

## **ADVISORY ETHICS OPINION 2001-08**

### **SYNOPSIS:**

An attorney serving as a mediator for the Environmental Court may contact litigants to discuss the mediation process and the benefits of mediation.

### **FACTS:**

The State of Vermont Environmental Court has adopted a mediation process in which litigants are asked in the pre-trial conference whether they are willing to consider mediation and, if they are undecided, whether they may be contacted by telephone by a mediator who has agreed to provide services to the Court. During such telephone calls, the mediators discuss the mediation process and benefits of mediation. There is no charge for this telephonic conference, but a mediator may subsequently charge for mediation services. Litigants are advised that they may choose any mediator on the Court's roster. Some mediators are nonlawyers; others are attorneys. Some mediators volunteer their services on a pro bono basis; others are paid.

We are asked whether the telephone contact by prospective mediators, who also happen to be attorneys, violates the anti-solicitation provisions of Rule 7.3.

### **ANALYSIS:**

As a threshold matter, an attorney's provision of court-supervised mediation services to Environmental Court litigants does not involve the practice of law, nor are parties to the litigation "clients" of the mediator. By definition, a mediator is a neutral who represents neither party. The mediation process uses lawyers and nonlawyers alike as mediators, and the fact that a mediator is admitted to the bar does not give rise to an attorney/client relationship with the parties to the mediation. Furthermore, the contact between mediators and parties is coordinated in the first instance by the Environmental Court, and is subject to that Court's supervision and control. Accordingly, Rule 7.3, which governs the solicitation of clients by attorneys, is not violated on these facts.

Vermont, however, has adopted Rule 5.7, which imposes additional obligations on attorneys who engage in "law-related services." This Rule provides:

- (a) A lawyer shall be subject to the Rules of Professional Conduct, with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
  - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to a client; or
  - (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services, and that the protections of the client-lawyer relationship do not exist.
- (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

The comment to Rule 5.7 provides the following examples of law-related services: "title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting."

An attorney's provision of mediation services for pay, appears to fall within the broad ambit of this definition. However, unlike lobbying or tax preparation, service as a mediator does not involve an attorney client relationship, and consequently does not implicate the ethical rules directed to such a relationship.

Accordingly, we conclude that a mediator's contact with litigants in the context of a court supervised mediation process does not violate Rules 7.3 or 5.7.