

Divorce Mediation Centers Subject to Lawyer Ethics Rules, Committee Says

By Henry Gottlieb

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A court ethics committee has warned New Jersey lawyers who run divorce mediation centers that they are covered by the Rules of Professional Conduct, and the panel has found one center in violation.

[Advisory Committee on Professional Ethics Opinion 711](#), issued Wednesday, is an ethics primer for lawyers who own or work for such centers, which have sprung up as alternatives to traditional divorce lawyering.

Matrimonial lawyers who have raised doubts about the quality of the divorce agreements reached at mediation centers will like Opinion 711.

So will lawyer mediators confused about the rules governing their practices. Indeed, the opinion is a response to a query a year ago by the lawyer-dominated, 400-member New Jersey Association of Professional Mediators. Its members wanted guidance on how to stay on solid ethical ground while tapping into the market for divorce mediations.

Though lawyers in the centers may tout themselves as third-party neutrals, they are offering legal advice and the sums they collect are legal fees, the opinion says.

Sharing such fees with the center violates rules against splitting fees with nonlawyers and a generic, corporate-sounding name could be an impermissible trade name for what is essentially an organization of lawyers, the opinion suggests.

The opinion says divorce centers need to deploy a full arsenal of disclosures to ensure that clients know what they are giving up when they opt out of the traditional, adversarial, system.

“It is possible that a mediated settlement may not be in a client’s best interest: imbalance of power, a controlling relationship, lack of sophistication or other factors may make a nominally ‘voluntary’ agreement severely disadvantageous to one party,” the opinion says.

Anju Jessani, president of the mediation association, says the group asked for guidance after members noticed how certain multi-professional practices worked and wondered whether they could adopt those models.

Jessani says the association sent the names of three mediation centers to the committee during the past year. But the only center whose practices are examined in the opinion is the Alpha Center for Divorce Mediation of Doylestown, Pa., which has six offices in New Jersey. The opinion does not identify the center, but Alpha Center's president confirmed it's the one whose practices were reviewed.

Jessani says, "our objective wasn't to finger-point at any particular firm, it was to ask, 'are these practices allowable or not?' They were looking at this model because some of our members were thinking of forming groups in a similar capacity."

According to the opinion, Alpha Center describes itself as a non-adversarial divorce process in which an attorney handles each case, and the clients are referred to accountants and therapists to deal with nonlegal issues.

The other professionals have their own practices, and when an agreement is reached on all issues, the clients get draft settlement agreements, pro se divorce pleadings and copies of supporting documents.

The clients are directed to take these documents to separate litigation attorneys for review.

As the committee sees it, the center's attorneys are practicing law, albeit for the sole purpose of serving as third-party neutrals, which is permissible under the rules.

Still, the Center is plainly offering the services of attorneys to provide legal advice and the fees are legal fees that are fixed by the Center and paid to it, the opinion says.

"RPC. 5.4(a) prevents sharing of legal fees with a non-lawyer (here the Center), and this situation is not within the exceptions listed in the Rule," the opinion says.

The opinion says lawyers who want to limit their representation to neutral mediation services must make a series of disclosures about not being the client's lawyer, about the possible desirability of hiring a separate attorney and the risks of the collaborative law processes.

"None of these safeguard are apparent here," the opinion says.

The opinion says the Center's requirement that an affiliated attorney make referrals only

to professionals approved by the Center violates the duty of independent judgment — making referrals solely in the client’s best interests and free of economic incentives to the lawyer.

The opinion says it’s unclear whether the Center is a partnership with non-attorneys. If so, it would be a violation of RPC 5.4(b).

Keila Gilbert, a lawyer who is Alpha Center’s president, says the opinion does not portray her center accurately. “I think it’s a bit of a Salem witch hunt because there are things that they say we do that we don’t do.”

Pending further study of the opinion, she doesn’t want to go into detail, she says. Alpha Center has been in business since 1994, and she says divorce mediation is “the sensible way.”

“It’s being done by organizations without compromising the interests of the clients, who end up at the end of the day with much more money and less stress to rebuild,” Gilbert says.

Opposition by matrimonial lawyers is not based solely on their economic interests, she says.

“They’re trained to be litigators and there are not many of them who can comprehend or absorb the neutral approach to conflict,” she says. “It’s a philosophical predisposition.”

Even so, matrimonial lawyers’ opposition to divorce mediation is diminishing, according to Jessani, who says two-thirds of the members of the mediation association are lawyers.

Jessani says the opinion will be helpful because it warns mediation lawyers against giving legal advice and it reminds them to tell clients to seek independent attorneys. Lawyers also must make sure they have no economic interests when they refer customers to other professionals.

The opinion won’t put any centers out of business, but some will have to change business practices, she says.

Ethics Inquiry About Divorce Mediators Did Not Target Any Firm

Dear Editor:

As the president of New Jersey Association of Professional Mediators (NJAPM), I am writing to clarify some of the points made in your article entitled “Divorce Mediation Centers Subject to Lawyer Ethics Rules, Committee Says” [p. 25 of this issue].

NJAPM made the inquiry on behalf of our members, but with no vested interest in the outcome. We made the inquiry because some of our members have indicated that they were interested in also expanding their practices in this direction, if the practice was permissible, and we felt an opinion from the advisory committee was essential to answering this question.

