation Rules also apply and require a determination of whether any actual or potential conflicts exist that "could reasonably be seen as raising a question of the mediator's impartiality."

As a result, attorney mediators should identify all participants in a mediation and any interested insurers. These names should be compared with the attorney's/law firm's client matter list to see if any of the participants are clients or adverse parties. If so, the attorney/mediator should either decline the mediation or disclose the potential conflict and follow the rules for a consent (or waiver of any conflict). This includes written full disclosure and written consent.

The more difficult question is how mediation participants are listed for determining conflicts with other firm representations. Here, the important step is to confirm with the participants that they are not clients of the attorney mediator or the law firm. This can best be accomplished through a form to be signed by all of the participants at the mediations stating: "Each participant understands and agrees as follows: no attorney-client relationship exists between the mediator and any participant based on this mediation." With this disclaimer, the attorney/mediator or law firm can designate mediation participants as just that, as opposed to listing them in the client database.

Importantly, Rule 2.4 of the Georgia Rules of Professional Conduct addresses lawyers serving as third-party neutrals. This Rule applies to any lawyer who "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." If unrepresented parties are participating in the ADR, then the lawyer is required to inform the unrepresented parties that the lawyer does not represent them. If it appears the unrepresented party does not understand the lawyer's role as a neutral, then the lawyer should explain the difference between his role as a neutral and a lawyer's role representing a client.

Practicing attorneys make good mediators and can supplement their practice with this important additional service. To mediate well, get trained. To do it safely, read and follow the ethics rules for mediators and comply at all times with the rule. This includes special attention to the identification and resolution of anything that looks like a conflict.

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