

## Alerts

### ABA Allows Mediators to Draft Divorce Settlement Agreements With Appropriate Party Consent

July 6, 2010

*Lawyers for the Profession® Alert*

ABA Standing Committee on Mediator Ethical Guidance, *Mediator's Duty of Care in Drafting Agreements*, Op. SODR2010-1 (2010)

#### Brief Summary

The ABA Standing Committee on Mediator Ethical Guidance opined that a mediator may draft divorce settlement agreements for unrepresented parties so long as he or she advises the parties to have the agreement reviewed by independent counsel and the parties consent to the mediator's new role. Further, to the extent that the mediator acts as more than a scrivener (i.e., by providing legal advice or adding language to the agreement), he or she is likely engaged in the practice of law, thus implicating unauthorized practice of law restrictions and possibly requiring the parties' consent to joint representation.

#### Complete Summary

The ABA Standing Committee on Mediator Ethical Guidance addressed issues based on a hypothetical in which a divorcing couple, neither party having legal representation, ask a mediator to draft a mutually agreed upon settlement. The Committee advised that its opinions were based on the Model Standards of Conduct for Mediators, and not local laws or codes of conduct for mediators that could be relevant to the issues addressed. The ABA's Model Standards of Practice for Family and Divorce Mediation (2000) also may be relevant.

First, the Committee noted that it is not clear whether and to what extent it would be appropriate for a mediator to draft such an agreement, though simply acting as a scrivener would likely be appropriate. The mediator should at least advise the parties to have the agreement reviewed by a lawyer or other professional. Further, if the mediator goes beyond the role of scrivener by providing legal advice (as compared to information) or adding language to the agreement, including boilerplate, he or she is likely engaged in the practice of law, thus implicating unauthorized practice of law restrictions. In this circumstance, the mediator must make sure not to affect the self-determination of either party, and to avoid the appearance of partiality.

The Committee further opined that before taking on a different role in the proceeding, the mediator would likely need to get the parties' informed consent by explaining the implications of assuming that role. If the mediator's roles include the practice of law, such consent might also need to include an

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explanation of joint representation and a waiver of potential conflicts.

Finally, the Committee opined that the ethical considerations are the same whether the agreement merely involves division of property or something more, such as custody or visitation rights.

### **Significance of Opinion**

This opinion emphasizes the importance of obtaining informed consent when mediators switch roles. Although the opinion is expressly limited to the context of divorce mediation, the same basic point likely would apply in other contexts. And to the extent that the mediator's new role involves the practice of law, the mediator is faced with two layers of ethical rules. He or she is bound by the rules applicable to lawyers, such as unauthorized practice of law and conflicts rules, as well as by the rules applicable to mediators, such as party self-determination and impartiality requirements.

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