**On Professional Practice**  
*By Sharon Press*

**When dispute resolution practitioners wear different hats, ethical considerations can be complicated**

“When On Professional Practice” examines how professional responsibility principles apply to our work. Sharon Press, a member of the Dispute Resolution Magazine editorial board, serves as the “On Professional Practice” editor. We encourage readers to submit ideas for future columns to her at sharon.press@mitchellhamline.edu.

Today’s dispute resolution professionals come from various backgrounds and training, and in their work helping people resolve disputes, they often serve in multiple roles. They might be lawyers, licensed social workers, construction engineers, teachers, or businesspeople, and they might serve as mediators, arbitrators, early neutral evaluators, or all the above. This can make ethical considerations especially tricky: when participating in a particular dispute resolution process, a neutral must carefully consider the ethical standards of his or her source profession as well as those of the dispute resolution process itself.

In this column, I focus on attorneys who serve as neutrals and the tension between the Model Rules of Professional Conduct (MRPC) for attorneys and the ethical standards for mediators and arbitrators. Similar issues arise for neutrals from source professions other than law; mental health professionals, for example, are often mandatory reporters of abuse and neglect, while mediators and arbitrators may not be. But because of space limitations, in this column I am focusing only on standards for attorneys.

Rule 2.4 of the MRPC defines a “third-party neutral” as a lawyer who “assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.” Because that definition is a little vague, the rule goes on to note that this “service” might be as an arbitrator, a mediator, “or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.”

When serving in this capacity, the lawyer’s ethical responsibility is to inform unrepresented parties that the lawyer or third-party neutral is not representing them (emphasis added).

Rule 1.12 specifically prohibits a lawyer from representing anyone “in connection with a matter in which the lawyer participated personally and substantially as … an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.” This rule has an exception for an arbitrator who is selected as a non-neutral member of a panel, saying that a party-appointed arbitrator is not prohibited from subsequently representing that party.1

The comments to Rule 1.12 acknowledge that third-party neutrals may be subject to “more stringent standards of personal or imputed disqualification” in dispute resolution codes.

For instance, the Model Standards of Conduct for Mediators explicitly addresses the creation of subsequent relationships. Although the standards do not prohibit all such relationships, they do require that mediators not establish any relationship that would “raise questions about the integrity of the mediation.”2 Factors that should be considered include the amount of time that has passed between the mediation and the subsequent relationship, the nature of the relationship, and whether the future relationship might create a perceived or actual conflict of interest.

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1. Ethical Considerations for Mediators and Arbitrators, American Bar Association, Section of Dispute Resolution (2019).
The Code of Ethics for Arbitrators in Commercial Disputes, for another example, requires arbitrators to be “faithful to the relationship of trust and confidentiality inherent in that office.” Canon VI specifically states that the arbitrator “should not appoint himself or herself to a separate office related to the subject matter of the dispute” unless upon request of the parties. While the canons reference serving as a receiver or trustee rather than as an attorney, the rule could easily be extended to serving as an attorney. The code of ethics does not require this, but arbitrators who serve as attorneys probably would want to consider how the representation would impact future arbitrations and the disclosures that would be required.

Neutrals also need to consider the converse set of circumstances: when can someone serve as a neutral when he or she has an existing or prior relationship? The comparable rule in the Model Standards of Conduct for Mediators defines conflict of interest as anything that “reasonably raises a question of a mediator’s impartiality.” Standard III A of the standards requires the mediator to make a reasonable inquiry to determine whether there is a conflict of interest, and also to disclose, as soon as practicable, all actual or potential conflicts of interest. If all parties agree after the disclosure, the mediator may proceed.

Comparing the two guidelines, the rule for lawyers and the Model Standards of Conduct for Mediators brings up some interesting differences. The rule for lawyers requires “informed consent, in writing” without any discussion of the timing of this disclosure. The mediator standards do not require that the consent be in writing, but they do impose a requirement that it be done “as soon as practicable.” The drafters of the Model Standards were concerned that if disclosure is not made until all the participants and their attorneys have gathered for a mediation, everyone may feel undue pressure to waive the conflict to avoid having to reschedule for another time with another mediator. There is another significant difference: under the mediator standards, a mediator may be required to withdraw from or decline to proceed with the mediation “regardless of the express desire or agreement of the parties to the contrary” if the conflict of interest “might reasonably be viewed as undermining the integrity of the mediation,” but the ethical standards governing lawyers would allow a mediator to proceed if all parties have given informed consent. The ethical standards for mediators would require a mediator to withdraw if continuing would have a negative impact on the integrity of the process.

Another consideration is who provides the waiver of a conflict of interest. Both standards reference the “parties,” but it is fairly common for mediators to have access only to the attorneys representing the parties in advance of the mediation session. In those circumstances, the mediator needs to give specific direction to the attorneys to convey the potential conflict of interest to the actual parties and obtain informed consent. If the parties do not learn of the conflict of interest until they arrive at the mediation, they could raise a legitimate grievance against the mediator for having failed to comply with the Model Standards of Conduct for Mediators.

Arbitrators have similar ethical requirements. The Code of Ethics for Arbitrators in Commercial Disputes requires that arbitrators disclose any relationship that “might reasonably affect impartiality or lack of independence in the eyes of any parties,” including any relationship they have with “any party or its lawyer.” It is a continuing duty, and “any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.” The code does not require that waivers be in writing but does allow the person to
serve as an arbitrator if the “parties, with knowledge of a person’s interest and relationships … desire the person to serve.”

Neutrals who maintain a law practice and a dispute resolution practice should be mindful of an additional provision in the Model Rules of Attorneys, the provision that the conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the disqualified lawyer is “timely screened” from participation in the matter and does not partake in any of the fees associated with the case. So being conflicted is not just an individual consideration.

It’s always worth remembering — and especially when considering different standards applying to one practitioner — that ethical standards generally set the floor below which a practitioner should not descend. I advise practitioners who are subject to multiple ethical standards to aim high, rather than low.

**Endnotes**

2. Model Standards of Conduct for Mediators IIIF.
3. Code of Ethics for Arbitrators in Commercial Disputes Canon VI D.
4. Model Standards of Conduct for Mediators IIIC.
5. Id.
6. Model Standards of Conduct for Mediators IIIE.
7. See Code of Ethics for Arbitrators in Commercial Disputes, Canon II.
8. Id. IIC and IID.
9. Id. IIF.

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