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The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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DEAR FORUM,

I am trying to diversify and expand my matrimonial practice by coming up with a flat rate structure that might appeal to couples working towards filing for an uncontested divorce. My thought was that I would charge a flat rate for mediation services with the intention of filing an uncontested divorce packet at the conclusion of the mediation. My contract with the couple would provide, however, that if the parties discontinue my services before resolving all of their issues, I would be paid at an hourly rate for my mediation services performed, and any unused amounts would be returned to the couple. Is this permissible under the Rules of Professional Conduct? For example, am I allowed to file legal papers on behalf of the couple if they both agree to it? Are there any issues I should consider if I do pursue this plan when it comes to advertising? Also, when I was discussing this idea with my wife, she said that her psychiatry practice does a lot of couples counseling and they could offer a free counseling session to couples if it looked like they were going to try to stay together. Can I ethically refer that couple to my wife?

Very truly yours,
Mary Split

DEAR MARY SPLIT,

It is no secret that Alternative Dispute Resolution (ADR) has become an increasingly important part of litigation that helps the parties reduce costs and resolve their disputes. Lawyers should be aware of the unique issues they face when they serve as a third-party neutral instead of the client's counsel. The New York State Bar Association

(NYSBA) Committee on Professional Ethics has opined that lawyers acting as mediators are not engaged in the representation of a client and are not providing legal services to the parties to the mediation. *See* NYSBA Comm. on Prof'l Ethics, Op. 999 (2014); *see also* NYSBA Comm. on Prof'l Ethics, Op. 1026 (2014). In other words, an attorney-client relationship is not established when the lawyer is acting as a third-party neutral. Consequently, the Rules of Professional Conduct (RPC) that apply when a lawyer represents a client including, for example, Rule 1.5 concerning fees, do not automatically apply in the context of a lawyer providing mediation services. *Id.* However, certain other rules will apply to lawyer-mediators even in the absence of an attorney-client relationship. *See* RPC 5.7, Comment [4].

For example, RPC 2.4 specifically governs an attorney's ethical obligations when acting as a third-party neutral. The Rule states, "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." RPC 2.4(a). Subsection (b) of RPC 2.4 requires the lawyer-mediator to inform unrepresented parties that the lawyer is not representing them and explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. *See* RPC 2.4(b). Therefore, unless all mediating parties are represented by counsel, it is imperative for the lawyer-mediator to adequately explain the boundaries of his or her role to assure there is no confusion. *See* NYSBA Comm. on Prof'l Ethics, Op. 878 (2011). However, the extent of explanation required under RPC 2.4(b) will depend on the particular sophistication and bargaining power of the parties involved, the subject matter of the proceeding, as well as the particular features of the dispute resolution process selected. *See* RPC 2.4, Comment [3].

While attorneys are permitted to act as third-party neutrals in the matrimonial context, it is generally more difficult for the lawyer-mediator in matrimonial matters to provide an effective explanation regarding the difference between their role as a lawyer-mediator compared to their role when representing a client, particularly where the parties are not represented by counsel. *See* NYSBA Comm. on Prof'l Ethics, Op. 736 (2001). Specifically, the NYSBA Committee has recognized that:

> the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions, and the inequality in bargaining power resulting from differences in personalities or sophistication of the parties make it virtually impossible to achieve a result free from later recriminations or bias or malpractice, unless both parties are represented by separate counsel. In the latter circumstances, [simply] informing the parties that the lawyer "represents" neither and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances, may be illusory. *Id.*

Therefore, for matrimonial matters, the lawyer-mediator must carefully consider the above considerations before deciding whether to undertake, or possibly end, the mediation, because a party's interests cannot be fairly protected without obtaining independent legal advice or because a party needs a lawyer's assistance to protect against overreaching by his or her spouse. *Id.*

In addition, a lawyer-mediator should be aware of the confidentiality obligations that apply even in the absence of an attorney-client relationship. While Rule 2.4, by itself, imposes no duty of confidentiality upon the lawyer-mediator, Comment [3] to Rule 1.12 provides that lawyers who serve as third-party neutrals typically owe the parties a duty of confidentiality under the codes of ethics governing third-party neutrals. *See* RPC 1.12 Comment [3]; *see also* NYSBA Comm. on Prof'l Ethics, Op. 1026 (2014). In light of the guidance given by Comment [3] to RPC 1.12, a prudent lawyer acting as a third-party neutral should become familiar with RPC 1.6, which governs the confidentiality of information. Likewise, in addition to the obligations imposed by the RPC, a lawyer acting as a third-party neutral also may be subject to court rules or other laws of their particular jurisdiction that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. *See* RPC 2.4 Comment [2]. As such, we recommend that any lawyer serving as a third-party neutral research the substantive law and ethics codes that may apply to him/her in his or her capacity as a mediator. *Id.*

Accordingly, as long as you comply with RPC 2.4 and any applicable state laws, the lawyer-mediator is generally free to conduct the mediation as the lawyer-mediator sees fit, including contracting for and structuring his or her fee however the lawyer-mediator would like. *See* NYSBA Comm. on Prof'l Ethics, Op. 1178 (2019). Therefore, in response to your question, you are permitted to charge a flat fee for mediation services with the caveat that you will charge an hourly rate for such services in the event the parties discontinue your services before resolving their dispute. The fee arrangement should, of course, be spelled out in writing in a pre-mediation agreement.

