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Identifying Potential Ethical Pitfalls in Non-Traditional Attorney Roles as Third-Party Neutrals

A CNA PROFESSIONAL COUNSEL GUIDE FOR LAWYERS AND LAW FIRMS

In today's market, more attorneys are looking beyond traditional legal counsel assignments and taking on rolls as mediators and arbitrators.[1] Pursuing these roles should involve a solid commitment by the lawyer to learn all of the related duties and responsibilities. Attorneys who have served in either capacity would likely agree that each of these non-traditional roles is truly a craft unto itself, which requires continuous learning. This article provides a general overview of the state of the industry for lawyers who undertake roles as third-party neutrals and concludes with vital risk control techniques to effectively manage the risks of accepting these appointments.[2]

Ethical Duties Relating to the Non-Traditional Role of an Attorney as Mediator

Prior to accepting a role as a mediator, attorneys should take necessary precautions to protect themselves from potential liability and a potential ethical grievance.[3] It is not uncommon in today's litigious society for parties to settle a lawsuit through mediation, experience "buyer's remorse" and then turn around and file a civil action seeking to set aside the settlement.

In the petition to set aside the mediated settlement, the petitioner might allege that the mediator was impartial or failed to disclose a known conflict of interest. A petitioner might allege on the part of the mediator fraudulent inducement, fraudulent misrepresentation, diminished capacity, or duress in attempt to quash an otherwise binding settlement agreement facilitated by mediation. These allegations arise because in order to invalidate a legally binding contract (e.g. mediated settlement agreement), a party must typically plead fraud, collusion, mistake, or accident.[4]

Fortunately, mediators in some states might benefit from a quasi-judicial immunity, which was first applied in by the court in *Wagshal v. Foster,* 28 F.3d 1249, 1254 (D.C. Cir. 1994).[5] However, attorneys serving as mediators should definitively investigate the availability of any applicable immunity in order to fully understand the potential risks and available defenses prior to their retention.

For example, one Florida court has recognized that in "compelling" circumstances involving a mediator's substantial violation of the rules of conduct for mediators, a court has the inherent authority to set aside a mediated settlement agreement. *Vitakis–Valchine v. Valchine,* 793 So.2d 1094, 1099–1100 (Fla.Dist.Ct.App.2001). In *Vitakis–Valchine,* the court noted that the conduct of the mediator, if true, would support a finding of misconduct. The mediator in that case allegedly told a party that she would never win in court, threatened to report to the court that the failure to reach an agreement was that party's fault, and gave the party only five minutes to decide whether to sign the agreement. *Id.* at 1097.

1 The American Bar Association's ADR Section is one of the fastest growing Sections, now with over fifty committees. See **http://www.americanbar.org/groups/dispute_resolution/about_us.html**.

2 There are a number of resources available to attorneys who are interested in learning more about serving in these capacities. Most state bar associations will have valuable information unique to their jurisdiction for attorneys serving in these non-traditional roles.

3 New Hampshire Ethics Op. 1993-94/4 (1993) (mediation service does not constitute practice of law; thus, lawyer may share fees from mediation services with non-lawyers); Indiana Ethics Op. 5 of 1992 (attorney who owns mediation service may operate it under trade name since mediation is not practice of law; however, attorney must comply with restrictions on legal advertising if he also practices law); Kentucky Ethics Op. E-377 (1995) (mediation is not practice of law; thus, lawyer's business providing mediation services to public may use trade name, but rules governing lawyer advertising apply); Missouri Informal Ethics Op. 980042 (attorney is not engaged in practice of law unless attorney holds himself out as being both lawyer and mediator); Utah Ethics Op. 97-03 (1997) (since mediation and arbitration services are not practice of law, lawyer's direct-mail advertising of those services is not prohibited under Rule 7.3). XXX

4 *Cf. Graham v. New York City Hous. Auth.*, 260 A.D.2d 541, 542, 688 N.Y.S.2d 591, 592 (1999).

5 *Howard v. Drapkin* (2nd Dist. 1990), 222 Cal.App. 3d 843, 851, 271 Cal.Rptr. 893. Also see *Schaffer v. Agribank* (Minn. 1997) (finding statutory mediator immunity under Minn. Stat. 583.26); *Joynes v. Meconi*, 2006 WL 2819762 (D. Del. 2006) (holding that family court mediator was entitled to quasi-judicial immunity).

Separate from potential civil liability, a lawyer who serves as a mediator is governed by the state equivalents of ABA Model Rules 2.4[6] and 1.12,[7] along with other applicable state laws, rules, and codes that may regulate conduct of mediators.[8] ABA Model Rule 2.4 addresses the real concern that parties to mediation might misunderstand the role of a lawyer-mediator. The rule imposes an affirmative duty on the lawyer-mediator to inform unrepresented parties of this distinction.

