

CHAPTER 54

ETHICS AND MEDIATION: MANAGING CONFLICTS OF INTEREST

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I. Introduction

“Conflicts” concern attorneys who mediate and the firms that employ them. Attorneys worry that their mediation work might cause their firms to be “conflicted out” of some future representations. Fear of conflicts may lead law firms to exclude attorneys who mediate from their ranks, which would have a deleterious effect on the practice of mediation by attorneys. This article discusses this issue and suggests a practical approach to managing potential conflicts arising from mediation under current ethical rules.

II. Model Rules of Professional Conduct

Attorneys must comply with the applicable ethical rules governing conflicts of interest, which are generally variations of the American Bar Association Model Rules of Professional Conduct (“Model Rules”) adopted by states to govern the practice of law within their borders.¹ Rule 1.6 (Confidential Information), Rule 1.7 (Conflicts of Interest), Rule 1.9 (Duties to Former Clients) and Rule 1.10 (Imputation of Conflicts of Interest to Firms) are designed to promote client loyalty on the part of all lawyers in a law firm and to protect confidential client information. Lawyers can be disqualified from representing clients under Rule 1.7 or

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¹ The Model Rules were adopted by the American Bar Association (“ABA”) in 1983. In 1997, the ABA created the Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) to evaluate and propose amendments to the Model Rules. The Model Rules currently incorporate amendments adopted by the ABA through its 2009 Midyear Meeting, including most of the proposals made by the Ethics 2000 Commission. As of the date of this publication, the Model Rules may be viewed at: http://www.abanet.org/cpr/mrpc/mrpc_toc.html. However, lawyers are cautioned to identify variations to the Model Rules adopted in the states where they practice law.

1.9 for reasons including, but not limited to, the acquisition of other clients' confidential information.²

Once a lawyer is disqualified, the disqualification can be imputed to his firm and disqualify it from representing a client under Rule 1.10. The firm can take on the otherwise prohibited representation only: (i) with the informed consent of the client, if informed consent is permitted by Rules 1.7 or 1.9 under the circumstances; *or* (ii) if the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, as provided under Rule 1.10; *or* (iii) if the prohibition arises out of the disqualified lawyer's association with a prior firm and the new firm employs a screening wall mechanism to insulate or "screen off" the lawyer from matters which raise the possibility of a conflict of interest, as permitted under Rule 1.10.³

Before recent revisions to the Model Rules, it was unclear how they applied when lawyers acted in a capacity not involving representation of a client.⁴ Prior to these revisions, there was no provision in Rule 1.10 allowing a firm to resolve a conflict by screening the disqualified attorney from the matter that created the conflict—and no provision in the Model Rules allowing a mediator to be insulated through a screening wall mechanism.⁵ Ethical rules in several states did allow screening walls to rebut the presumption that confidential information has spread from a lawyer switching firms to the entire new law firm.⁶ And case law suggesting that screening walls are an appropriate mechanism to prevent confidential information from being communicated to other lawyers in the

² Rule 1.6 defines confidential information as "information relating to the representation of a client." "Confidentiality within the meaning of Rule 1.6 therefore cannot attach to information acquired as a third-party neutral, because the role is defined as non-representational." See ABA Annotated Model Rules of Professional Conduct, 6th Edition (2007).

³ The ABA amended Rule 1.10 to permit screening of a lawyer who moves between private firms so that conflicts of interest are not imputed to the new firm at the 2009 Midyear Meeting. However, screening walls are not effective to avoid disqualification due to knowledge obtained by a lawyer who remains with the same firm.

