FEATURES

Ethics Rules for Neutrals

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The Ethics 2000 Commission is tackling an important subject by determining both to develop rules covering neutrals—mediators and arbitrators—and to incorporate them into the Model Rules. As one involved in legal ethics who first worked as a mediator in domestic relations cases over twenty years ago, and who now works as a neutral through the American Arbitration Association, I recognize that such rules will have increasing significance. The following are some thoughts about the direction I believe such rules should take.

(1) **Separate rules should apply to mediators and arbitrators.** The work of an arbitrator is far closer to that of a judge than to that of a mediator. As the "Georgetown proposal"1 discusses, different forms of mediation and arbitration exist. There are also hybrid forms, such as "med/arb" (a mediation that will turn into binding arbitration if not successfully settled) and "arb/med" (an arbitration in which the arbitrator moves the parties into a settlement model and resolves the case consensually.) But the fact remains that there is a fundamental, qualitative difference between neutrals who have the power to make a decision (i.e., "you win and they lose, and here's how much") and those who do not.

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This distinction should be reflected in the development of different rules for mediators and arbitrators. This is because, in several key respects such as the issues of conflicts of interest, disclosure, and whether a neutral who provides legal information can be practicing law, looking at the attorney as a mediator or arbitrator will affect drafting a well-constructed rule. In some instances, Rule 1.12 being the best example, the Commission may well determine that the rules that apply to former judges apply equally well to arbitrators, though not, in my view, to mediators.

(2) **Conflicts of interest, disclosures, and consent.** There is a substantial distinction between how conflicts of interest play out as a practical matter for arbitrator/decision-makers vs. mediators with no decision-making authority. It is both logical and sensible that an arbitrator vested with decision-making power over a case should be held to the same standards as any other decision-maker when it comes to inhibiting or potentially disabling conflicts of interest, both when they apply to the arbitrator and the arbitrator's law firm.

In the case of mediators, however, familiarity with the parties and their counsel, rather than causing problems, often assists in reaching an agreement. Because the mediator has no decision-making authority whatever, this familiarity should be viewed differently from a traditional "conflict of interest," in that the mediator has no power over the matter other than the power to discuss, facilitate, and possibly persuade toward resolution.

Which pre-existing relationships should require disclosure, which should require the parties' explicit consent, and which should be deemed non-waivable, or, as the Commission has termed it, "nonconsentable," must be separately analyzed for arbitrators and mediators in order for the standards to make practical sense, because the functions of arbitrators and mediators are so different. Similarly, the effect of law firm imputation should also be separately evaluated. Again, it makes more sense to consider arbitrators to be in circumstances similar to other decision-makers and to former judges, and mediators to be in a separate class. Standards for arbitrators could be stricter than those for mediators in certain circumstances.

The effect of hybrid neutrals. Although there are occasions where neutrals can serve in a dual capacity, these situations can and should be dealt with by using the stricter applicable standards. For instance, in "med/arb," the parties agree to have the neutral attempt to mediate the dispute to a consensual resolution, with the understanding that if this effort fails, the neutral will make a decision as arbitrator. (I personally refuse to serve in this role because I believe the conflicts between my goal as mediator and as arbitrator make me less effective at both jobs. Nevertheless, such arrangements— and other similar ones— commonly exist.) The med/arbitrator should be treated under the rules like an arbitrator, one who is vested with decision-making power, even if the hope is that such power will never be used.

(3) **Addressing the issue of legal representation by mediators.** The current proposed Rule 2.x states that a third-party neutral shall not "give legal advice to the parties, except that where appropriate, the lawyer may provide legal information and other neutral evaluation if the parties agree . . . ." This provision needs substantial expansion and increased specificity. Separating the rules for arbitrators and mediators will be a helpful threshold step.

Mediators working with unrepresented parties present perhaps the most difficult situation. Here, most frequently in family law cases or community mediations, the mediator may be working with parties who may not have basic relevant legal information (e.g., a spouse's pension is community property, or the definition of "joint legal custody," as opposed to "joint physical custody.") The issues are first, whether the mediator should provide information about the law as applied to the facts presented by the parties, and second, whether this would constitute the practice of law.

The mediator essentially has a choice between not giving legal information and allowing unrepresented parties to resolve their matter in ignorance of basic legal issues, or to provide the information at the risk of giving legal advice and thereby establishing an client-lawyer relationship, albeit one with limited scope. The first alternative — allowing the parties to resolve matters in ignorance of essential information—is understandably not palatable to most mediators.

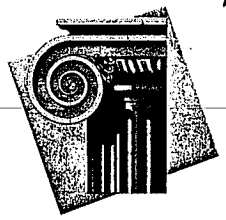
Accordingly, rather than essentially begging the question by describing what a neutral Ashall not@ do, the Ethics 2000 Commission would be better served by addressing this issue head-on, and defining what circumstances do and do not constitute client-lawyer representation of even limited scope. One approach is to make a distinction between providing legal information (which would not establish an client-lawyer relationship) and giving advice (which would.) Obviously, careful drafting and intelligent commentary would be necessary to make this rather fine distinction sufficiently clear. Equally important is drafting language carefully evaluating the scope of any limited representation.

Ancillary issues. The issue has been raised as to what happens when one or more parties are poorly represented. This is, of course, an inevitable occurrence for any experienced mediator. The Commission can and should make it clear that giving legal information to counsel for a party does not create an client-lawyer relationship between the mediator and the party or the party's lawyer.

Finally, arbitrators acting as decision-makers should under no circumstances give legal advice or information to parties, whether the parties are represented or not. To do so would interfere with their neutral decision-making function. A rule can specify that arbitrators may engage in settlement discussions with the parties within these limitations.

ENDNOTES

1. Proposed Model Rule of Professional Conduct for The Neutral Lawyer presented to the Ethics 2000 Commission by Professor Carrie Menkel-Meadow on behalf of The Commission on Ethics and Standards in ADR (sponsored by Georgetown University and CPR Institute for Dispute Resolution) ■



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