Committee Opinion
December 12, 1990

LEGAL ETHICS OPINION 1368

MEDIATION – ARBITRATION: ATTORNEYS FORMING LAY CORPORATION TO PROVIDE MEDIATION/ARBITRATION SERVICES TO CORPORATION'S CUSTOMERS.

You have indicated that Attorneys, A and B, are the sole shareholders of Virginia Corporation, X, which was formed for the purpose of providing mediation and arbitration services, in all fields except domestic relations, to the general public. Mediation and arbitration services will be provided by A and B, as well as by other attorneys, on an independent contractual basis with Corporation X. Each mediator or arbitrator will disclose to the parties at the outset that although he/she is a licensed attorney, he/she will not be serving as an attorney and will not provide legal advice at any time to any person during or in connection with the mediation or arbitration process. Further, you advise that Corporation X will charge an administrative fee, to be totally retained by the Corporation, and an hourly fee for the services of the mediator or arbitrator, a portion of which will be paid to the mediator or arbitrator and the remainder of which will be retained by the Corporation. With specific regard to mediation, you indicate that the lawyer/mediator would agree in advance that they (1) will clearly inform the parties of the lawyer's role and will obtain the parties' consent to this arrangement; (2) will draft settlement agreements but only after advising and encouraging the parties to seek independent legal advice before executing it; (3) will not act on behalf of any party in court nor represent one party against the other in any related legal proceeding; and (4) will withdraw as mediator if any party so requests or if any of the conditions (1) through (3) above are no longer satisfied, following which withdrawal the lawyer/mediator will not continue to act on behalf of any of the parties in the matter that was the subject of the mediation. Finally, you indicate that potential arbitrators and mediators who have prior relationships with parties will not be appointed to serve in a dispute involving such parties.

You have inquired if the scenario you present violates any disciplinary rules. In addition, you have asked the Committee to consider specifically the propriety of: (1) Attorneys A and B, who will serve as mediators or arbitrators, soliciting business for Corporation X from other attorneys, insurance carriers and the general public; and (2) attorneys entering into contractual arrangements with Corporation X in which the hourly fee charged for the mediator's or arbitrator's services is split between the corporation and the mediator.

Based on the descriptions you have provided as to the activities involved in the proposed mediation/arbitration endeavor, and upon Virginia Code §8.01-581.21, which defines a mediator as "an impartial third party" without regard to that individual's status as an attorney, the Committee is of the view that such activities do not constitute the per se practice of law. Therefore, the Committee opines that the Code of Professional Responsibility has only limited application to the circumstances you describe. Although the facts, as you have presented them, indicate that the attorney/mediator will not be serving as attorneys and will not be providing legal advice to the parties, the Committee is of the view that the activities involved in mediation and the subject matter to which the

mediation is addressed closely resemble the practice of law. The Committee believes that providing legal information, albeit not legal advice, and assisting individuals to reach agreement on such issues as division of property, contractual obligations, liability and damages, by definition, entails the application of legal knowledge and training to the facts of the situation. (See LE Op. 511, LE Op. 513, LE Op. 516, LE Op. 519) Therefore, under the rationale of LE Op. 1325 and ABA Opinion 336, the Committee believes that such activities subject the attorney/mediator to the provisions of the Code of Professional Responsibility while carrying out the tasks involved in mediation.

The Committee has consistently recognized the permissibility of lawyers engaged simultaneously in the practice of law and related entrepreneurial endeavors. Thus, the Committee is of the opinion that the solicitation of business for Corporation X, as you describe, would not be improper. The Committee cautions, however, that the attorneys' ownership interest in the mediation/arbitration enterprise, Corporation X, may constitute the type of financial, business, property or personal interest envisioned by DR:5-101(A). Thus, before referring a client to Corporation X, or before accepting representation of a client who was theretofore served by Corporation X, albeit by another mediator or arbitrator, Attorneys A and B must obtain the consent of the client after full and adequate disclosure of the attorney's personal interest. (See LE Op. 1345, LE Op. 1254, LE Op. 1198, LE Op. 1131, LE Op. 939, LE Op. 512, LE Op. 187) In addition, Ethical Consideration 5-20 provides specific direction regarding the provision of mediation services by attorneys and their subsequent professional relationships with the parties involved. (See LE Op. 849, LE Op. 590, LE Op. 544, LE Op. 519, LE Op. 516, LE Op. 513, LE Op. 511)

With regard to your question (2), related to the splitting of fees between the mediator and Corporation X, the Committee is of the opinion that, since the business of Corporation X does not constitute the practice of law, the prohibitions of the Code of Professional Responsibility against sharing fees with non-lawyers are inapplicable in the usual course of the business of Corporation X. To the extent that the mediator is engaged by the parties as a scrivener of the agreement reached during the mediation process, such tasks do not constitute the practice of law and, therefore, fees paid for that service are not deemed to be legal fees. Should, however, the mediator/lawyer provide any services beyond those of a scrivener, the mediator/lawyer must meet the requirements of DR:3-102, which prohibit the sharing of legal fees with a nonlawyer, and DR:5-107, relative to settling similar claims of clients. (See Kansas Opinion 84-8 (10/4/84), ABA/BNA Law. Man. on Prof. Conduct 801:3818; Association of the Bar of the City of New York Opinion 1987-1 (2/23/87), ABA/BNA Law. Man. on Prof. Conduct 901:6404; Tennessee Ethics Opinion 83-F-39 (1/25/83), ABA/BNA Law. Man. on Prof. Conduct 801:8107)

Finally, the Committee cautions that, as in any other activities engaged in by members of the Bar, any criminal or deliberately wrongful act, or any conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law would be improper and violative of DR:1-102(A)(3) and (4) and would subject the attorney to disciplinary action. (See ABA Formal Opinion 336; LE Op. 1325 at 3).