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December 20, 2002

Arthur Garwin
Center for Professional Responsibility
American Bar Association
541 North Fairbanks
Chicago, Illinois 60611

Re: Comments of the Section of Dispute Resolution to the Task Force on the Model Definition of the Practice of Law

Dear Mr. Garwin:

The Section of Dispute Resolution is pleased to submit comments to the Task Force on the Model Definition of the Practice Law. It is the position of the Section, based upon our review of the generally accepted definitions of the "practice of law" and our examination of reported state ethics opinions and court rules, that one who provides mediation or arbitration services is not engaged in the practice of law. We ask that the Task Force adopt this view in any report that it might issue.

Mediation and Arbitration Defined

Although the processes of arbitration and mediation are quite different, the analysis demonstrating that neither the role of an arbitrator nor the role of mediator constitutes the practice of law is virtually the same. Mediation is a nonadjudicative process in which a neutral third person—the mediator—helps the parties discuss and try to resolve the dispute. Unlike an arbitrator, the mediator does not have the power to make a binding decision for the parties. Stated simply, mediation is a process in which an impartial third party facilitates the resolution of a dispute by promoting a voluntary agreement by the parties to the dispute. Arbitration, on the other hand, is an adjudicative process in which the parties, through a contract, grant to the arbitrator the power to determine the rights and obligations of the parties in a final and binding way, subject to very limited appeal rights under the Federal Arbitration Act or a state arbitration act.

Neither of these processes constitutes the practice of law because in both arbitration and mediation, no "client" relationship of trust and confidence exists between the mediator or arbitrator, and the parties to the dispute. The beginning point, of course, in this analysis is to review the cases defining what constitutes the practice of law.

The Practice of Law Defined

Surprisingly, courts have struggled with developing a clear definition of the "practice of law." The difficulty in providing one comprehensive definition of the practice of law was articulated by the Arizona Supreme Court when it stated that "it is impossible to lay down an exhaustive definition of "the practice of law' by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work." *State Bar of Ariz. v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 8-9 (Ariz. 1961)("*Arizona Land Title")*. Typical activities that have been held by many courts to constitute the practice of law include the following: representing another in court; holding oneself out as a lawyer; preparing, filing or signing documents in legal proceedings; threatening to file suit on behalf of clients; negotiating settlement of legal claims or plea agreements on behalf of a client; giving legal advice; taking depositions; recording deeds; and interviewing clients. *See generally* G. Hazard, Jr. & W. Hodes, 2 The Law of Lawyering § 46.4 (3d ed. 2002 Supp.); R. Rotunda, Legal Ethics § 39-1 (2000).

More specifically, courts have developed a number of "tests" to determine whether an activity constitutes the practice of law. One such test is to examine whether "professional judgment" is being used. This test considers whether the activity in question requires specialized legal training or skills not ordinarily possessed by the average person. In *Oregon State Bar v. Smith*, 942 P.2d 793, 799 (Or. Ct. App. 1997), the court held that the practice of law involved the utilization of "professional judgment" in applying legal principles in the giving of assistance or advice to address an individual's needs. Professional judgment also has been defined as the lawyer's "educated ability to relate the general body and philosophy of law to a specific legal problem of a client." *Committee on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Baker*, 492 N.W.2d 695, 701 (Iowa 1992).

Another test employed to determine if an activity falls within the practice of law is the "client reliance test" which examines whether or not the client believes that they are receiving legal services. Courts such as the Arizona Supreme Court have found that "[r]eliance by the client on advice or services rendered . . . is more pertinent in determining whether certain conduct is the purported or actual practice of law." *Arizona Land Title*, 366 P.2d at 9.

This test is illustrated by the Supreme Court of Florida's decision in *Florida Bar v. Brumbaugh*, 355 So.2d 1186 (Fla. 1978). In that case, the respondent ran a secretarial service that prepared legal forms for individuals in various legal proceedings. Although she did not hold herself out as an attorney to the individuals for whom she provided this service, the preparation of the various forms itself was deemed the unauthorized practice of law. The rationale for this decision was based on the respondent having advised individuals regarding which form they should use. Because the individuals utilizing her services relied on her to select the appropriate forms needed in their legal proceedings, the activities were deemed to constitute the unauthorized practice of law.