> ABA Model Rule 2.4(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.

This rule supports a fundamental risk control principle that CNA actively promotes: better use of written communications by lawyers in the practice of law, including engagement letters. To this end, it is imperative that lawyers who serve as mediators utilize an explicit retention letter that clearly and concisely sets forth the nature of the service. It is also good practice to follow the requirements in Model Rule 2.4(b) by informing all parties (both represented an unrepresented) in writing what the relationship is not: a lawyer-client relationship.[9]

In addition, ABA Model Rule 1.12 prohibits former third-party neutrals from representing a client in any matter in which the lawyer-mediator participated, unless all parties consent in writing, but other lawyers in the former neutral's firm may do so if the former neutral is screened. This rule appears more lenient than the treatment of conflicts of interest under most jurisdictions' existing ethics rules and most case law, because the comments to this rule state that Model Rule 1.12 should run parallel to Model Rule 1.11.

However, one of the leading cases on mediation and lawyers' conflicts of interest, *Poly Software Int'l Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995), held that when a lawyer has served as a mediator for parties in a dispute, the propriety of his representation of one of those parties against the other in subsequent related litigation should be judged under the standard of Utah's adopted version of Model Rule 1.9 on former clients rather than the more lenient standard in the state's adopted version of Model Rule 1.12.[10] In *Poly Software,* the court disqualified counsel for having served as a mediator in a "substantially factually related matter" (taken from Utah's Rule 1.9), while recognizing that under Utah rule 1.12 the attorney would not have been disqualified because that rule's definition of "matter" is narrower. The court determined that by applying the more stringent standard set out in the Utah rule 1.9 parties would be encouraged to more freely disclose their positions during mediation by assuring them that the specific information disclosed will not be used against them at a later time.

6 ABA Model Rule 2.4 (Lawyer Serving as Third-Party Neutral).
7 ABA Model Rule 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral).
8 *Cf. Matluck v. Matluck*, 825 So. 2d 1071, 18 Law. Man. Prof. Conduct 605 (Fla. Dist. Ct. App. 2002) (in decision disqualifying firm based on conflict of interest arising from lawyer's prior role as mediator court cited opinions rendered by Florida panel that provides guidance to mediators on standards of conduct); Oregon Ethics Op. 2002-167 (2002) (lawyer-mediators bound both by rules that apply to lawyer conduct generally and by statutes governing mediation).
9 *Chang's Imports Inc. v. Srader,* 216 F. Supp.2d 325, 18 Law. Man. Prof. Conduct 541 (S.D.N.Y. 2002) (noting that parties' mediation agreement clearly spelled out that lawyer was not acting as attorney).
10 See also *Clark v. Alfa, Ins. Co.*, 2001 WL 34394281 (N.D. Ala. 2001) (refusing to follow *Poly Software* and instead applying local Alabama court rules); *Hossaini v. Vaelizadeh*, 2011 WL 3422782 (D. Neb. 2011) (refusing to follow *Poly Software* and instead applying standard in Nebraska Parenting Act Neb. Rev. Stat. sec. 43-2939(3)).

It is also important for lawyer-mediators to be familiar with the Model Standards of Conduct for Mediators. These model standards were originally developed in 1994 and later revised jointly by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.[11] While these standards do not have any force of law, the preamble states "[n]onethless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators." A summary of the Model Standards of Conduct are attached to this article in Addendum A.

It is good business practice for attorneys who serve as mediators to familiarize themselves with the applicable standards of care and ethical obligations for the assignment. Many of these issues will require a state specific analysis. Attorneys who decide to pursue the opportunity of serving as a mediator should commit to the role as an ongoing venture and take the steps to continuously educate themselves of developments in this area of the law.

In the next section, the discussion focuses on the related role of attorneys serving as arbitrators. Following that discussion are suggested risk control measures to mitigate potential liability and professional risks in serving as both a mediator and arbitrator, given the similarities in the suggested techniques.

Attorneys who decide to pursue the opportunity of serving as a mediator should commit to the role as an ongoing venture and take the steps to continuously educate themselves of developments in this area of the law.

11 As of the date of publication of this article, a copy of the current version of the Model Standards of Conduct for Mediators may be found at the following link: **http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf**. If you find this link to be invalid, the model standards may likely be found on the ABA's Section of Dispute Resolution's webpage.

