LEGAL ETHICS OPINION 1826

POTENTIAL CONFLICTS FOR ATTORNEY/MEDIATOR WHEN CLIENT MOVES FROM MEDIATION TO LEGAL REPRESENTATION WITH FIRM OF ATTORNEY/MEDIATOR

You have presented a hypothetical in which two attorneys are in a law firm ("Law Firm"). They are the only partners in the Law Firm. Simultaneously, they serve as mediators for a mediation firm ("Mediation Firm"), whose other mediators include both attorneys and non-attorney mediators. These two attorney/mediators are independent contractors of the Mediation Firm. One of them also serves as the director of that Mediation Firm. All of the mediators refer clients to the two lawyers for legal representation in the same matters as the mediations.

With regard to that hypothetical scenario, you have asked the following questions:

1) May the attorney who is director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict of interest, would disclosure to the clients of the attorney's role with the Mediation Firm cure that conflict?

2) May the attorney who is *not* the director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict, would disclosure to the clients of the attorney's work for the Mediation Firm cure that conflict? Would a "firewall" be needed between the two attorneys[1]?

The Rules of Professional Conduct pertinent to your inquiry are:

Rule 1.7 which states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

[1] This opinion request asks about a "firewall." That concept is also commonly referred to with the alternate terms, "screen," "ethical screen," and "Chinese wall." Throughout the discussion in this opinion, the Committee uses the term "screen" as that term appears in the Rules of Professional Conduct. *See, e.g.,* Rules 1.11 and 1.12.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

Rule 1.10(a) which states that when 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 1.6, 1.7, 1.9 or 2.10 (e).

Rule 2.10(e) which prohibits an attorney who has served as a third party neutral[2] from representing "any party to the dispute . . . in any legal proceeding related to the subject of the dispute resolution proceeding."

Also critical to your inquiry are Virginia Code §§ 8.01-581.22 and -581.24 which impose certain standards and duties when a person serves as a mediator, including the duty to maintain the confidentiality of materials and communications relating to the controversy being mediated. Fundamental to your inquiry is whether confidential information learned by a mediator in the Mediation Firm may be imputed to other employees in that firm, including the attorney/mediators, thereby creating a possible conflict of interest when a referral is made to the Law Firm.

Under Rules 2.10 (e) and 1.10 (a), any mediation performed by one of the attorneys in the Law Firm for the Mediation Firm creates a conflict of interest in representing either mediation party in that same dispute for each of the two attorneys in the Law Firm. As to the mediating lawyer, there is no cure for such a conflict. Where the attorney/mediator herself served as a mediator in the particular matter, Rule 2.10(e) is the source of a conflict of interest for subsequent representation of either mediation party. Rule 2.10(e) does not provide a curative provision, such as consent, and a "screen" is not recognized as an appropriate means to cure a conflict under any circumstances except those described under Rule 1.11.[3] Further, Rule 1.10 (a) imputes a conflict of interest under Rule 2.10 (e) to any other attorney associated in the firm.[4]

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[2] Rule 2.11 (a) defines a "mediator" as a "third party neutral."

[3] In some situations, while not a "cure" for a conflict, a "screen" may induce the parties to consent and waive a conflict. However, unlike other conflicts rules, Rule 2.10 does not provide for the waiver of a conflict under Rule 2.10 (e) with the consent of the parties in the mediation. The Committee notes that Rule 2.10 (d) allows the parties to consent to a conflict under that rule, but no such provision is made for a conflict under Rule 2.10 (e). Therefore, the Committee believes that the drafters of Rule 2.10(e) intended such a conflict to be not curable.