The court reasoned that the "tendency of persons seeking legal assistance to place their trust in the individual purporting to have expertise in the area necessitates this Court's regulation

of such attorney-client relationships, so as to require that persons giving such advice have at least a minimal amount of legal training and experience." *Id.* at 1193. The importance of reliance in determining whether conduct constitutes the unauthorized practice of law is illustrated clearly in this case. The court explained:

> Although Marilyn Brumbaugh never held herself out as an attorney, it is clear that her clients placed some **reliance** upon her to properly prepare the necessary legal forms for their dissolution proceedings.

Id. at 1193-94 (emphasis added).

Similar to the client-reliance test is the attorney-client relationship test. This test assesses the activity being performed by evaluating whether the relationship in question is the equivalent of the attorney-client relationship. Under this test, the practice of law is implicated if a personal relationship is formed that is "tantamount to that of attorney and client." *State Bar of Mich. v. Cramer*, 249 N.W.2d 1, 8 (Mich. 1976).

Another important factor courts consider in determining whether activity is the practice of law is if the activity affects important legal rights. For example, preparing instruments and contracts by which legal rights are secured have been found to be indicators of whether an activity is the practice of law. *State Bar of N.M. v. Guardian Abstract & Title Co., Inc.*, 575 P.2d 943, 948 (N.M. 1978). For example, in *Palmer v. Unauthorized Practice Comm. Of the State Bar of Tex.*, 438 S.W. 2d 374 (Tex. Ct. App. 1969), the court found that the sale of will forms by untrained laymen fell within a statutory prohibition barring unlicensed individuals from practicing law particularly because "confidential communications regarding family relations are often necessary." *Id.* at 376.

In our view, common to all of these tests is the underlying premise that the consumer or "client" has placed their trust and confidence in the provider of the "legal" service and is relying upon the provider of the legal service to protect their individual interests. In other words, there exists a relationship of trust and confidence between the two parties such that a reasonable person would believe that the provider of services was, in effect, functioning as that person's attorney. *See, e.g.*, *In re Pappas*, 768 P.2d 1161, 1167-68 (Ariz. 1988)("[W]here a person holds an objectively reasonable belief that a lawyer is acting as his attorney, relies on that belief and relationship, and the lawyer does not refute that belief, we will treat the relationship as one between attorney and client . . . ."); *G & S Inv. v. Belman*, 700 P.2d 1358, 1365 (Ariz. Ct. App. 1984)(the existence of the attorney-client privilege "hinges upon a client's belief that he is consulting a lawyer in that capacity and upon his manifested intention to seek professional legal advice.").

Court Rules and Ethics Opinions

There are a number of court rules and ethics opinions addressing specifically the question of whether a mediator or arbitrator is engaged in the practice of law. *See generally* S. Cole, N. Rogers & C. McEwen, Mediation: Law, Policy & Practice, § 10:5 (2d ed. 2001). Based upon

our review of these rules and opinions, the prevailing view is the one we have expressed here—in mediation and arbitration, the parties do not rely upon the mediator or arbitrator to protect their individual interests, and because the parties know and understand that the mediator or arbitrator is neutral, the parties cannot hold an objectively reasonable belief that these individuals are functioning as their attorney.

This view has been expressly adopted by the District of Columbia Court of Appeals in promulgating its rule on the unauthorized practice of law within the District of Columbia. The practice of law is defined as the "provision of professional legal advice or services where there is a client relationship of trust or reliance." Rule 49(a)(2), District of Columbia Court Rules. Specifically addressing alternative dispute resolution, the Comments to the Rule state:

> The Rule is not intended to cover the provision of mediation or alternative dispute resolution ("ADR") services. This intent is expressed in the first sentence of the definition of the "practice of law" which requires the presence of two essential factors: the provision of legal advice or services and a client relationship of trust or reliance. ADR services are not given in circumstances where there is a client relationship of trust or reliance; and it is common practice for providers of ADR services explicitly to advise participants that they are not providing the services of legal counsel.

Comment, *Id.(*emphasis added).