Ethical Duties Relating to the Non-Traditional Role of an Attorney as Arbitrator

The use of arbitration agreements in commercial contracts has become widely popular in today's marketplace. Recently, a number of arbitration related questions have even made their way into the United States Supreme Court's docket.[12] Arbitration agreements are an often utilized alternative dispute resolution tool in international commercial transactions, in construction disputes, in financial services contracts and throughout the technology segment. In fact, multi-billion dollar disputes are routinely decided in this forum and, for the last ten years, the American Lawyer has issued an "Arbitration Scorecard" providing a glimpse into this otherwise confidential world.[13] Interestingly, the American Lawyer's 2013 scorecard highlights a number of disputes that go beyond dollars and cents, such as the following:

1. Greece's debt restructuring (*Cyprus Popular Bank v. Greece*);
2. Germany's ban on nuclear power after the Fukushima meltdown (*Vattenfall v. Germany*);
3. Zimbabwe's treatment of white farmers (*Boarder Timbers v. Zimbabwe*); and,
4. The division of spoils after the breakup of Sudan (*Sudapet v. South Sudan*).[14]

Clearly, arbitrators who decide these disputes require some level of immunity based on the dollars (or highly sensitive issues) at stake. Not surprising, most forums provide some level of immunity to arbitrators in that capacity either through common or statutory law.[15]

Regardless of whether the arbitrator is allocating the assets of a defunct nation or deciding a small commercial dispute, lawyer-arbitrators must recognize the ethical obligations that might apply to their service. The most relevant ABA Model Rules that apply to a lawyer serving as an arbitrator are Rule 1.12 and 2.4.

Much like the discussion in the lawyer-mediator section, the *sine qua non* for ethical conduct is clarification of the arbitrator-lawyer's role at the outset of the process. The lawyer-arbitrator should make it abundantly clear that there will be no legal advice provided and that no attorney-client relationship will be formed.

12 See *AT&T v. Concepcion* 131 S. Ct. 1740 (2011) (compelling mandatory arbitration in commercial cell phone contracts, holding that Federal Arbitration Act preempts California state consumer protection laws); *Rent-A-Center v. Jackson* 130 S. Ct. 2772 (2010) (provision in employment agreement which delegates to arbitrator exclusive authority to resolve any dispute relating to the agreement's enforceability was a valid delegation under the Federal Arbitration Act, including employee's sec. 1981 action alleging race discrimination and retaliation); *Stolt-Neilson S.A. v. AnimalFeeds International,* 130 S. Ct. 1758 (2009) (arbitrators cannot impose class arbitration on a party when the arbitration agreement is silent on that issue).

13 See Arbitration Scorecard 2013 at the following link: **http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202608198051&slreturn=20140002152629**. If link does not work, please visit the company's main website and search for "Arbitration Scorecard."

14 *Id.*

15 For example see Cal. Civ. Proc. Code sec. 1297.119; Fla. Stat. Ann. sec. 44.107 (1995); N.C. Gen. Stat. sec. 7A-37.1 (1995) and sec. 1-569.14 (1995); Utah Code Ann. sec. 78-31b-4 (1994); *Butz v. Economou,* 438 U.S. 478 (1978); *Corey v. New York Stock Exch., Inc.,* 691 F.2d 1205 (6th Cir. 1982); *Stasz v. Schwab,* 121 Cal. App. 4th 420 (2d Dist. 2004); *Olson v. National Ass'n of Security Dealers* 85 F.3d 381 (8th Cir.1996); accord, *Intern. Medical Group, Inc. v. American Arbitration,* 312 F.3d 833 (7th Cir.2002).

Comment 2 to Rule 2.4 specifically identifies that arbitrators may be subject to other rules of conduct, such as the Code of Ethics for Arbitration in Commercial Disputes. The lawyer-arbitrator should be fully aware of the applicable rules by which the arbitration will proceed and take the appropriate steps to familiarize himself or herself with those standards. The preamble to the Code qualifies that "in those instances where this Code has been approved and recommended by organizations that provide, coordinate or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide." A summary of the Code is located in Addendum B to this article.

As for ABA Model Rule 1.12 regarding potential conflict of interest issues, a member of the ABA Ethics 2000 Commission reported that the commission did an about-face on conflicts of interest arising from a lawyer's service as a third-party neutral.

> "The Commission initially proposed to extend a broader conflict of interest rule to all third-party neutrals, and disallow screening for lawyers associated with them. It later decided against this in light of comments received that this would tend to discourage arbitration and mediation practice by lawyers in firms, including participation in voluntary court-sponsored dispute resolution programs. The Commission was persuaded that third-party neutrals typically do not share confidential information with other lawyers and are usually precluded from doing so by applicable rules."[16]

Attorneys should take caution when analyzing these conflict issues. Recall that one of the landmark decisions on this issue is the *Poly Software* opinion, which has been cited in many jurisdictions.[17] Using the appropriate standard (Model Rule 1.9 or Model Rule 1.12) will require a state-by-state analysis based on the versions of those model rules adopted by the states.