[4] In LEO 1759 (2002) the Committee addressed a conflict problem under Rule 2.10 (e). That opinion held that Rule 2.10 (e) prohibited an attorney who had mediated a dispute from subsequently representing either party to that mediation in a legal matter related to the subject matter of the mediation. At the time LEO 1759 was issued, conflicts under Rule 2.10 (e) were not among those that are imputed to the other lawyers in a law firm under Rule 1.10 (e). Consequently, the Committee in LEO 1759 held that the conflict was personal only to the lawyer/mediator and not her partners and associates in the firm. Since that time, however, Rule 1.10 was amended to include conflicts under Rule 2.10 (e) and therefore those conflicts are now imputed to the other lawyers associated with the mediating lawyer. The conclusion in LEO 1759, that a mediation conflict pursuant to 2.10(e) is "personal to the attorney," is no longer the proper interpretation of the pertinent rules. Accordingly, any conflict either of the two attorneys in the present scenario may have from their mediation work under Rule 2.10(e) is imputed to the other attorney. If one of these attorneys refers her mediation clients to her partner for legal representation in the underlying dispute, that attorney receiving the referral and accepting the representation has a conflict of interest. LEO 1759 is overruled, in part, by the subsequent amendment to Rule 1.10 which became effective January 1, 2004.

In contrast, where the attorney's law partner's service as mediator is the source of a conflict for subsequent representation of the mediation parties, the first attorney's conflict is triggered by Rule 1.10(a)'s imputation language. Rule 1.10, unlike Rule 2.10, does provide a curative provision. Rule 1.10(c) provides that any conflict disqualification triggered by Rule 1.10, "may be waived by the affected client under the conditions stated in Rule 1.7." Rule 1.7(b) allows waiver of a conflict of interest where the enumerated are met.

To reiterate, under Rule 2.10(e), together with Rule 1.10(a), any mediation directly done by one attorney of the Law Firm for the Mediation Firm creates a conflict of interest in representing either mediation party in that same dispute for all of the attorneys in the Law Firm. For the mediating lawyer, this conflict cannot be cured by client consent; however, as to the non-mediating lawyer, the imputed conflict may be cured with the consent of the affected clients.

The foregoing analysis has only addressed successive representation where either of the two lawyers in the Law Firm has been a mediator. What about those cases referred by the other mediators in the Mediation Firm to lawyers in the Law Firm? Do those referrals trigger conflicts of interest for these two attorneys? When other mediators (lawyer or nonlawyer) refer their mediation clients to these two attorneys, those mediators are not members of the lawyers' "firm"[5] for purposes of Rule 1.10(a)'s imputation; nor would either attorney have mediated the dispute herself as contemplated by the prohibition in Rule 2.10(e). Thus, the sort of mediation conflict of interest outlined above is not triggered when mediators not in the Law Firm refer cases to these two lawyers.

Nevertheless, the two lawyers in accepting referrals from fellow mediators should analyze whether their "personal interest" of participation in this Mediation Firm may materially limit their representation of the clients, including whether there may be any duty owed the mediation parties. *See* Rule 1.7(a). Examples of things to consider would be the financial arrangement with the Mediation Firm, the nature of the relationship with fellow mediators (are they familiar with each other's cases, do they advise each other regarding their mediation cases, etc.), language in any contract between the Mediation Firm and its customers, and any pertinent legal authority. *See, e.g.,* Va. Code §8.01-581.22. Presumably, the answer to such analysis may differ for the attorney who serves only as a contracting mediator and that attorney who also serves as the Mediation Firm's director. Whether or not these attorney/mediators have a personal interest creating a conflict of interest, pursuant to Rule 1.7, in any of these cases referred by fellow mediators cannot be determined with the limited facts provided in the hypothetical scenario.[6] However, if such a conflict is present in any of these referred cases, it would impute from one firm attorney to the other due to the language of Rule 1.10(a), quoted above.

As discussed earlier, Rule 1.7 and Rule 1.10(a) allow for conflicts of interest to be "cured" under the requirements delineated in Rule 1.7(b). That curative provision is available to these Rule 1.7 "personal interest" and/or "duty to a third person" conflicts if each requirement of Rule 1.7(b) can be met.

In sum, the direct answers to your questions are as follows:

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[5] The term "firm" as used in the Rules of Professional Conduct denotes a professional entity organized to deliver legal services. The mediation firm is not "firm" as defined by the Rules of Professional Conduct. Imputed disqualification under Rule 1.10 (a) applies "while lawyers are associated in a firm."

