

## **The Committee on Ethics of the Georgia Commission on Dispute Resolution**

### **Advisory Opinion 4**

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The Committee on Ethics of the Georgia Commission on Dispute Resolution has been asked to consider the following situation: A registered mediator who is also a lawyer mediated a divorce case in which both parties were represented and a full settlement was reached. The divorce was finalized. Several months after the case was settled the former wife contacted the mediator to prepare a will and do some estate planning. She said that her ex-husband had suggested that she call the mediator. The mediator did not accept the representation himself, but one of his partners did accept the representation. The mediator asks for an opinion as to how this type of situation should be handled in the future. He specifically asks that the Committee assume that the other party to the mediation has no knowledge of the contact, since the fact that the former wife consulted her former husband about this matter is probably unusual.

#### **Issue I: Conflict of Interest**

Commentary to paragraph III B on Neutrality, Appendix C to the Supreme Court of Georgia Alternative Dispute Resolution Rules, is as follows: “ It is the Commission's recommendation that a lawyer/mediator never accept any legal work arising out of the mediation.” The acceptance of a professional opportunity during the pendency of the mediation or arising out of the mediation would constitute a clear conflict of interest. The threshold question in this case is whether this legal work arose out of the mediation. While it did not arise out of the mediation itself, it apparently arose out of the subject matter of the mediation since the divorce revoked any previous will as a matter of law.

#### **Issue 2: Solicitation**

Assuming that the matter did not arise out of the subject matter of the mediation, the next relevant inquiry would be whether the request for professional services is made so soon after the mediation that acceptance would give at least the appearance of impropriety. Paragraph V on Rules of Fair Practice, Appendix C to the Supreme Court of Georgia Alternative Dispute Resolution Rules governs referrals:

Mediators should observe the same care to be impartial in their business dealings that they observe in the mediation session. In this regard, mediators should not refer parties to any entity in which they have any economic interest. As a corollary to this principle, mediators should avoid referrals to professionals from whom the mediator expects to receive future business. Similarly, mediators should avoid an ongoing referral relationship with an attorney that would interfere with that attorney's independent judgment.

It is not improper to receive referrals from attorneys or parties. However, mediators

should be aware that their impartiality or appearance of impartiality may be compromised by referrals from parties or attorneys for whom they act as mediators on more than one occasion.

### **Discussion**

The Florida Mediator Qualifications Advisory Panel recently considered a case in which a lawyer/mediator was contacted one and a half years after a divorce mediation and asked to represent one of the parties in the dissolution of a second marriage. The Advisory Panel concluded that since the representation would be for a completely different legal matter than that which was the subject of the mediation, the mediator was permitted to accept this future work. The Panel cautioned that the mediator must avoid solicitation prohibited by the Florida Rules and in addition avoid any appearance of solicitation. Therefore the length of time from the original mediation to the future representation was an important factor to consider.. *The Resolution Report* of the Florida Dispute Resolution Center, Volume 12, Number 2, June 1997

In a related case involving the potential conflict of a therapist/mediator the Florida Panel concluded that a therapist is permitted to mediate a divorce for a couple with whom s/he is providing marriage counseling as long as 1) both parties request the mediation; 2) everyone understands that the counseling role ceases once mediation is undertaken; and 3) the therapist/mediator is certain that s/he can maintain impartiality. The Panel also concluded that the mediator could mediate for former marriage counseling clients if 1) both parties were clients; 2) both requested the mediation; and 3) the therapist/mediator feels that s/he can maintain impartiality. *The Resolution Report* of the Florida Dispute Resolution Center, Volume 12, Number 2, June 1997

In an opinion from The Supreme Court of Texas Professional Ethics Committee (TX Eth. Op/ 496, November 1994) the Committee analogized a mediator to a lawyer acting as an adjudicatory official and concluded as follows: 1) During the pendency of the mediation the mediator is prohibited from accepting representation in a matter either related to or unrelated to the mediation on behalf of or adverse to a party to the mediation. A similar bar would apply to the mediator's law firm unless all parties agreed that the mediator's impartiality would not be compromised. 2) After the conclusion of the mediation neither the mediator nor anyone in his law firm could accept representation in a matter related to the mediation unless all parties agreed after full disclosure.

In *Poly Software International, Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995), plaintiff's attorney had acted as mediator in a case involving the same computer software in a lawsuit between the present plaintiff and defendant, who were partners at that time, and a computer software company. The court considered whether the attorney should be disqualified and whether the disqualification should extend to his law firm.

The court discussed the importance of competing policy considerations: 1) encouraging the candor of the parties by assuring that confidential material will not be used by the mediator

in a subsequent case; and 2) defining reasons for disqualification narrowly enough to avoid discouraging lawyers from becoming mediators. The court concluded that the plaintiff's attorney should be disqualified and also disqualified the attorney's law firm, holding that "[w]here a mediator has received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or a substantially factually related matter unless all parties to the mediation proceeding consent after disclosure. (Id. at 1493).

## **Conclusions**

### **Issue 1: Conflict of Interest**

In the case at hand, the lawyer/mediator was asked to do legal work that did not arise out of the mediation but did arise out of the divorce action which was the occasion for the mediation. This request came several months after the mediation. Both parties to the mediation were aware of the request for representation of the former wife by the lawyer/mediator, the former husband having apparently suggested the representation. Although estate planning and preparation of a will are not adversarial in nature, it is possible that estate decision could have consequences adverse to some interests of the former husband. Information or insights that the mediator gained during the mediation might be used in the planning in a way that would be disadvantageous to the interests of the former husband. Therefore, in considering the ethical obligation of the mediator to remain free of conflicts, the representation should not go forward without permission of all parties.

To apply this conclusion to the lawyer/mediator's law firm is too harsh, however. The Rules and Regulations of the State Bar of Georgia, Standard 38, provides that if a lawyer is disqualified from serving a client because of a conflict of interest, the law firm of the lawyer is disqualified as well. This is because knowledge that a lawyer possesses is imputed to the members of his or her law firm as well. The same rule should not be applied to a mediator. The mediator is pledged to secrecy about all aspects of the mediation, not only client confidences.

### **Issue 2: Solicitation**

Having discussed the question as a potential conflict of interest question, we turn to a consideration of the matter under the Rules of Fair Practice of Appendix C. Does the fact that the request for legal representation followed the actual mediation within several months raise an issue of the propriety of accepting future business so close in time to the date of the mediation? We conclude that it does not. However, mediators should be sensitive to the fact that future business referrals too close in time to a mediation could cause an appearance of improper solicitation.