While in many jurisdictions lawyer-arbitrators may rely on available immunity defenses, they often face expensive defense costs when claims do arise. Accordingly, lawyer-arbitrators should be sure to appropriately mitigate the risks by having the appropriate retention letters in place; by following the recommended standards of care provided by the Model Standards of Conduct; and by having the appropriate safeguards in place to protect their business assets should a claim arise.

16 Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000,* 15 Geo. J. Legal Ethics 441, 462 (2002).
17 *Poly Software Int'l Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995).

Risk Control Techniques for Lawyers Serving as Third-Party Neutrals

With the growing number of mediations and arbitrations occurring in today's legal arena, third-party neutrals must be cognizant of the relevant state requirements applicable to their assignments. Good risk control techniques for mediators to adopt include:

1. **Due Diligence:** Research and fully understand the relevant standards of care in the appropriate jurisdiction and applicable ethical duties, including the following:
   a. Verify whether the jurisdiction has adopted Model Rule 2.4 and whether the jurisdiction has imposed any additional obligations on lawyers serving as third-party neutrals;
   b. Verify that the jurisdiction has adopted Rule 1.12 and analyze the specific language in the state rule to determine if and when the ability to screen off any lawyers who have served as third-party neutrals is available.
   c. If the jurisdiction has adopted Model Rule 1.12, verify whether there is jurisprudence that follows the more limiting conflicts analysis in *Poly Software,* or follows the comments to ABA Model Rules 1.11 and 1.12; and,
   d. Identify any applicable quasi-judicial immunity or statutory immunity applicable to the assignment.
2. **Do Not Offer Legal Advice:** Resist the temptation to dispense legal advice during the dispute resolution process. Doing so might unintentionally embroil a lawyer in an unintended lawyer-client relationship and unintended liability exposure.
3. **Commit to the Role and Continuously Learn:** Stay abreast of current laws and regulations relating to dispute resolutions and continue to hone the skills necessary to competently serve as a third-party neutral.
4. **Utilize Explicit Engagement Agreements:** Explicitly define the scope of assignment as a third-party neutral with the parties in a written document. The scope should specifically advise that the third-party neutral will not be representing any party and no attorney-client relationship will be established with the third-party neutral.

The last recommendation is certainly not the least important. Having the appropriate documentation in place goes a long way towards setting expectations with the parties involved. It is another reminder that attorneys should be vigilant in taking affirmative steps to dispel any expectation of representation, regardless of whether a communication takes place in the lawyer's office.[18]

18 Excellent examples of engagement letters may be found through both JAMS and AAA websites. See **http://www.jamsadr.com** and **www.adr.org**. In addition, attorneys may want to consider incorporating relevant paragraphs from CNA's Attorneys Toolkit, which can be found at **www.lawyersinsurance.com**

Addendum A
Model Standards of Conduct for Mediators

The Model Standards of Conduct for Mediators comprise nine standards. Below are the nine standards followed by a general summary description:[19]

- *Self-Determination:* Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- *Impartiality:* Impartiality means freedom from favoritism, bias or prejudice.
- *Conflicts of Interest:* A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.
- *Competence:* Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
- *Confidentiality:* A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law. Depending on the circumstance of the mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.
- *Quality of the Process:* A mediator shall conduct mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
- *Advertising and Solicitation:* A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
- *Fees and Other Charges:* A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation
- *Advancement of the Mediation Process:* A mediator should act in a manner that advances the practice of mediation.

19 As of the date of publication of this article, a copy of the current version of the Model Standards of Conduct for Mediators may be found at the following link: **http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf**. If you find this link to be invalid, the model standards may likely be found on the ABA's Section of Dispute Resolution's webpage.

Addendum B

Code of Ethics for Arbitration in Commercial Disputes

The Code sets out ten canons of conduct:

1. An arbitrator should uphold the integrity and fairness of the arbitration process.
2. An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
3. An arbitrator in communication with the parties should avoid impropriety or the appearance of impropriety.
4. An arbitrator should conduct the proceedings fairly and diligently.
5. An arbitrator should make decisions in a just, independent and deliberate manner.
6. An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.
7. An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.
8. An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.
9. Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this Code as exempted by Canon IX.
10. Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.[20]

20 The AAA Code of Ethics for Arbitration in Commercial Disputes is available from the American Arbitration Association, **http://www.adr.org**.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com.

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