

# **Ethics Update: What Happened During the Pandemic?**

**June 28, 2022**

# **Mediation & Third-Party Neutrals**

- **New CR 99 “Mediation”**
- **New CR 100 “Code of Conduct for Mediators”**
  - **Order 2022-04, effective February 1, 2022**
  - **Replaces “Model Mediation Rules”, Admin. Order 1999-01 and “Mediation Guidelines for Court of Justice Mediators”, Admin. Order 2005-02.**

# CR 99 “Mediation”

## When Does It Apply?

- **CR 99.01(4):**
  - **Mandatory for Court ordered mediation:**
    - “These Rules shall be followed in any mediation ordered by the trial court.”
  - **Recommended for private mediation:**
    - “Parties are encouraged to follow these Rules in mediations not ordered by the trial court.”
  - **Not exclusive:**
    - “However, nothing in these Rules shall prohibit parties from resolving disputes through other methods.”

## Mediation CR 99.02

- **“Mediation is an informal process in which a neutral third person called a mediator facilitates the resolution of a dispute between two or more parties.** The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. **Decision-making authority remains with the parties, not the mediator.** The mediator assists the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.”

## Mediation CR 99.03

- **Court ordered mediation is discretionary**
  - **“Courts shall not, however, follow any blanket policy or practice of referring all cases, or any particular type of case, to mediation, nor any blanket policy or practice requiring completion of mediation as a pre-condition to assigning a trial date.”**

# Mediation CR 99.03

- **Factors for court to consider in ordering mediation:**
- 1. The **stage of the litigation**, including the need for discovery, and the extent to which it has been conducted.
- 2. The **nature of the issues** to be resolved.
- 3. The **value to the parties** of confidentiality, rapid resolution, or the promotion or maintenance of on-going relationships.
- 4. The **willingness of the parties** to mutually resolve their dispute.
- 5. **Other attempts** at dispute resolution.
- 6. The **ability of the parties** to participate in the mediation process including the ability of any party, counsel or required representative to participate in virtual mediation.
- 7. The **cost to the parties**.

# **Mediation Procedure**

**CR 99.04 to 99.07**

- **CR 99.04 No stay of proceedings (unless agreed in writing or by order)**
- **CR 99.05 Appointment of mediator –15 days to agree**
- **CR 99.06 Mediator compensation (contract rate as agreed with mediator; court appointed—standard rate—shared equally)**
- **CR 99.07 Mediation procedure –agreed time and place; may confer with mediator on procedure, including confidential position statement**

# Mediation Attendance

## CR 99.08

- 1. Unless otherwise ordered by the court or explicitly agreed to by the parties, **the parties and their counsel**, if any, shall attend the mediation conference.
- 2. If a party is a **public entity**, it shall appear by the presence of a **representative with full authority to negotiate** on behalf of the entity and **to recommend settlement** to the appropriate decision-making body or officer of the entity.
- 3. If a party is an **organization other than a public entity**, it shall appear by the presence of a **representative, other than the party's counsel of record, who has full authority to settle**.

# Mediation Attendance

CR 99.08

- 4. If any **party is insured for the claim in dispute**, that party shall also be required to **have its insurance carrier(s) present by the presence of a representative of the insurance carrier(s) who is not that carrier's outside counsel** this representative must have **full settlement authority**. A court **may not restrict** a carrier representative **from having telephone or other communication to seek additional authority**.
- Unless expressly ordered by the court, **a party who is represented by counsel and the presence of a representative of the party's insurance carrier is not required to be present for the mediation**.

# Mediation Attendance

CR 99.08

- **5. Full authority to settle, or full settlement authority, means** that the representative has **authority to negotiate settlement** on behalf of a particular party, organization, entity or insurance carrier. **It does not require authority to settle for any specific amount or terms.**
- 6. Unless otherwise agreed by the parties or ordered by the court, **a mediation may be entirely virtual, or the presence of any attendee may be virtual.**

# **Post-Mediation**

**CR 99.09 to 99.11**

- **CR 99.09 Reporting to the court—describes notification procedures, joint statement, and if unanimous consent is given, can report to the court on remaining issues**
- **CR 99.10 Agreement—required to be reduced to writing; “parties shall be responsible for the drafting of the agreement, although the mediator may assist in the drafting of the agreement with the consent of the parties.”**
- **CR 99.11 Confidentiality—incorporates KRE 408; describes confidentiality of discussions and of agreement, if applicable**

