Unauthorized Practice of Law—APFM Response

January 12, 2019

Response to the Washington State Bar Opinion by the Academy of Professional Family Mediators (APFM) Board of Directors, as drafted by Steve Erickson

This memo comments on a Washington State Bar Association Advisory Opinion addressing "Lawyer-Mediator Preparing Legal Documents for Unrepresented Parties." (Although the ethics opinion questions whether lawyers acting as mediators may prepare court-filing documents that implement mediated settlement agreements, this response also addresses the larger issue of non-attorney drafting of documents suitable for court filing.)

Controversy Arises Due to Blurring of Boundaries Between Mediation and Adjudicative Processes

The on-going national discussion as to whether professional family mediators should act as scriveners and prepare agreements ready for signing and court filing, instead of drafting a generalized memorandum of decisions reached in mediation (and then referring the parties to attorneys), goes way back to the early 1970s, when divorce mediation was first developed. In a sense, this controversy lies at the heart of the differences between professional family mediators and lawyers; specifically, whether mediators practice under different standards and different expectations than do lawyers. To begin to resolve this controversy, it must be acknowledged that "mediating" and "lawyering" are two distinct, stand-alone professions. Neither is the sub-group of the other.

The Academy of Professional Family Mediators (APFM) has adopted *Standards of Practice for Family Mediators* that govern its members. Lawyers who, from time to time, practice as neutral mediators have their primary allegiance to the Canons of Ethics for Attorneys. The resolution to the question addressed by the Washington State Bar Opinion must start with a recognition that attorney ethics govern professionals that work in an *adversarial* process. As such, attorney ethics cannot be expected to easily translate into rules governing mediation, which is a non-adversarial process with completely different rules and assumptions. Attempts

to fit mediation into the legal ethics of attorneys blurs the needed boundaries between the two professions.

The legal profession's continued use of the hyphenated descriptive term, "Lawyer-Mediator," blurs the distinction between mediation and lawyering. Other professions have not created such designations; there are not "therapist-mediators," or "financial planner-mediators," or "retired judge-mediators." These types of designations confuse the public and incorrectly blend completely separate activities, governed by completely separate ethical rules.

The reason for needing to maintain boundaries between the two professions is two-fold:

1) By continuing to use hyphenated descriptions, clients do not know whether they are hiring a mediator, or an attorney, or a hybrid-mediator, or a hybrid-lawyer who refers to himself as: "evaluative-mediator, directive-mediator, facilitative-mediator, transformative-mediator, narrative-mediator, collaborative-attorney, cooperative attorney, or retired-judge mediator.

2) If someone holds herself out as an attorney-mediator and applies the skills learned in a 40-hour divorce mediation training, but believes she is governed by the Canons of Ethics for Attorneys (which govern an adversarial process,) how can

she reconcile her drafting the "legal" paperwork at the end to secure the parties' legal rights when she was taught in her mediation training that mediation is not the practice of law, but is now told by her bar association that drafting divorce papers for her mediation clients is actually the practice of law?

Resolution of This Issue by The State of Virginia

The state of Virginia has resolved this issue by declaring that the drafting of court documents at the end of mediation is scriveners' work, not legal work.

By acknowledging that the document-drafting is a seamless part of the mediation process, Virginia has been able to find a solution to the problem of drafting court-ready documents, regardless of whether they have been prepared by attorneys, or paralegals, or trained mediators without a law license:

> *It appears that the Virginia mediation statutes, particularly § 8.01-576.4, authorize non-attorney mediators to prepare written agreements for disputing parties so long as they, like attorney-mediators, limit their drafting services to*

those of a scrivener. This harmonizing of the UPL rules and the mediation statutes gives mediators the flexibility to assist the parties in committing their mediated agreements to writing but stops short of allowing mediators to draft instruments in which they include legally operative terms not requested or contemplated by the parties during the mediation process. Allowing mediators to prepare written agreements for the parties facilitates the efficient resolution of disputes and minimizes the costs to the parties, who may not desire or be able to afford their own attorneys." Report of the Guidelines on Mediation and UPL (Unauthorized Practice of Law Project) found at http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf.

New York Attorneys Have Addressed the Drafting Issue in Their Ethics Opinion 736.

