

N.H. ETHICS OPINIONS ANNOTATED

AO 1993-94/17

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1993-94/17
Conflict of Interest/Attorney serving as Mediator in District Court ADR Program/
Firm Member Serving as District Court Special Justice
May 11, 1994

RULE REFERENCES:

- *Rule 1.11A
- *Rule 1.12A
- *Rule 2.2
- *Rule 2.2(c)
- *Rule 6.1
- *Rule 8.4(d)

STATUTORY REFERENCES:

- *R.S.A. 502-A:21

SUPREME COURT RULES REFERENCES:

- *Rule 38

SUBJECTS:

- *Alternative Dispute Resolution
- *Attorney/Client Relationship
- *Conflict of Interest
- *District Court
- *Mediators
- *Part-time Judge

SUPERIOR COURT RULES REFERENCES:

- !!!Rule 170(e)

CODE REFERENCES:

- EC 5-20

ANNOTATION:

An attorney may appear as an advocate in the same district court where the attorney is a volunteer mediator in an alternative dispute resolution program, only if the attorney has not provided mediation services in the matter.

An attorney may serve as a mediator in an alternative dispute resolution program in the same court where a member of the attorney's firm serves as a special justice.

Statutory law prohibits an attorney from practicing in the same district court where a member of the attorney's firm serves as a special justice. An attorney, however, may appear in other district courts where the member of the firm who is a special justice does not sit.

FACTS:

The inquiring attorney serves as a mediator in an alternative dispute resolution program (ADR) at a local district court. The program is similar to the “neutral evaluation” ADR in Superior Court established and governed by Superior Court Rule 170. The attorney serves as a neutral facilitator to settle small claims and minor civil suits.¹ If the mediation is successful, the attorney drafts a settlement agreement which is subject to court approval. If approved, the agreement becomes an order of the court. Participation in the program is entirely voluntary; the parties or the attorney may terminate the mediation process at any point and proceed in court.

The attorney is not compensated in any way for his or her services as a mediator. The attorney spends approximately three (3) hours a week serving as a volunteer mediator.

Another lawyer in the inquiring attorney's firm may be appointed as a special justice in the same local district court where the attorney serves as a volunteer mediator.

QUESTIONS:

A. Is it proper for the attorney to provide voluntary alternative dispute resolution services to a court on a regular basis and at other times appear before the same court as an advocate in various matters which were not subject to ADR?

B. Where one member of a firm is a special justice for a district court, to what extent, if any, is another member of the firm precluded from serving that district court as a volunteer mediator?

C. Where one member of a firm is a special justice for a district court, to what extent, if any, is another member of the firm precluded from appearing before that district court as an advocate?

D. Where one member of a firm is a special justice for a district court, to what extent, if any, are members of the firm (including the special justice) precluded from appearing in other district courts within the state as an advocate?

RESPONSES:

A. An attorney may appear as an advocate in the same district court where the attorney is a volunteer mediator in an alternative dispute resolution program, when the attorney has not provided mediation services in the matter.

The New Hampshire Rules of Professional Conduct encourage attorneys to provide public service. (See Rule 6.1, 1.11A). The Rules also permit attorneys to serve as mediators. See NHOp 1990-91/9(A lawyer may serve as an arbitrator or mediator in a dispute among parties who are not his or her clients.) Alternative dispute resolution programs such as the one described benefit the public by expediting the resolution of minor civil matters without cost to the parties and conserving limited judicial resources. Members of the Bar should be encouraged to participate in these programs.

An attorney participating in a program in which participation by all parties (including the attorney) is entirely voluntary is not comparable to a special justice who is specifically precluded by statute and the Rules of Professional Conduct from appearing in the same court where he or she sits.² The attorney does not have any judicial authority to control the proceeding, issue orders to the parties, or enforce any directive. The mediator is not paid by the State or in any way compensated. It should be noted that the role of such a neutral evaluator in the Superior Court ADR is described as quasi-judicial. The attorney functions under the “umbrella of the Court” for immunity purposes. See Superior Court Rule 170(e). However, this does not convert the attorney into a special judge who would be barred from practicing in that court under any circumstances. The contrary conclusion would extract an unconscionably high price for laudable pro bono publico service to that court.

An attorney providing such important voluntary services to the court should be aware of the strictures of Rule 8.4(d) which states “It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official.” It would be misconduct for the attorney to in any way suggest to clients that the attorney would have some advantage appearing in the same court where the attorney is serving as a mediator.

B. An attorney may serve as a voluntary mediator in an alternative dispute resolution program in the same court where a member of the attorney's firm serves as a special justice.

As noted below in C, the law prohibits an attorney from practicing in a court where another lawyer associated with the attorney serves as a special justice. (R.S.A. 502-A:21).

However, an attorney serving as a volunteer mediator is not practicing law in that court. Neither party is a client of the mediator. The mediator does not appear in the matter for either side, nor could the mediator become an advocate for either party should the mediation fail. See NHOp 1989-90/15: (“The roles of attorney and mediator are mutually exclusive. One cannot serve as an attorney and mediator in the same case.”) See also Michigan Ethics Opinion CI-1100 annotated in ABA/BNA Lawyers Manual on Professional Conduct 801:4897. (“A lawyer may not accept employment in a matter in which he previously served as a mediator. A mediator is a quasi-judicial official and must comply with the provisions governing disqualifications of judges.”) See also Rule 2.2(c) and A.B.A. Model Code of Professional Responsibility EC 5-20.

C & D. An attorney may not appear in the same court where another lawyer associated with the attorney serves as a special justice.

R.S.A. 502-A:21 states in part:

No attorney shall be permitted to practice before any district or municipal court where any justice, associate justice or special justice thereof is associated with said attorney in the practice of law.

Nothing in the Rules of Professional Conduct would prohibit the attorney from practicing in other district courts where a member of the attorney's firm does not sit as a special justice. However, the prohibition against an attorney implying or suggesting some special ability to influence the court because a member of the firm is a special justice in another court must be kept in mind. See Rule 8.4(d).³

¹Thus, Rule 2.2 governing “Intermediaries” does not apply as none of the parties is a client of the attorney/mediator. See the New Hampshire and A.B.A. Model Code Comments to that Rule.

²Rule 1.12A states “A lawyer who regularly serves as a part-time judge may not practice in the court where he or she serves as a part-time judge.” See also R.S.A. 502-A:21.

³This opinion does not consider the conduct of the special justice. A special justice is subject to the higher standards of the Code of Judicial Conduct set out in New Hampshire Supreme Court Rule 38 and R.S.A. 502-A:21.