# Mediation CR 100

## Code of Conduct for Mediators

- **CR 100.01 Purpose**
- **CR 100.02 Competency**
- **CR 100.03 Impartiality**
- **CR 100.04 Confidentiality**
- **CR 100.05 Consent**
- **CR 100.06 Self-determination**
- **CR 100.07 Separation of mediation from legal and other professional advice**
- **CR 100.08 Conflicts of interest**
- **CR 100.09 Protecting the integrity of the mediation process**

# Third Party Neutrals

## KBA Ethics Op. 449 March 14, 2019

- SCR 3.130 (Rule 2.4) Lawyer serving as third-party neutral.
- (a) A lawyer serves 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 a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an *arbitrator*, a *mediator* or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (a) A lawyer serving as a third-party neutral *shall inform unrepresented parties that the lawyer is not representing them*. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

# Third Party Neutrals Issues

- Is mediation the practice of law?
  - If so, would it be limited to lawyers?
- Is mediation a non-legal activity to be kept separate from the practice of law?
- What is the lawyer's responsibility when the lawyer undertakes to share office space with or otherwise work with non-lawyers.
- The essence of the opinion is that the Rules of Professional Conduct set the floor for the expected conduct and practice methods of the lawyer.
  - Consider Ethics Op. 417

# Third Party Neutrals

- Opinion referenced Supreme Court of Kentucky Model Mediation Rules, Rule 2
  - Effective February 1, 2022 New Rule 99.02:
- Mediation is an informal process in which a neutral third person called a mediator facilitates the resolution of a dispute between two or more parties. The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. Decision-making authority remains with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.

## Third Party Neutrals

- **Question 1: May Lawyers Serve as Third Party Neutrals (Mediators, Arbitrators, Facilitators, and Like Services) as Part of Their Overall Law Practice?**
- **Yes.**
- “The Rules of Professional Conduct Contemplate that lawyer may provide services as an arbitrator, a mediator, or other third-party neutral.”

# Third Party Neutrals

- **Question 2: May Lawyers Conduct Third Party Neutral Services (Mediation, Arbitrations, Facilitators, and Like Services) on Their Law Practice Premises?**
- **Yes**
- SCR 3.130 (Rule 2.4) **does not require** a third-party neutral to conduct the mediation, arbitration or other alternative dispute resolution process either on the lawyer's premises or in a **business separate and apart from the lawyer's practice of law.**

# Third Party Neutrals

- **Question 3: May Lawyers Who are Engaged in Third Party Neutral Services (Mediation, Arbitrations, Facilitators, and Like Services) on Their Law Practice Premises Utilize Non-Lawyer Staff in Mediations?**
- **Yes.**
- “Under SCR 3.130 (Rule 5.3) the lawyer, whether acting as a third-party neutral or in the representation of the client “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; . . .”
  - See SCR 3.130 (Rule 5.3) **Responsibilities regarding nonlawyer assistants**

## SCR 3.130(Rule 5.8)—New Rule (4/1/22)

### Responsibilities regarding law-related services

- 1) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in subsection (2), **if the law-related services are provided:**
  - a) by the lawyer in *circumstances that are not distinct* from the lawyer's provision of legal services to clients; or
  - b) in other circumstances by an 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 are not legal services and that the protections of the client-lawyer relationship do not exist.*

## SCR 3.130(Rule 5.8)—New Rule “law-related services”

(2) 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.*

# SCR 3.130(Rule 5.8)—New Rule “law-related services”

- **Commentary:**
- **1) A broad range of economic and other interests of clients may be served by lawyers engaging in the delivery of law-related services. Examples of law-related services include providing *title insurance, financial planning, accounting, trust services, real estate counseling, mediation, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.***
  - **See KBA Ethics Op. 417 (2001)—lawyer sharing office space with non lawyer activities**

# **SCR 3.130(Rule 5.8)—New Rule “law-related services”**

## **Commentary**

- **(11) When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).**
- **Make sure the legal services and client and non legal clients understand what you’re providing and not providing**

# Order 2022-11—Other SCR Changes

- **SCR 3.023 Disclosure of Professional Liability Insurance –Late fee added**
- **SCR 3.380 Degrees of discipline: Is “private reprimand” no longer option?** Still mentioned in SCR 3.160(3)(b), but deleted from SCR 3.380
- **SCR 3.501 to 3.504 Reinstatement (new rules)**
- **SCR 3.580(6) & (7) Hotline opinions with respect to Unauthorized Practice of Law – clarifies distinction on UPL Committee and Ethics Committee**