⁴ For commentary on the debate over whether mediation constitutes the practice of law, see Carrie Menkel-Meadow, *Is Mediation the Practice of Law?* 14 ALTERNATIVES 57 (CPR May 1996); Bruce Meyerson, *Lawyers Who Mediate are Not Practicing Law*, 14 ALTERNATIVES 74 (June 1996); Symposium—*Is Mediation the Practice of Law?* NIDR FORUM (June 1997); Geetha Ravindra, *When Mediation Becomes the Unauthorized Practice of Law*, 15 ALTERNATIVES 94 (July-August 1997); Menkel-Meadow (letter to the editor), *Is Mediation the Practice of Law? Redux*, NIDR NEWS 2 (Nov./Dec. 1997-Jan. 1998); *NJ Panel Finds ADR is Part of Law Practice*, 12 ALTERNATIVES 87 (July 1994).

⁵ Paul M. Lurie, *Ethics and Mediation: Using Screening Walls and Advance Waivers to Manage Conflicts of Interest*, Chapter 6, AAA Handbook on Mediation, Juris Publishing (May 2006).

⁶ Ill. Rule of Prof'l Conduct 1.10(b)(2)(e); Md. Rule of Proc. 1.10(b)(2)(d); Mass Rule of Prof'l Conduct 1.10(e); Mich. Rule of Prof'l Conduct 1.10(b)(1); Minn. Rule of Prof'l Conduct 1.10(b)(2); Wash. Rule of Prof'l Conduct 1.10(b).

new firm did exist.⁷ However, prior to the recent revisions, there were no reported mediation cases involving the screening wall device.⁸ This raised a concern that mediators who work in law firms may taint new business coming into the firm, and that the firm will react by restricting mediation activities of its attorneys, which would curtail the use and continued development of this important form of alternative dispute resolution (“ADR”).

In recognition of the increasingly important role played by ADR in the civil justice system, the ABA revised the Model Rules to explain how the ethical rules apply to lawyers acting as mediators and to address some of the ethical issues arising from activities of lawyer-mediators.⁹ Recently adopted Rule 2.4 (Lawyer Serving as Third Party Neutral) resolved the applicability of the Model Rules to lawyers acting as mediators, and recently amended Rule 1.12 (Former Judge, Arbitrator, Mediator or Other Third Party Neutral) addressed the need for screening walls in situations where there may not be an effective current or advance waiver of conflicts. These amendments facilitate the continued growth of ADR and recognize the increasingly important role lawyers play as neutrals in these proceedings.

III. Rule 2.4: Lawyer Serving as Third-Party Neutral

Adopted by the **ABA Model Rules of Professional Conduct** in 2002, new Rule 2.4 is designed to sanction non-representational or “third-party” mediation.¹⁰ It acknowledges the special duties of lawyers who serve as third-party neutrals, and provides as follows:

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them.

⁷ *Chapman v. Chrysler Corp.*, 54 F. Supp.2d 864, 866 (S.D. Ind. 1999) (presumption of shared confidences could be rebutted by demonstrating specific institutional mechanisms had been implemented to effectively insulate against any flow of confidential information from the infected attorney to any other member of the firm); *Cromley v. Board of Educ. of Lockport Tp. High School Dist.* 205, 17 F.3d 1059, 1065 (C.A.7 (Ill.) 1994) (rebuttal may be established by proof that screening procedures were timely employed).

⁸ Lurie, *supra* note 5.

⁹ ABA Model Rules of Professional Conduct Rule 2.4, Comment 1 (2007).

¹⁰ Compare to former Rule 2.2 (Lawyer as Intermediary), which “was created to legitimize representational mediation –that is, serving as a go-between for clients.” ABA Annotated Model Rules of Professional Conduct, 6th Edition (2007).

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.