[6] For further guidance regarding the affect of particular financial arrangements on the ethical responsibilities of these attorneys, see the final three paragraphs of this opinion, which address issues not asked in this request but highlighted by the Committee as worthy of note.

1) May the attorney who is director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict of interest, would disclosure to the clients of the attorney's role with the Mediation Firm cure that conflict?

The attorney/director can represent former customers of the Mediation Firm only where she either does not have a conflict of interest, or if she does, has properly cured it via Rule 1.7(b). Disclosure to the clients of the attorney's role with the Mediation Firm is one component of steps that would be needed to meet the requirements of Rule 1.7(b) in a particular matter.

2) May the attorney who is *not* the director of the Mediation Firm represent clients who appeared before other mediators in the Mediation Firm? If this is a conflict, would disclosure to the clients of the attorney's work for the Mediation Firm cure that conflict? Would a "firewall" be needed between the two attorneys?

Similarly, this attorney can represent those clients, who are former mediation customers of fellow mediators, where she either has no conflict of interest, or if she does, where she properly can meet the requirements of Rule 1.7(b)'s curative provision. Disclosure to the client of the attorney's role with the Mediation Firm is a likely component of the needed steps to comply with Rule 1.7(b). One appropriate strategy for obtaining client consent may be creation of a "screen" between the two lawyers regarding a case. In addition, due care must be exercised to comply with the requirements of Virginia Code Section 8.01-581.22 which makes all memoranda, work product and other material contained in the mediator's case file confidential and not subject to disclosure. Also protected are any communications made in the course of or in connection with the controversy being mediated. This means that the two lawyers associated with the mediating company must ensure that adequate security measures are implemented to avoid the unauthorized access to or disclosure of information protected under the statute unless all the parties to the mediation have waived confidentiality.

Having addressed your specific questions, the Committee also cautions that, while not part of those questions, certain issues are suggested by the present scenario. The Committee notes that the given facts lack detail as to the financial arrangements regarding this Mediation Firm. Do either of those attorneys have ownership interests in the company? This Committee has issued a number of opinions providing guidance for attorneys who own ancillary businesses. *See* LEO 1819 (lobbying firm); LEO1754 (attorney selling life insurance products); LEO 1658 (employment law firm/human resources consulting firm); LEO1647 (employee-owned title agency); LEO1634 (accounting firm); LEO 1368 (mediation/arbitration services); LEO 1345 (court reporting); LEO 1318 (consulting firm); LEO 1311 (insurance products); LEO 1254 (bail bonds); LEO 1198 (court reporting); LEO 1163 (accountant; tax preparation); LEO 1131 (realty corporation); LEO 1083 (non-legal services subsidiary); LEO 1016 (billing services firm); LEO 187 (title insurance). The Committee commends those opinions to you if in fact these attorneys are owners of the mediation company.

A second item of note regards referrals between the Mediation Firm and the Law Firm. The facts presented discuss referrals by mediators of clients to the Law Firm for legal services. Details are not provided as to whether such referrals are exclusive, i.e., whether mediators ever refer customers to any other Law Firms. While it is not inappropriate *per se* for such referrals to occur, the attorneys must be mindful of the limitation imposed by Rule 7.3(d), which states as follows:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1and 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.

The scenario lacks sufficient detail for the Committee to determine whether the arrangement complies with Rule 7.3(d); the Committee highlights the issue for your attention.

With regard to referrals, the scenario is silent as to whether the Law Firm makes referrals to the Mediation Firm. Again, there is no *per se* prohibition against such referrals. However, if these attorneys do refer clients to the Mediation Firm for which they work and which they may or may not own, the attorneys must be mindful of the potential conflict of interest regarding the attorneys' business interest, which is governed by Rule 1.7, provided above.

To reiterate, the Committee lacks sufficient information to make determinations regarding these issues regarding ancillary businesses and referrals, but refers you to the pertinent authorities for guidance.

This opinion supersedes LEO 1759 only with respect to the imputation of conflicts arising under Rule 2.10(e). This opinion is advisory only, based on the facts presented and not binding on any court or tribunal.

Committee Opinion
March 28, 2006