# Order 2022-11—Other SCR Changes

- **SCR 3.150 Access to disciplinary information**
- 1) **Confidentiality.** *In a discipline matter, prior to a rendition of a finding of a violation of these Rules by the Trial Commissioner or the Board and the recommendation of the imposition of a public sanction, the proceeding is confidential **prior to the filing of a verified answer to a Charge or, in the case of default, (30) days following service on the Respondent pursuant to SCR 3.164.***

# Order 2022-11—Other SCR Changes

## *“Pro Hac Vice” Practice*

- **VII. SCR 3.030 Membership, practice by nonmembers and classes of membership**
- b) Failure to pay the renewal fee within thirty (30) days of the due date will result in the attorney being suspended from appearing in any case in which he or she has been admitted pro hac vice. **Upon notification of the failure of payment, members of the KBA serving as co-counsel shall immediately notify the court in which the case is pending.**

# **Ethics Opinion KBA E-450**

**Issued: May 15, 2020**

- **Dealing with an unrepresented adversary**
- **Question 1:** May an attorney representing a client give advice, other than the advice to get an attorney, to an unrepresented adverse party?
- Answer: No. Rule 4.3
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- **Question 2:** May an attorney, representing a client, provide information to an unrepresented adverse party?
- Answer: Qualified yes, Rule 4.3, comment 2.

## **Ethics Opinion KBA E-450**

- “The distinction is between giving the unrepresented party information or explaining (permitted), and suggesting what the unrepresented party should do (not permitted). In this context, “explain” may be defined as making an idea, situation or problem clear by describing it in more detail while legal advice is generally understood as guidance with regard to future action.”

## Ethics Opinion KBA E-450

- “Don’t use words (for example “should”) that could be reasonably interpreted as advice.”
- “The lawyer may explain procedures applicable to the representation (time for filing, mandatory disclosures, etc.) and may, with the client’s consent, provide other relevant information to the non-client, including the lawyer’s view of applicable law and the meaning of documents prepared by the lawyer. Rule 4.3, comment 2.”

# **Ethics Opinion KBA E-451**

## **Issued: July 17, 2020**

- **Revealing a client's confidential information after the client's death**
- Question 1: After the death of a client may an attorney reveal information relating to the representation of the client?
- Answer: Yes, if revealing the information is reasonably believed to be necessary to accomplish one of the purposes of the representation. SCR 3.130(1.2), Comment 1 & SCR 3.130(1.6), Comments 5 & 12.
- Question 2: After the death of a client, may an attorney assert (or waive) the attorney client privilege on behalf of the client?
- Answer: Yes. SCR 3.130(1.6), Comment 12; KRE 503(c).

# Ethics Opinion KBA E-451

- “Attorneys have implied authority to disclose information reasonably believed necessary to carry out the purposes of the representation.”
- “The attorney may reasonably assume that the decedent would want the attorney to do what is necessary to effectuate the client’s objectives.”
- See Rule 1.2(a) ... A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. . . . , and
- See Rule 1.6(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

**Ethics Opinion KBA E-452**  
**Issued: September 18, 2020**

- **Ethical Duties of Lawyers Defending Insured Clients Without Separate Retained Counsel for the Client *Where Insurance Carriers Have Reserved Rights to Coverage Defenses and Then Intervene to Determine Those Rights in the Same Litigation or in a Separately Filed Litigation.***

# **Ethics Opinion KBA E-452**

## **Issued: September 18, 2020**

- **Insured is the Client:**
- KBA Ethics Op. 410 (1999);
- KBA E-416;
- KBA E-368 (1994);
- KBA E-378 (1995);
- *American Insurance Association v. Kentucky Bar Association, et al.*, 917 S.W.2d 568, 574 (Ky. 1999).

## **Ethics Opinion KBA E-452**

- **Basic Premise: When an Insurer provides the defense to an Insured, the attorney represents the Insured but not the Insurer.**
- **Question #1: May a lawyer be retained to defend an insured defendant where the retaining insurance carrier has reserved its rights to coverage defenses?**
- **Answer: Yes. KBA Ethics Op. 410, Question #2 (1999).**

## Ethics Opinion KBA E-452

- Question #2: May a lawyer be retained to defend an insured defendant in litigation where the retaining insurance carrier has **reserved its rights to coverage defenses and has commenced a separate civil action** to determine the coverage questions?
- Answer: Yes. KBA Ethics Op. 410, Question #4 (1999).

## Ethics Opinion KBA E-452

- Question #3: May a lawyer defend an insured defendant in litigation where the retaining insurance carrier has reserved its rights to coverage defenses and has been permitted to intervene in the same civil action to determine the coverage questions?
- Answer: **Yes, if the insurance contract coverage issues are bifurcated** from the liability issues **and stayed** pending the determination of the liability issues. See discussion below.

