

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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April 27, 2006

Opinion No. 06-079

Mediation and the Practice of Law

QUESTIONS

1. Does mediation by definition involve the practice of law?
2. If the answer to the first question is yes, is a District Attorney General or an Assistant District Attorney General prohibited by Tenn. Code Ann. § 8-7-104 from performing mediation services during “off hours?”

OPINIONS

1. No. “Mediation,” as that term is defined in Tenn. S. Ct. R. 31, § 2(f), is an informal process in which a neutral third party conducts discussions among disputing parties to facilitate an agreement between them concerning the issues in dispute. Under the definitions of “practice of law” in Tenn. Code Ann. § 23-3-101(2) and “the practice of law” in Tenn. S. Ct. R. 9, § 20.2(3), one of the components of engaging in the practice of law is acting in a representative capacity either as an advocate or counselor. Because a mediator is neutral and not acting in a representative capacity, the mediator does not engage in the practice of law.

2. Because mediation by definition does not involve the practice of law as defined under Tennessee law, a District Attorney General or an Assistant District Attorney General would not violate Tenn. Code Ann. § 8-7-104 by performing mediation services during “off hours.” Caution should be exercised though to ensure that performing mediation services during “off hours” does not create actual or apparent conflicts with the primary job functions of the District Attorney General’s Office.

ANALYSIS

1. The practice of law is defined twice in Tennessee law and both definitions contain an element of representation or advocacy. Under the Tennessee Unauthorized Practice of Law statutes, the “practice of law” means:

the appearance *as an advocate in a representative capacity* or the drawing of papers, pleadings or documents or the performance of any act *in such capacity* in connection with proceedings pending or prospective before any court, commissioner, referee or

any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(2) (emphasis added). The Tennessee Supreme Court Rules define the practice of law for purposes of determining who must pay certain periodic assessments. This definition states:

[t]he term, “the practice of law” shall be defined as any service rendered involving legal knowledge or legal advice, *whether of representation, counsel or advocacy*, in or out of court, rendered in respect to the rights, duties, regulations, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law.

Tenn. Sup. Ct. R. 9, § 20.2(e) (emphasis added). The plain language of both definitions contemplate action in a representative capacity, either as an advocate for the interests of another or as a counselor concerning a client’s rights, obligations or affairs.

Mediation, by contrast, does not involve those elements. The Tennessee Supreme Court Rules define mediation as “an informal process in which a *neutral person* conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.” Tenn. Sup. Ct. R. 31, § 2(f) (emphasis added). Likewise, mediation is also defined as a “method of non-binding dispute resolution involving a *neutral third party* who tries to help the disputing parties reach a mutually agreeable solution.” BLACK’S LAW DICTIONARY 1003 (8th ed. 2004) (emphasis added). Under these definitions, a mediator is not acting in a representative capacity but, instead neutrally assists parties to a dispute in achieving agreement. It is therefore the opinion of this office that “mediation” as defined above does not constitute the “practice of law.”

2. The Tennessee Code states that “[d]istrict attorneys general are prohibited from engaging in the practice of law.” Tenn. Code Ann. § 8-7-104. We interpret this prohibition as intended to forbid District Attorneys General and their Assistants from performing legal services for clients outside the scope of their official duties as representatives of the State of Tennessee. Because a mediator as defined above does not engage in the practice of law, a District Attorney General or an Assistant District Attorney General would not violate Tenn. Code Ann. § 8-7-104 by performing mediation services during “off hours.”

Although a mediator does not represent the parties to a mediation, certain elements of a mediator’s role could conceivably require the mediator “to examine the law or pass upon the legal effect of any act, document or law.” Tenn. Sup. Ct. R. 9, § 20.2(e). For example, a mediator arguably has a duty to ascertain whether a party to a mediation understands “how an agreement may adversely affect legal rights or obligations.” Tenn. Sup. Ct. R. 31, Appendix A, § 8 (b). Performing such functions would not constitute the “practice of law” as defined in Tenn. Code Ann. § 23-3-

101(2), because they are not undertaken in a representative capacity.¹ Whether the performance of such functions would trigger liability for periodic assessments under Tenn. Sup. Ct. R. 9, § 20.2, is a matter for the Supreme Court to determine in the exercise of its plenary authority to interpret and apply its own rules.

Additionally, because District Attorneys General and Assistant District Attorneys General have unique obligations to the public, a mediator who holds one of these offices should consider securing appropriate advice from the District Attorney General or the judges before whom they are assigned to appear as public prosecutors to ensure that performing mediation services during “off hours” does not create actual or apparent conflicts with the primary job functions of the District Attorney General’s Office.

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¹ The Supreme Court requires “Rule 31 Neutrals” who conduct non-binding arbitration, preside over mini-trials or act as “evaluators” in general civil cases or family cases to be licensed attorneys. Tenn. Sup. Ct. R. 31, §§ 14-16. The conduct of lawyers acting as Rule 31 Neutrals in these situations could conceivably fall within the definition of “law business” under Tenn. Code Ann. § 23-3-101(1). Persons merely performing as Rule 31 Mediators, however, are not engaged in either “law business” or the “practice of law.”