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**Ethics Opinion Will Alter How Neutrals Operate at Mediation Centers,
Brining New Cautions, and Expectations, for Litigation-Avoiding Clients**

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The New Jersey Supreme Court's Advisory Committee on Professional Ethics published Opinion 711 this summer, providing new and extensive guidance for lawyers who provide services to divorce mediation centers operating in New Jersey.

The opinion opens up a big box of ADR practice questions on how attorney-neutrals align themselves with provider organizations, and how ADR users interact with them. With the intersection of law and ADR practices, and the state-by-state regulation schemes, the seemingly straightforward clarification raises warning flags not only in New Jersey, but under legal ethics schemes nationwide.

Practitioners need to know how to represent themselves publicly, or risk their practices. ADR customers need to know exactly who and what they are hiring to help them avoid litigation.

Opinion 711—released on July 11, 2007, and published at 189 N.J.L.J. 253 (July 16, 2007), and 16 N.J.L. 1401 (July 23, 2007) (available at http://lawlibrary.rutgers.edu/ethics/acpe/acp711_1.html) -- responded to an inquiry from the New Jersey Association for Professional Mediators (“NJAPM”). NJAPM, a Trenton, N.J., nonprofit group of mediation professionals, sought to correct widespread confusion in the legal and dispute resolution communities regarding the limits of multi-disciplinary practice. Opinion 711 protects both practitioners and clients by offering guidance so that practitioners could stay within ethical and legal bounds.

THE RIGHT ANSWER

If the ethics question is whether, under appropriate circumstances, a lawyer may involve himself or herself in a commercial center for divorce mediation, a diligent student of any of the learned professions could confidently predict the right answer: It depends.

Multi-disciplinary practice is a natural progression from mediation and ADR-conversant law practices. MDP offers clients the opportunity to resolve their problems on their own, with assistance from outside experts--but without relying on the experts to devise the solution.

Whether an ideal result is reached, however, depends on a number of factors described in Opinion 711. The advisory committee lays out ground rules that, if followed, will assure that such practices satisfy ethical requirements and do not constitute the unauthorized practice of law.

The opinion focuses on divorce centers. But cautious ADR practitioners in other provider entities should consider adopting the opinion guidelines as a best practice—and under its terms, probably would be required to do so anyway at New Jersey firms.

Lawyers working for providers like the divorce center in the advisory opinion tend to hold themselves out as third-party neutrals. The advisory committee opinion finds that these attorneys are practicing law—accepting clients for limited representation purposes. See Henry Gottlieb, “Divorce Mediation Centers Subject to Lawyer Ethics Rules, Committee Says,” *New Jersey Law Journal* (July 11, 2007)(available at www.law.com/jsp/nj/PubArticleNJ.jsp?id=1184144793524).

The opinion considers, for example, attorneys who accept cases referred to them by a commercial center for divorce mediation, and who neutrally advise both parties about legal rights and obligations. The opinion explains that these attorneys are practicing law and are therefore expected to abide by the Rules of Professional Conduct. In accordance with RPC 1.2(c), attorneys may appropriately restrict their services to non-adversarial work.

Under RPC 2.4, attorneys may properly serve as neutral advisers. In accordance with RPC 5.4(a), any fees attributable to the attorney's services may not be shared with non-lawyers. This problem may be avoided by having the attorneys act as independent contractors, with payment for legal services going directly from the parties to them.

Opinion 711 emphasizes that obtaining a divorce settlement through mediation, including referral to a “neutral lawyer,” may or may not be in clients’ best interests. There are conditions that may be outside the mediator's or neutral attorney's power to control that could keep a client from achieving ideal results. These include a power imbalance, a controlling relationship, and a party’s lack of substantive knowledge or understanding. Mediators often face these power imbalances between parties. The question is whether the parties, with the mediator’s help, will overcome them.

Unlike litigation or collaborative law cases in which each party is represented by an attorney, a disadvantaged party in mediation will not necessarily have an advocate attorney to advise that the mediation process is not working. This could result in excess fees, legal conflicts, and wasted time.

