

## FORMAL OPINION NO. 2005-101

### Unauthorized Practice of Law: Lawyer as Mediator, Trade Names, Division of Fees with Nonlawyer

#### Facts:

Lawyer and Psychologist would like to form a domestic relations mediation service under the assumed business name of “Family Mediation Center.”

#### Questions:

1. May Lawyer act as mediator?
2. May Lawyer join with Psychologist to establish a mediation practice?
3. May they use the trade name “Family Mediation Center”?
4. What limitations, if any, exist on the potential allocation of work between Lawyer and Psychologist and on the allocation of fees or profits relating thereto?

#### Conclusions:

1. Yes.
2. Yes, qualified.
3. Yes, qualified.
4. See discussion.

#### Discussion:

1. *Lawyers as Mediators.*

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - (2) must clearly inform the parties of and obtain the parties’ consent to the lawyer’s role as mediator.
- (b) A lawyer serving as mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.

(d) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Pursuant to Oregon RPC 2.4, an Oregon lawyer who acts as mediator does not represent any of the parties to the mediation. This is why, among other things, the multiple-client conflict-of-interest rules set forth in Oregon RPC 1.7 do not apply. *Cf.* OSB Formal Ethics Op Nos 2005-94, 2005-46.

As long as Lawyer's conduct is consistent with Oregon RPC 2.4, Lawyer may act as mediator. For example, Lawyer could not, in light of Oregon RPC 2.4(b), draft a settlement agreement on behalf of divorcing spouses and then endeavor to file the parties' settlement agreement of record with the court without first obtaining the consent of the parties.

## 2. *Joining with a Nonlawyer to Provide Mediation Services.*

Oregon RPC 5.4 provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that;

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Nonlawyers can and do lawfully act as mediators. In addition, lawyers are at liberty to engage in businesses other than the practice of law. *Cf.* OSB Formal Ethics Op No 2005-10. If the mediation service to be formed by Lawyer and Psychologist does not involve the practice of law, there is no reason Lawyer and Psychologist cannot join together to provide mediation services. Moreover, if the practice of law is not involved, the Oregon RPCs do not govern the nature of the business entity created by Lawyer and Psychologist (e.g., as a partnership, as a jointly owned corporation, or in an employer-employee relationship).

The practice of law involves, among other things, the application of a general body of legal knowledge to the problems of a specific entity or person. Drafting settlement agreements for others constitutes the practice of law. *Cf. In re Jones*, 308 Or 306, 779 P2d 1016 (1989); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 377 P2d 334 (1962). See also OSB Formal Ethics Op Nos 2005-87 and 2005-20, and sources cited; *Kolker v. Duke City Collection Agency*, 750 F Supp 468 (DNM 1990).

If it is anticipated that the mediation service would involve the practice of law, such as by drafting settlement agreements, then Oregon RPC 5.4(b) and (d) prohibit Lawyer and Psychologist from forming a partnership, or professional corporation, or other association in which Psychologist owns an interest. Oregon RPC 5.5(a) is also relevant:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

*See also In re Jones, supra.* The net result of these provisions is that Lawyer may not aid or assist Psychologist in doing acts that would constitute the practice of law; that Lawyer and Psychologist may not form a partnership that includes the practice of law; that Lawyer may not work as Psychologist's agent or employee in providing legal services to others, and that Lawyer and Psychologist may not jointly own a corporation whose business consists in whole or in part of the practice of law.

### 3. *Use of a Trade Name.*

If the mediation service would not involve the practice of law, there would be no particular ethical limitation on the use of a trade name other than the general obligation to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3).

If the business of the mediation service includes the practice of law, attention must also be given to Oregon RPC 7.5(c).<sup>1</sup> The name "Family

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<sup>1</sup> Oregon RPC 7.5(c) provides:

(c) A lawyer in private practice:

(1) shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm;

(2) may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1; and

(3) may use in a firm name the name or names of one or more of the retiring, deceased or retired members of the firm or a predecessor law firm in a continuing line of succession. The letterhead of a lawyer or law firm may give the names and dates of predecessor firms in a continuing line of succession and may designate the firm or a lawyer practicing in the firm as a professional corporation.

As a general proposition, Oregon RPC 7.1 prohibits a lawyer from making any misrepresentations or misleading statements, impressions, or expectations in communications about the lawyer or the lawyer's services.

Mediation Center” appears to be permissible as a trade name that is not misleading. *Cf. In re Shannon/Johnson*, 292 Or 339, 638 P2d 482 (1982).

4. *Allocation of Profits or Fees.*

If the mediation service would not involve the practice of law, there is no ethical restriction on the allocation of profits or fees.

If the mediation service would involve the practice of law, Lawyer would be prohibited from sharing fees with Psychologist pursuant to Oregon RPC 5.4(a) but could hire Psychologist on a salary basis.<sup>2</sup> *Cf. OSB Formal Ethics Op Nos 2005-25, 2005-10.*

**Approved by Board of Governors, August 2005.**

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<sup>2</sup> Whether there are any ethical or legal limitations with respect to Psychologist’s practice that would prevent Lawyer from owning a part of Psychologist’s practice is a question that we have not been asked to consider and therefore do not consider. *Cf. OSB Formal Ethics Op No 2005-10.*

COMMENT: For additional information on this general topic or other related subjects, see THE ETHICAL OREGON LAWYER §§2.18–2.20, 12.3, 12.9–12.11, 12.15, 12.25 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§3–4, 9–10 (2003); and ABA Model Rules 2.4, 5.4–5.5, 7.5, 8.4(c).