The Ethics Helpline has received several calls involving former M. Bar R. 3.7(a), now replaced by M. R. Prof. Conduct. 4.4(a). Some of those calls involved Professional Ethics Commission Advisory Opinion 71, which dealt with a proposed ad for divorce mediation services. Issued by the Professional Ethics Commission (the Commission) on May 7, 1986, Opinion 71 merits review under the current Maine Rules of Professional Conduct, specifically Rule 2.4.

The Commission had been asked some 30 years ago whether a law firm may offer and advertise the service of consulting with both parties to a divorce proceeding, reviewing their case in depth, and preparing a proposed divorce settlement agreement. The firm submitted its draft ad describing the service.

As a result, in Opinion 71 the Commission analyzed the ad and proposed services and suggested certain additional precautions that would render the ad, and proposed services, in compliance with the Maine Bar Rules. The Commission noted that if neither party is or has been a client of the firm, or becomes a client during the mediation process, the conflict of interest rules would not be involved. The Commission went on to note, however, that it must

be clear that the firm is not representing either one of the parties and is not using confidences imparted by one against the other or allowing its judgment on the recommended settlement to be affected by a confidence previously imparted to it. This critical factor could become confused if, for example, the firm previously represented one or both of the parties. In that case, for purposes of Bar Rule 3.4(e) we conclude that the position of a mediator would be employment “adverse” to the party who is a former client and would be employment “adverse” to both if both parties are former clients of the firm.

The Commission went on to state that it would be “an extremely rare case” in which an attorney could serve as a mediator without risking violations of Rule 3.4(c) if the firm had represented either the family or one of the parties before the decision to seek a divorce, although it does acknowledge that it may be possible with informed consent of both parties.

Under the Maine Bar Rules, a lawyer acting as mediator was governed by now abrogated M. Bar R. 3.4(h). M. Bar R. 3.4(h)(2) had stated, as does current M. R. Prof. Conduct, Rule 2.4(c), that a lawyer acting in such capacity does not create a lawyer-client relationship with

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1 At the time, the matter was subject to M. Bar R. 3.4. Effective August 1, 2009, the Maine Bar Rules were abrogated and replaced by the current Maine Rules of Professional Conduct, including the adoption of M. R. Prof. Conduct 2.4, based upon ABA Model Rule 2.4 (2002), which addresses the professional obligations of a lawyer acting as a third party neutral.
either of the parties. The current rule, however, specifically requires that the attorney inform the
unrepresented parties that he/she is not representing them. M. R. Prof. Conduct 2.4(b).

Both abrogated Bar Rule 3.5 and current Rule 2.4 allow the attorney acting as mediator to
draft a settlement agreement, but both require that the parties be advised and encouraged to
consult with independent counsel to review the same before executing the agreement.

The second part of Opinion 71 relative to the statements made in the advertisement
endures under the new Rules as well. Back in 1986, the Commission noted that it did not wish to
discourage “experiments in private dispute resolution” but concluded that some of the statements
in the proposed ad be amended or qualified to insure that no misleading impressions were
created. At the time, service as a mediator, or “third party neutral,” was more of a novelty than it
is today. Nonetheless, the recent inquiries indicate a review of the conduct rules dealing with
this service is warranted. Attorneys are well advised to be sure the clients understand that while
the service as a neutral may lower the cost of a divorce or other legal procedure for the parties, it
is not a substitute for separate, independent representation of each party.

Any fee or engagement agreement should specify very clearly that the employment is not
for purposes of rendering legal services by an attorney, but rather only for services as a third
party neutral. See also, Professional Ethics Opinion # 89 (Drafting Complaint Signed by Pro Se
Client, interpreting abrogated M. Bar R. 3.7, replaced by M. R. Prof. Conduct 4.4 (Respect for
Rights of Third Persons; Inadvertent Disclosures).