EDUCATION, INFORMED CONSENT, AND INDEPENDENT JUDGMENT ARE PARAMOUNT

Educating the client is paramount. While such issues may become more pronounced at a divorce mediation center, high-dollar commercial or employment cases are subject to similar dynamics.

The Advisory Committee expects each client to be fully informed of his, her, or its rights before agreeing to mediation. To remain within the guidelines of RPC 1.2(c), the neutral attorney must explain that he or she “cannot and will not” act as an advocate for the client.

The neutral also must explain that he or she will not provide legal advice that is biased toward one party. Under the opinion, the client must be advised that it may be in their best interests to get an outside lawyer who will be their advocate. The mediators must explain the positives and negatives of all of the available options to their clients. Finally, the client should be aware of the consequences of a failed mediation.

The opinion imposes a significant obligation on neutral attorneys, too. Neutral attorneys may not be required to refer the parties to financial or mental health professionals solely approved by the divorce center.

In commercial mediation, by extension, the Advisory Committee might well take the position that an ADR provider’s “one-stop shopping” posture must be subject to clients’ scrutiny and informed consent. Doing otherwise could “violate[] the duty of independent judgment concerning referrals to other professionals solely in furtherance of the client's best interests, free

from any economic or other incentives that might impinge on the lawyer's judgment.”

The opinion discusses “affiliated attorney” referrals to therapy and accounting services as examples, but the same idea could apply to any other referrals by ADR providers beyond the divorce setting.

This concern may be satisfied easily. First, providers’ mediator hires could be separated from the hiring of financial, psychological, or other experts.

Second, attorneys may explain that they are recommending experts affiliated with the mediation center due to their experience in conflict resolution. Clients who choose mediation may prefer those experts, since a collaborative process is the reason for choosing a mediation center, but clients must understand they have the right to select their own experts.

Third, mediation centers may assign financial and psychological experts first, and then refer the parties to outside legal counsel.

NO OUTSIDE RELATIONSHIPS

The last issue addressed by Opinion 711 relates to the business itself. If practicing attorneys actually have an ownership interest in a divorce mediation center, then the name must be consistent with the guidelines set forth in RPC 7.5—that is, no impermissible trade names.

Attorneys may not be in a partnership with non-attorneys, as proscribed in RPC 5.4(b). Therefore, attorneys who are providing legal services may have no financial interest in a mediation center that is also owned and operated by non-attorneys. Those financial arrangements will have to be restructured in New Jersey so that there is no conflict.

Opinion 711 indirectly raises the question of how clients should be represented in the divorce process itself. After the mediation is completed, an attorney who has been involved in the mediation in any way, whether as a mediator or a neutral advisory attorney for both parties, may not then choose one of the parties to represent. That is an impermissible conflict of interest.

Such restrictions could extend fully to a commercial or other mediation setting, and practitioners need to check carefully their local jurisdictions as to timing and methods for accepting subsequent business.

Furthermore, if a mediation center is owned by (A) licensed attorneys and (B) those who are licensed and/or involved in other professions, then the mediation center may not provide a lawyer to represent either or both of the parties. That would involve both a conflict of interest and the unauthorized practice of law--non-lawyers partnering with lawyers who are providing legal services.

Finally, since parties may elect to represent themselves, the mediation center must make it clear that the parties should seek independent legal advice, and that any information the center provided, including legal information, was intended to be neutral. Parties should not view such information as a substitute for complete information and advice by an outside and independent attorney at law.

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Opinion 711 offers guidance to protect both professionals and clients from having the prospect of economic gains interfere with ethical operations of a divorce mediation center. The opinion focuses on a specific center, but it potentially applies to a variety of ADR providers, at least implicitly. It may be a leading indicator of more provider regulation down the road.

Practitioners should investigate their own operations to see if changes are required to remain consistent with the new guidelines. Attorney-advocates should make sure that the

mediator firms they hire are in compliance with regard to their clients, or else face risks of client dissatisfaction or worse. And any users of ADR centers should educate themselves to be sure that they know what they are buying, as well as their rights under applicable laws and ethics rules, before they walk in the door.

As long as MDP's follow the Opinion 711 guidelines, they may continue to provide complete and collaborative solutions to their clients' conflicts. "Let 1,000 reasonably regulated flowers bloom."

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