Rule 2.4 is designed to promote understanding of the lawyer-neutral's role in dispute resolution. This role is different than "representing a client" under Rule 1.7 and the distinction can create confusion, particularly for infrequent litigants and unrepresented parties.¹¹

Rule 2.4 requires lawyers serving as third-party neutrals to inform unrepresented parties that the lawyer is not representing them. The amount of disclosure required under Rule 2.4 depends on the sophistication of the affected parties. Where appropriate, a lawyer-neutral should explain the distinction between lawyer-advocate and third-party neutral, including the inapplicability of the attorney-client evidentiary privilege to interactions between parties and a lawyer-neutral.¹² Caution dictates scrupulous observance of the limited role of a third-party neutral. For example, lawyer-neutrals should not draft settlement agreements that affect unrepresented parties.¹³

Rule 2.4 does not differentiate between mediators, arbitrators and evaluators.¹⁴ However, some commentators have noted "an important distinction separating mediators from adjudicators and evaluators: mediators are far likelier to acquire sensitive information from the parties and their lawyers."¹⁵ For mediation to be successful, parties must be able to share sensitive information with a mediator.¹⁶ Yet, without a screening wall device, the ethical rules that protect confidential client information could prevent a firm in which a mediator practices law from representing a party to a prior mediation, or another party whose interests are adverse to one of the parties to the mediation in which the mediator served as the neutral.¹⁷ Rule 1.12 was recently amended to address this once-controversial issue.

¹¹ ABA Model Rules of Professional Conduct Rule 2.4, Comment 3 (2007).

¹² *Id.*

¹³ *But see Chitkara v. New York Telephone Co.*, 45 Fed. Appx. 53 (2d Cir. 2002), cert. denied, 123 S. Ct. 2091 (U.S. 2003) (mediator misrepresentation of law rejected as grounds to overturn a settlement agreement).

¹⁴ An alternative to Rule 2.4 proposed in 2002 defined four different kinds of mediation: adjudicative, evaluative, facilitative and hybrid. See ABA Annotated Model Rules of Professional Conduct, 6th Edition (2007). For commentary on perceived differences between evaluative and facilitative mediation, see Kenneth M. Roberts, "Mediating the Evaluative-Facilitative Debate: Why Both Parties are Wrong and a Proposal for Settlement," 39 Loyola University Chicago Law Journal 187 (2007).

¹⁵ ABA Annotated Model Rules of Professional Conduct, 6th Edition (2007).

¹⁶ Lurie, *supra* note 5.

¹⁷ Comment 3 to newly amended Rule 1.12 observes that although neutrals do not receive confidential information protected under Rule 1.6, they have a duty of confidentiality that

IV. Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third Party Neutral

After proposing draft rules for public comment, in 2002, the **ABA Model Rules of Professional Conduct** extended Rule 1.12 to include “mediators” and “other third-party neutrals.” This amendment was intended to recognize a more expansive class of neutrals who take part in dispute resolution activities.¹⁸ Subsections (a), (c) and (d) of Rule 1.12 provide as follows:

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.¹⁹

Rule 1.12 prohibits a lawyer from subsequently representing a party in the same matter in which the lawyer acted as a mediator. However, this prohibition can be waived under subsection (a) if the parties to the mediation give their informed consent in writing. This provision allows a lawyer to seek an “advance waiver” of potential future conflicts of interest under the informed consent provisions of Rule 1.7(b).²⁰ The effectiveness

arises under laws or codes of ethics governing neutrals. Thus, the issue of imputation to a mediator’s firm arises from laws or codes of ethics governing neutrals.

¹⁸ ABA Annotated Model Rules of Professional Conduct, 6th Edition (2007), *citing* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1983-2005*, at 287 (2006).

¹⁹ Subsection (d) refers to *ad hoc* arbitrations where each party appoints an arbitrator and the two arbitrators appoint a third “neutral” arbitrator. The exception under Subsection (d) does not apply to lawyers who serve as “neutral” arbitrators rather than a “partisan” arbitrators. Rule R-12 of the American Arbitration Association Commercial Arbitration Rules presumes that arbitrators are not partisan unless the parties have specifically agreed otherwise.

²⁰ ABA Model Rules of Professional Conduct Rule 1.7, Comment 22 (2007)

of an advance waiver will depend on the adequacy of the disclosure made at the time of execution of the agreement that contains the consent. This issue will be of greater concern when the party whose waiver is sought is not represented by counsel since this person may not fully understand the mediator's request for a waiver of prospective conflicts of interest.