While we mentioned another firm conducting similar practices to the divorce center referenced in the article and later provided the name of a third firm, also with similar practices to the committee, we were not targeting any specific firm in our inquiry, and do not know why the committee chose to focus their comments to the divorce center, as our inquiry was more of a generic nature.

NJAPM is the largest mediation association in New Jersey, with over 400 members, and is the only mediation association in New Jersey with a structured accreditation process. NJAPM encourages the use of accredited mediators by the public, and is committed to educating the public, the government, the courts systems, and various affiliated professions about the mediation process. Two-thirds of our members are attorneys, with other members coming from a variety of backgrounds, including business and mental health. The organization has a code of ethics that we rigorously enforce, to protect both the profession and the public.

Anju D. Jessani
Trenton

Advisory Committee on Professional Ethics
Appointed by the Supreme Court of New Jersey

OPINION 711 (July 11, 2007)

Advisory Committee on Professional Ethics

Divorce Mediation Centers Operated By New Jersey Attorneys

An inquirer questions whether a commercial center for divorce mediation (hereafter "Center") run by a New Jersey attorney from an out-of-state office under a trade name, "___ Center for Divorce Mediation, P.C.," is operating consistent with the New Jersey *Rules of Professional Conduct*.

The attorney responsible for the Center describes its operations as follows:

An attorney, who is responsible for guiding our clients through a non-adversarial divorce process, handles each case. As in the litigated divorce process, clients are referred to accountants and therapists to deal with ancillary, non-legal issues. The only difference is that our referral list of professionals includes only those who agree to act as neutral mediators.

All of the attorneys, accountants and therapists affiliated with the Center have their own individual practices. They provide the Center with a calendar of open appointments. Based on the attorney's recommendation, our client coordinators will match clients with the professionals whose services are needed and whose schedules are compatible. The meetings are held in the same office so that clients do not have the inconvenience of finding several different locations.

When a tentative agreement is reached on all outstanding issues, the attorney provides the clients with a draft of a settlement agreement, pro se divorce proceedings and a copy of all supporting documentation. The clients are directed to take these documents to separate litigation attorneys for review.

The Committee reaches the following conclusions:

1. The attorneys affiliated with and taking mediation cases on referral from the Center are practicing law. In effect, they are accepting clients in a form of limited representation, consistent with *RPC 1.2(c)*, for the sole purpose of serving as a third-party neutral, as contemplated in *RPC 2.4*.

2. All conduct of attorneys practicing law is governed by the *Rules of Professional Conduct*. The Center's website is replete with references to the furnishing of legal advice (e.g., "[Center] attorneys ... help you make the decisions and navigate the necessary legal procedures"; "your attorney-mediator helps you understand your legal rights and obligations"; "your rights under law are explained and you are encouraged to make an agreement that follows the law"). As such, the Center is plainly offering the services of attorneys to provide legal advice.

3. The amounts paid by the client for a lawyer's mediation services are legal fees. They are fixed by and paid to the Center. RPC 5.4(a) prevents sharing of legal fees with a non-lawyer (here the Center), and this situation is not within the exceptions listed in the *Rule*.
4. It is possible that a mediated settlement may not be in a client's best interest: imbalance of power, a controlling relationship, lack of sophistication or other factors may make a nominally "voluntary" agreement severely disadvantageous to one party.
5. For an attorney to limit representation to neutral mediation services in a way that is proper under *RPC 1.2(c)*, the attorney must fully disclose that the attorney cannot and will not at any time act as the client's individual lawyer, nor provide legal advice or representation adverse to the other party to the dispute, and that it may be in the client's best interest to engage a separate attorney who represents only that client. Furthermore, all of the safeguards contained in ACPE Opinion 699, *182 N.J.L.J.* 1055 (December 12, 2005), *14 N.J.L.* 2474 (December 12, 2005), are applicable to this disclosure. As noted in Opinion 699, a lawyer may participate in the collaborative law process only if: (i) based on her knowledge and experience, after being fully informed about the existing relationship between the parties, the lawyer has no reason to believe that there is any significant possibility that the process will fail; and (ii) the lawyer discloses to the clients the potential risks and consequences of the failure of the collaborative law process, including a description of the alternative procedures available with all of their attendant risks and consequences, thereafter receiving informed consent of both clients. None of these safeguards are apparent here. For such mediation representation to be deemed "reasonable" under *RPC 1.2(c)* and consistent with the requirements of *RPC 1.7(a)*, the clients must give informed consent after such disclosure is made.
6. The Center's requirement that an affiliated attorney make other referrals, for therapy and accounting services, only to professionals approved by the Center, violates 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. See *RPC 5.4(c)*; ACPE Opinion 694, *174 N.J.L.J.* 460 (November 3, 2003), *12 N.J.L.* 2134 (November 3, 2003).
7. "_____ Center for Divorce Mediation, P.C.," run by a lawyer and involving other "affiliated" lawyers, is not a permissible trade name under *RPC 7.5*.
8. It is unclear whether the Center involves a partnership with any non-attorneys. Since it is practicing law, any such partnership would be a violation of *RPC 5.4(b)*. The Center appears to be a for-profit enterprise, not the kind of not-for-profit entity for education of the public about the benefits of mediation that was examined and conditionally permitted in Opinion 699.