The state of New York resolves the controversy by declaring that mediation (which includes drafting of documents) is not the practice of law. That is, mediating does not equate to legal representation.

As we have recognized in the past, a lawyer who serves as a mediator to assist in the resolution of a possible dispute does not "represent" either party as a client for purposes of the conflict of interest rules and other rules governing the lawyer-client relationship. Therefore, even in many situations where a lawyer could not properly represent two clients with differing interests, the lawyer may serve them both as a mediator. This is true in matrimonial as well as other legal contexts. In N.Y. State 258 (1972), although we concluded that a lawyer may not jointly represent the spouses in a divorce proceeding, we also observed, "A lawyer approached by husband and wife in a matrimonial matter and asked to represent both, may . . . properly undertake to serve as a mediator or arbitrator." Accord N.Y. City 80-23 (1981) ("The Code's recognition that lawyers may serve as mediators (EC 5-20), as well as ethical aspirations which recognize a lawyer's duty to assist the public in recognizing legal problems and aiding those who cannot afford the usual costs of legal assistance (EC 2-1; EC-2. 25), make it inconceivable to us that the Code would deny the public the availability of non-adversary legal assistance in the resolution of divorce disputes"). New York State Bar Association Ethics Opinion 736 (Committee on Professional Responsibility)

Bill Eddy, a prominent professional family mediator from San Diego, writes in an APFM publication article titled, "Should Mediators Write Divorce Agreements?" See: https://apfmnet.org/should-mediators-write-divorce-agreements/

> In my opinion, a non-lawyer-mediator who is experienced in the subject matter of the particular agreement can ethically draft the divorce agreement to be filed with the court. I did not always think this way. However, as professional family mediators have gotten more training and subject matter knowledge, I have seen many become more competent in their areas than many attorneys. For example, take parenting plans; many mental health professionals serving as mediators can do an excellent job of writing parenting plans for the court—in fact, that is what occurs in California with the court-connected Family Court Services, where mediators (who are mostly mental health professionals) write up agreements (or recommendations in some counties) which are then ordered by the court. Another example is with financial issues, in which some divorce-focused financial analysts are more experienced than I am. If they have sufficient knowledge in the subject matter of the agreement and they have directly mediated the agreement with the parties, I believe they could ethically write up the agreement. With all of this said, if a non-lawyer-mediator drafted the agreement, I would still strongly encourage the parties to consult with

separate attorneys. But I would not require this, if the mediator was certified by a mediation organization that has high standards.

For all the reasons above, I believe having a non-lawyer-mediator draft the agreement would be a best practice, if the mediator was certified and the parties were strongly encouraged to have the agreement reviewed by separate professionals (lawyers, mental health professionals and financial analysts) relevant to the issues in the case. Divorcing families need the calm and balanced involvement of a skilled mediator as much as or more than adversarial professionals focused on fighting for individual rights. There are fewer individuals whose rights will be harmed by non-lawyer-mediators writing agreements than there are families that have been harmed by over-zealous advocates.

Conclusion: The solution to lawyer drafting and non-lawyer drafting is resolved by declaring the two activities the function of two separate professional fields, guided by two separate sets of Standards. When mediating, one should follow the standards of practice for professional family mediators. When practicing law, one should follow the Canons of Ethics for Attorneys. If mediators and lawyers

carefully attend to and diligently follow the Standards of Practice for professional family mediators promulgated by the APFM, and partially reproduced below, they will stay out of trouble:

Standard VI-C. The role of the mediator differs substantially from other professional roles. Combining the role of the a mediator with another professional role within the same case is prohibited and thus, a mediator shall not undertake an additional dispute resolution role in the same matter with the same participants, because such change in role may result in carrying out duties and responsibilities that could be in conflict with those of the mediator (this shall not prohibit the mediator from drafting agreements of the parties so long as allowable under state law or ethics rules).

Standard XI-D. A family mediator shall not label or describe a dispute resolution process it offers to the public as mediation when such process is adjudicative, coercive, or predicts outcomes in court.

Standard VI-4

The mediator should inform the participants that any agreement can be reviewed by an independent attorney before the agreement is signed. From

Academy of Professional Family Mediators Standards of Practice, at APFM website at http://apfmnet.org/standards-practice-professional-family-mediators.