Rule 1.12(c) also allows other lawyers in a firm to represent a party where the mediator would be disqualified as long as the disqualified lawyer is timely screened off from the matter creating the conflict and not apportioned part of the fee.²¹ In states or situations where a waiver of future conflicts cannot be obtained, and where revised Rule 1.12 has been adopted, the firm must use a timely and effective screening wall mechanism to insulate the lawyer who served as the neutral from the matter creating the conflict of interest.²²

Amended Rule 1.12 is a substantial improvement over earlier versions, which did not extend to neutrals or allow use of the screening wall mechanism to manage conflicts of interest.²³ Screening walls are an important tool because consent frequently cannot be obtained from the parties after a mediation has concluded. By accepting the screening wall device to insulate mediators from matters which raise the possibility of a conflict of interest, Rule 1.12 properly recognizes that the relationship between a mediator and the mediating parties (like that between a judge and litigating parties) differs from the lawyer-client relationship.

V. Suggested Language for Neutral Client-Agreement

In light of Rules 1.12 and 2.4, lawyer-mediators should consider including provisions similar to the following in agreements with the mediating parties:

(A) The Neutral shall not provide legal services to a Party in connection with the matter that is the subject of this

²¹ Comment 4 to Rule 1.12 relaxes the prohibition on fee sharing by allowing the screened lawyer to share in the fee as salary or a partnership share established by prior independent agreement rather than directly in connection with the matter in which the lawyer is disqualified.

²² Under Rule 1.0, the term "screened" is defined as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." Screening measures that are appropriate to avoid imputation of disqualification to a firm depend on the circumstances, but "must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening." ABA Model Rules of Professional Conduct Rule 1.0, Comment 9 (2007).

²³ In *Pappas v. Waggoner's Heating & Air, Inc.*, 108 P.3d 9 (Okla.Civ.App. 2004), the court applied Rule 1.12 and held that, although the mediator was disqualified, the screening devices employed by a mediator's law firm were sufficient to prevent the firm from representing a party to the mediation in the subsequent litigation.

mediation, without a waiver by informed consent, either contemporaneous or in advance, of any conflict of interest.

- (B) Notwithstanding paragraph A, the Neutral's law firm may provide services on matters for or against any Party during or after the pendency of this proceeding, on the condition that: (a) the Neutral does not participate in such matters in violation of Paragraph A; (b) a timely and effective screening procedure is established to insulate the Neutral from such matters and to insure that other attorneys, support staff, and employees of the Neutral's firm do not have access to any Confidential Information obtained by the Neutral during the course of the Mediation; (c) the Neutral is not specifically apportioned any part of the fee; and (d) written notice is given to the Parties to enable them to determine compliance with these procedures.
- (C) Each Party understands that the Neutral is not providing any legal services to any party and his or her sole role is to act as a neutral to assist in the resolution of the dispute which is the subject of the proceeding.

Language of this kind is not typically included in the mediator appointment agreements of ADR service providers such as the American Arbitration Association, so neutrals should consider a supplemental agreement with the mediating parties. The screening wall should give the parties to the mediation an incentive to waive future conflicts by providing needed comfort that their confidential communications to the mediator will be protected. This will allow the mediator to draw out the sensitive information needed to resolve the dispute while mitigating the risk that serving as a mediator will taint future business coming into the mediator's firm.

VI. Conclusion

Identifying conflicts of interest is extremely important. But so is finding a practical way to address them. Screening walls ensure the integrity of the mediation process, encourage the free flow of confidential information to the mediator, and protect the interests of the mediating parties and the mediator, while also protecting the law firm from unreasonable disqualifications from new representations. When used in combination with prospective waivers of conflicts of interest, screening walls should satisfy current ethical requirements.