## Ethics Opinion KBA E-452

- Question #4: May a lawyer defend an insured defendant in litigation where the retaining insurance carrier has reserved its rights to coverage defenses and has been permitted to intervene in the same civil action to determine the coverage questions, if the insurance contract coverage issues are not bifurcated from the liability issues and proceed through pre-trial practice collaterally with the determination of the liability issues?
- Answer: **Yes, if** the insured defendant is represented by **separate counsel** with respect to the coverage questions in the combined liability and coverage proceedings. **No, if the insured defendant is and remains unrepresented** by separate counsel as to the coverage questions in the combined liability and coverage proceedings.

## Ethics Opinion KBA E-452

- If the **insured client does not have separate counsel** to advise and represent the client on the insurance policy coverage claims, and the parties and the court determine the **litigation will be combined and refuse to sever** the matters for discovery, pretrial and trial proceedings, *then the liability defense lawyer should withdraw from the client's representation. See SCR 3.130(1.16).*

# **Ethics Opinion KBA E-453**

## **Issued: March 19, 2021**

- **Confidentiality of Information for Former Government Officers or Employees**
- **SCR 3.130(1.11), Special conflicts of interest for former and current government officers and employees**
- A former government lawyer who has substantially and personally participated in a matter that is the subject of inquiry may not disclose nor use any such information unless the government employer gives the requesting former government lawyer its informed consent which must be confirmed in writing.

# Ethics Opinion KBA E-454

## Issued: November 19, 2021

### Ethical Responsibilities of an Attorney as a Guardian *Ad Litem*

- **Question #1:** As a Court-appointed Guardian *Ad Litem* (“GAL”), does the attorney owe ethical duties to the minor, prisoner and/or legally disabled person as opposed to the Court?
- **Answer:** Yes.
- **Question #2:** If the GAL reasonably believes that the client has diminished capacity, is at risk for substantial physical, financial or other harm unless action is taken, and cannot adequately act in his or her own interest, can the GAL take reasonably necessary protective action for the client, even to the point of advocating a position contrary to the client’s wishes?
- **Answer:** Qualified Yes.

# Ethics Opinion KBA E-454

- “(The GAL) is appointed to represent defendants who are under legal disability and is given the duty to ‘attend properly to the preparation of the case’ in their behalf.... (The GAL’s) obligation is to stand in the infant’s place and determine what his rights are and what his interests and defense demand.”
- “Although not having the powers of a regular guardian, (the GAL) fully represents the infant and is endowed with similar powers for purposes of litigation in hand.... He is, therefore, both a fiduciary and lawyer of the infant, and in a special sense, the representative of the court to protect the minor.”
- *Morgan vs. Getter, et al.*, 441 S.W.3d 94, 107 (Ky. 2014).

# Ethics Opinion KBA E-454

- As the GAL, an attorney<sup>4</sup> is ethically required, as with any other client, to render competent legal representation to the minor, prisoner or disabled person, providing “... the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>5</sup> The attorney is required to inform the client of the circumstances of the case, consult with the client about how goals and objectives of the client are to be accomplished, and explain all matters “... to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>6</sup> Further, the attorney is not to reveal confidential information imparted by the client to the attorney unless the client gives informed consent, the disclosure is implied authorized so that the attorney can carry out the representation of the client, or the disclosure is specifically permitted by SCR 3.130 (1.6)(b).<sup>7</sup>

# Oldies But Goodies

## SCR 3.130 (Rule 4.4(b))

- **Respect for rights of third persons.**
- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) **A lawyer who receives a document** relating to the representation of the lawyer's client **and knows or reasonably should know that the document was inadvertently sent shall:**
  - (1) **refrain from reading the document,**
  - (2) **promptly notify the sender, and**
  - (3) **abide by the instructions of the sender regarding its disposition.**

# **“Reply All” Email**

**SCR 3.130 (Rule 4.2):**

**Communication with person represented by counsel.**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

## **“Reply All” Email—What if the sender shows a copy to his/her client?**

- If a lawyer (Lawyer A) sends an email to another lawyer (Lawyer B), who is not affiliated with Lawyer A, and copies Lawyer A’s client by using “cc,” Lawyer B should not correspond directly with Lawyer A’s client by use of the “reply all” key. A lawyer who, without consent, takes advantage of “reply all” to correspond directly with a represented party violates Rule 4.2. Further, showing “cc” to a client on an email, without more, cannot reasonably be regarded as consent to communicate directly with the client.
  - KBA Ethics Opinion 442, “*Email Replies*”, November 17, 2017

**The End**

**Go Forth and Sin No More**