The conclusion found in the District of Columbia rule has been adopted in the majority of bar ethics opinions and court rules we have studied. *See, e.g.*, Connecticut Bar Ass'n, Comm. on Prof'l Ethics, Informal Op. No. 97-12 (June 4, 1997)("At all times in the process, the lawyer acts as mediator between the parties, not as an advocate for either one."); Indiana Ethics Opinion No. 5 (1992)("Thus, because the Supreme Court permits non-attorneys to act as mediators and because the nature of . . . mediation is substantially different from the practice of law, mediation service is not the practice of law."); Rule 901(d), Rules of the Supreme Court of Kansas ("An attorney acting as a mediator is not the legal representative of the parties and there is no attorney-client relationship between the parties and the attorney-mediator."); Kentucky Bar Ass'n Ethics Op. 377 (1995) ("Mediation is not the practice of law . . . "); Maine Bar Rule 3.4(h)(2)("The role of mediator does not create a lawyer-client relationship with any of the parties and does not constitute representation of any of them."); State Bar of Michigan, Standing Comm. on Prof'l and Judicial Ethics, Op. No. RI-256 (April 8, 1996)("By definition, a neutral arbitrator or mediator has no client with respect to the matter being arbitrated or mediated."); Mississippi Bar, Op. No. 241 (Nov. 20, 1997("At the present time mediation and arbitration services are not considered the practice of law per se."); New York State Bar Ass'n, Comm. on Prof'l Ethics, Op. 736 (Jan. 3, 2001)("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."); Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. No. 96-167 (Dec. 30, 1996)(mediation is not considered to be a "legal" service when provided by a nonlawyer); Utah State Bar Ethics Advisory Opinion Comm., Formal Op.

97-03 (April 25, 1997) ("ADR services are not considered by the Utah Legislature to be legal services or the practice of law."); Washington State Bar Ass'n, Comm. to Define the Practice of Law, Final Report (July 1999), adopted by Washington State Bar Association Board of Governors, September 1999 ("[P]ersons acting in [the] capacity of [mediator, arbitrator, conciliator or facilitator] are not engaged in the practice of law."); South Carolina Bar Ethics Advisory Comm., Ethics Advisory Opinion No. 97-03 (March1997) (" A lawyer serving in the role of an intermediary is not engaged in the practice of law while acting as the intermediary. Moreover, the ethical obligations of an arbitrator may be more nearly analogous to those of a judge, than of a member of the Bar."); *contra* Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct, Op. No. 96-30 (June 5, 1997)("Alternate dispute resolution done by others than lawyers has not been held to be the practice of law. . . . But when done by a lawyer it becomes the practice of law."); New Jersey. Sup. Ct. Advisory Comm. Prof'l Ethics, Op. No. 676 (April 4, 1994) (holding that when a lawyer serves as a third party neutral, he or she "is acting as a lawyer").

The recent revisions to the American Bar Association Model Rules of Professional Conduct (the "Model Rules"), adopted by the ABA House of Delegates on February 5, 2002, provide further support for the view that serving as a mediator or arbitrator does not constitute the practice of law. For the first time, the Model Rules acknowledge that a lawyer may serve a role different than in a representational capacity. Rule 2.4 provides that a lawyer may serve as a "third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of the dispute or other matter that has arisen between them." The Comments define a "third-party neutral" as a person such as a "mediator, arbitrator, conciliator or evaluator who assists the parties . . . in the resolution of a dispute or in the arrangement of a transaction." The rule clearly recognizes that this neutral role does not constitute the practice of law by creating an attorney-client relationship, as Rule 2.4(b) states that the neutral "shall inform unrepresented parties that the lawyer is not representing them."

The Rule places no such duty upon the neutral when the parties are represented. Presumably, the drafters believed that when parties are represented by their own counsel, there could be no confusion over the neutral's role, and the parties could not reasonably believe that the neutral was serving as their attorney. The Comments to the Rule note that when the parties are unrepresented, however, it is conceivable that there could be confusion over the lawyer's role. Thus, the Comments instruct the lawyer, where appropriate, to inform the unrepresented parties of the "important differences between the lawyer's role as a third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege."

Consistent with these many court decisions, rules and ethics opinions, the Section of Dispute Resolution adopted a resolution also declaring that the practice of mediation is not the practice of law. The resolution provides, in part:

> **Mediation is not the practice of law.** Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.