Should you succeed in helping the parties reach an agreement, you are also permitted to assist them in the

preparation of a writing memorializing the terms of their agreement during the mediation and file an uncontested divorce packet. *Id.* The NYSBA Committee on Professional Ethics has averred that a lawyer-mediator is permitted to file legal papers on behalf of the couple if they both agree to it. *See* NYSBA Comm. on Prof'l Ethics, Op. 736 (2001). The NYSBA Committee has stated: "[a]n attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies [the applicable conflict rules]." *Id.*

In some cases, a lawyer who serves as a third-party neutral, particularly in the context of matrimonial mediation, may be subsequently asked to serve as a lawyer representing a client in the same matter. RPC 1.12(b) permits the lawyer-mediator to represent one party in filing a divorce action in court at the conclusion of the mediation, so long as the other party gives informed consent, confirmed in writing. *See* NYSBA Comm. on Prof'l Ethics Op. 1178 (2019). It might be advisable to address this possibility in a pre-mediation agreement. Under these circumstances, if the former mediator ends up representing one of the parties, the lawyer, of course, owes all duties accompanying an attorney-client relationship under the RPC to the represented party. *Id.* However, under no circumstances (even with informed consent) will the former-mediator be able to represent both parties in a divorce proceeding. *See* RPC 1.7(b)(3).

On the issue of advertising your mediation services, RPC 7.1 governs attorney advertisements, and RPC 1.0(a) defines the term "advertisement" as "any public or private communication made by or on behalf of a lawyer . . . the primary purpose of which is for the retention of the lawyer or law firm." RPC 7.1(a) prohibits any advertisement that is false, deceptive, misleading or that violates any of the other RPC. Comment [3] to RPC 7.1 further notes, "[a] truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation." RPC 7.1 Comment [3]. As such, a lawyer-mediator may advertise its mediation services so long as the lawyer-mediator is truthful and not misleading when advertising or otherwise communicating the mediator's qualifications, experience, services, and fees. *See* RPC 7.1. You should be careful, for example, not to tout your success rate on such matters. RPC 7.1(e) requires that the information contained in the advertisement be factually supported as of the date on which the advertisement is published or disseminated, and contain the disclaimer "Prior results do not guarantee a similar outcome," and in the case of a testimonial or endorsement from a client for a matter still pending, the client must give informed consent confirmed in writing. *See* Rule 7.1(e).

Lastly, turning to whether you are ethically permitted to refer the couples you work with to your wife's psychiatry practice for a free consultation, you should be mindful of RPC 8.4(c), which provides that an attorney "must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Thus, pursuant to RPC 8.4(c), you are required to make clear disclosures that the psychiatrist is your spouse, that the free session might not be sufficient to resolve every issue between the parties, and that there is a possibility that you may derive an indirect benefit from fees charged to the parties by your spouse for work beyond the free consultation session. *See* NYSBA Comm. on Prof'l Ethics, Op. 999 (2014).

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM:

I am the managing partner of a general practice law firm of approximately 40 lawyers and 20 staff members. In response to the recent pandemic, all firm employees are required to work from home. While the safety of the firm's employees is always a top priority, our management team has concerns about how our employees remain in compliance with their ethical obligations during this time. Specifically, with many of our attorneys working in close quarters to other family members, how can they best ensure they are safeguarding client's confidentiality?

Additionally, our firm has implemented a number of practices to facilitate a seamless transition when working from home. For example, we provide remote access to our work applications. We also provide a firm-hosted cloud-based file-sharing service so that our employees can transfer multiple and high-volume files to clients, as

well as one another, throughout the workday. Are there any specific ethical obligations we should be aware of with respect to the technology and working from home? How can our firm ensure that we are using technology safely, effectively, and in compliance with our ethical obligations?

Given that face-to-face communications are severely limited, and individual accessibility is uncertain, what are our ethical obligations with respect to the supervision of subordinate attorneys and staff? Are they lessened in any way due to the circumstances?

Separately and surprisingly, we have reached out to adversaries requesting extensions of deadlines, and one adversary in particular was obstinate, refusing to give us an extension, despite the fact that my client was one of the many individuals who fell ill during the public health crisis. As a result, we were forced to make an application to the court. Is our adversary's conduct ethical? Does this conduct rise to the level of notifying the grievance committee?

Sincerely,
Patty Partner