LEGAL ETHICS OPINION 1759 CONFLICT: WHETHER CO-COUNSEL AND/OR THE SPOUSE OF AN ATTORNEY/MEDIATOR MAY FILE DIVORCE ON BEHALF OF A PARTY TO THE PRIOR MEDIATION

You have presented a hypothetical situation in which Attorney A is a Certified Virginia Family Mediator and the sole owner of Mediation Company. Attorney A is also "of counsel" to Law Firm, but does not represent any family law client of Law Firm. Attorney B, the owner and principal attorney of Law Firm, is married to Attorney A. Upon the request of the parties to a mediation, Attorney A prepared, as the mediator, a separation and property settlement agreement for the parties, which may also address parenting and support issues, and advises the parties to have the agreement reviewed by an attorney not affiliated with Mediation Center or Law Firm prior to execution. After execution of the agreement, the parties to the mediation request that an associate of Law Firm file the divorce on behalf of one of the parties.

Under the facts you have presented, you have asked the committee to opine as to:

1) whether an associate of the law firm for which the attorney/mediator serves as “of counsel” may file the divorce on behalf of one of the parties provided that both parties are provided with full disclosure and give informed consent to the representation; and

2) whether, had the spouse of the attorney/mediator not been in that firm, would that familial relationship alone trigger a conflict of interest preventing the spouse attorney from representing one of the parties in the divorce.

The appropriate and controlling disciplinary rules relative to your inquiry are Rules 1.7(b),1.8(i), 1.10(a) and (c), 2.10(e), and 2.11(a), which provide as follows:

RULE 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 1.8 Conflict of Interest: Prohibited Transactions

(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

RULE 1.10. Imputed Disqualification: General Rule. --

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

RULE 2.10 Third Party Neutral

(e) A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.

RULE 2.11 Mediator

(a) A lawyer-mediator is a third party neutral (*See* Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

As Rule 2.11(a) establishes that a mediator is a "third-party neutral," Rule 2.10(e) provides an outright prohibition against an attorney serving as a mediator and then representing one of the parties in any legal proceeding related to the mediation matter. That rule contains no provision allowing consent of the parties to cure this type of conflict of interest. Rule 2.10(e) has no precedent in the former Code of Professional Responsibility. However, there are a number of prior ethics opinions interpreting that former Code on this issue. *See*, LEOs 1684, 590, 544, and 511. In the most recent opinion, LEO 1684, the ethics committee opined that it is a conflict of interest for an attorney to represent a party in a matter that was the subject matter of mediation, where that attorney had been the mediator. In that opinion, the committee provides that the conflict of interest faced by the former mediator could be cured by consent of the parties to that mediation. As referenced earlier, Rule 2.10(e), adopted subsequent to the issuance of LEO 1684, provides no "consent cure." If an attorney has a conflict of interest under Rule 2.10(e), then he must decline the representation. To the extent that prior LEOs contradict that rule, they are hereby superseded.

Your hypothetical inquires whether an attorney is blocked by the prohibition in Rule 2.10(e) from representing a party in a matter that had been mediated by a second attorney who is "of counsel" to the first attorney's firm. The committee notes it has previously opined that an attorney who is "of counsel" to a firm is equivalent to an associate of the firm for the purpose of determining conflicts of interest. *See*, LEO 1735. The Rules of Professional Conduct contain a provision listing all conflict of interest rules that are to be imputed to members of an attorney's firm. Specifically, Rule 1.10(a) maintains that an attorney may not represent a client whom an associated attorney would not be able to represent under any of several conflict of interest rules. Rule 2.10 is not on that list; moreover, neither Rule 2.10, nor its related Rule 2.11, contain language that would impute 2.10(e) conflicts to members of an attorney's firm. A conflict of interest under Rule 2.10(e) is personal to the particular attorney; it does not prohibit his associates from accepting the representation.

Your hypothetical also inquires whether an attorney is blocked by the prohibition in Rule 2.10(e) from representing a party in a matter that had been mediated by the attorney's spouse. Rule 1.8(i) finds a conflict of interest whenever, among other things, an attorney represents a client who is directly adverse to a client of the attorney's spouse. In the hypothetical, the attorney-mediator does not represent either party to the divorce. Thus, Rule 1.8(i) does not prohibit the spouse of that attorney-mediator from representing a husband or wife where the attorney-mediator had provided mediation to the couple on issues related to their divorce.

One remaining rule to consider regarding this hypothetical's possible conflicts of interest is Rule 1.7(b), providing in pertinent part that an attorney must not represent a client if the attorney has a duty to a third person or an interest of his own that would materially limit the representation unless the representation will not be adversely affected and the client has consented. The committee notes that the attorney/mediator's duty of confidentiality for the mediation creates a duty to a third person that would materially limit his representation of one of these parties; under Rule 1.10, that conflict of interest is imputed to all members of

his firm. Accordingly, the second attorney in this hypothetical does have a conflict of interest under Rule 1.7, which may only be cured via consent, as contemplated in Rule 1.10(c).

In contrast to members of the same firm, no provision in Rules 1.7 and 1.10 ascribe to a *spouse* all conflicts of interest incurred by the other spouse. Rule 1.8, as discussed above, would be the only potential trigger for a conflict of interest between two married attorneys. Therefore, as concluded in that discussion, above, the spouse of the attorney-mediator is not precluded from representing the husband or wife from that mediation in a subsequent divorce.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion Revised
February 18, 2002