> **Mediator's discussion of legal issues.** In disputes where the parties' legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

The rationale underlying the resolution is found in the Comments, which note that:

> Essential to most of the common definitions of the practice of law is the existence of an attorney-client relationship. Because mediators do not establish an attorney-client relationship, they are not engaged in the practice of law when they provide mediation services.

Furthermore, the Comments focus on the critical point that parties in mediation do not expect the mediator to provide them specific legal advice for the protection of their personal, individual interests:

> It is important that mediators who are competent to engage in discussion about the strengths and weaknesses of a party's case be free to do so without running afoul of UPL statutes. Indeed, many parties, and their counsel, hire mediators precisely to obtain feedback about their case. Even though mediators who engage in these discussions do sometimes aid the parties by discussing possible outcomes of the dispute if a settlement is not reached and providing evaluative feedback about the parties' positions, this conduct is not the practice of law because the parties have no reasonable basis for believing that the mediator will provide advice solely on behalf of any individual party. This is the important distinction between the mediator's role and the role of an attorney. Parties expect their attorney to represent solely their interests and to provide advice and counsel only for them. On the other hand, a mediator is a neutral, with no duty of loyalty to the individual parties.

Indeed, it is clear that a lawyer's ethical duties to a client, are fundamentally incompatible with the obligation of a neutral—a mediator or arbitrator—to fairly balance the interests of all parties in either facilitating a negotiated settlement in mediation, or adjudicating a dispute in arbitration.

Evaluative Mediation

There has been only one area where a meaningful debate has emerged with respect to the issue of the unauthorized practice of law by neutrals. Those who argue that mediation is the practice of law single out so-called evaluative mediators--mediators who assist the parties in evaluating the strengths and weaknesses of their case, and who help the parties reach an acceptable resolution by assisting them in seeing more clearly the probable results of the litigation and its attendant costs, delays, disruption, anxiety and so on. Because lawyers

traditionally assist clients in this very same way, this view takes the position that the evaluation by a mediator of a party's case and the assessment of outcomes constitute the practice of law.

Good evaluative mediators assist the parties to carefully analyze their positions, to understand the legal aspects of their problem fully, to consider how their dispute will play out before a judge or jury, and to look into the future to understand all possible outcomes of the dispute, including appeals. It is the feedback, analysis and impressions of the neutral that provide the parties with new information about their problem. This is critical in causing them to examine the problem from another perspective, thereby enabling them to see the other side's point more clearly, and thus moving toward a more common understanding of a fair settlement.

The view that so-called evaluative mediation is the practice of law has been expressed by the North Carolina Bar Association, and by the State Bar of Virginia in its Guidelines on Mediation and the Unauthorized Practice of Law (the "Guidelines"). Published in 1999, the Guidelines prohibit mediators from giving "legal advice." According to the Guidelines:

> [A]t a minimum, a mediator provides legal advice whenever, in the meditation context, he or she applies legal principles . . . that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue.

Id. at 14. The position advanced in Virginia is incorrect, but warrants discussion. The Guidelines are presumably based on the rationale that an important aspect of a lawyer's role is his or her ability to apply law to specific facts and predict how a court might rule on a particular issue. As explained above, however, in order for one to be engaged in the practice of law, one must have a "client" or, at a minimum, someone placing their trust, confidence and reliance on the provider of "legal" services to give advice and assistance solely on their behalf. Because the parties in mediation are not the "client" of the mediator, the type of evaluative function addressed by the Guidelines does not constitute the practice of law.

The Guidelines fail to recognize that the various definitions of the practice of law have at their core the principle that the "client" or consumer of the purported legal services views the lawyer or other provider of legal services as their representative, placing their trust and confidence in, and reliance upon, that person to protect their personal interests. That relationship of reliance does not exist between a mediator and arbitrator, and the parties they serve.

Summary and Conclusion

In conclusion, when an individual provides mediation or arbitration services, that individual is not engaged in the practice of law. The practice of law involves the creation of an attorney-client relationship in which a party reasonably places their trust and confidence in another for assistance in meeting their legal needs. Neither mediators nor arbitrators serve in this capacity.

We appreciate this opportunity to submit these comments.

Sincerely,

Bruce Meyerson

BEM/eg

Cc: Council, Section of Dispute Resolution
Jack Hanna