Serving as a Mediator or Arbitrator

If you or any other members of your firm serve as mediators or arbitrators in civil disputes,[1] you might be interested in a malpractice suit recently filed in a New York trial court[2] against the well-known firm of Sullivan & Cromwell LLP claiming that the firm represented a client in a matter in which one its partners, James Carter, had previously been an arbitrator, all in violation of New York's equivalents to Arizona's ERs 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral) and 1.10 (Imputation of Conflicts of Interest: General Rule).[3]

ER 1.12 provides, among other things, that a lawyer shall not represent anyone in connection with a matter in which that lawyer participated "personally and substantially"[4] as "an arbitrator, mediator or other third-party neutral" unless all parties involved give their informed consent,[5] confirmed in writing. The evil sought to be avoided here is not only to prevent a lawyer, who has already been involved in deciding the facts of a case in favor of one side or the other, from undertaking a representation for any party claiming that some or all of those facts are still at issue. Confidences received while mediating or arbitrating also might be compromised, and there is also the risk that the mediator or arbitrator might favor one side or another to attract future employment as a lawyer.[6]

Determine who in your firm is presently serving or who has recently served as a mediator, arbitrator or third-party neutral in a matter and put the names of the parties involved into your firm's conflict system.

Thus, there is an exception in ER 1.12(d) that provides the rule does not apply to an arbitrator selected as "a partisan" of a party where a multimember arbitration panel is employed. There, each party gets to pick a partisan arbitrator it thinks is sympathetic to its position, and then those arbitrators pick a "neutral" arbitrator to complete (and usually chair) the panel. ER 1.12 further provides that if a lawyer is disqualified under the rule because one or more of the parties refuses to consent, thereby potentially disqualifying every member of that lawyer's firm by virtue of ER 1.10, another member of the lawyer's firm can in fact represent the client if the disqualified lawyer is effectively "screened,"[7] as defined in ER 1.12(c), which includes written notice thereof being given to the parties and to "any appropriate tribunal."[8]

While it appears that the screening provision was originally designed to allow a full-time arbitrator or mediator to join a new firm as a lawyer, it can just as easily be applied to a temporary assignment for a lawyer who then returns to her existing firm.[9] The way ER 1.12 is written, if the appropriate parties consent to the potentially disqualified lawyer's representation, no screening is necessary. By the same token, if the potentially disqualified lawyer can be effectively screened, the informed consent of the appropriate parties is not required.[10]

The New York case involves an underlying dispute between two Laotian companies arising as part of the breakup of a joint venture in which they were the members. The joint venturers agreed to arbitrate in Malaysia pursuant to the terms of their agreement, which also called for a three-member panel like the one described above. The neutral arbitrator chosen, who chaired the panel, was Mr. Carter.

The panel proceeded to find in the claimant's favor to the tune of over $56 million. The claimant's lawyer, Andrew Delaney, had the case on a contingent fee. When he proceeded on behalf of his client to enforce the award, he discovered that the judgment debtor had hired other members of the arbitrator's firm to attempt to avoid paying the very award that the arbitrator had signed and ordered and, to add insult to injury, had even submitted an amicus brief in another case opposing the enforcement of foreign arbitration awards. When Sullivan & Cromwell's client was successful in having the Malaysian award set aside, Mr. Delaney filed suit against the firm, alleging malpractice based on the breaches of the New York versions of the ethics rules discussed above, and which Mr. Delaney claims were not honored (i.e., violated) by the firm. The alleged damages? The contingent fee that couldn't be collected due to the firm's efforts, plus compensatory and punitive damages.

However this is resolved—including whether the firm was unaware of Mr. Carter's involvement in the underlying arbitration or of its ethical violations as alleged—the

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Ethics Opinions and the Rules of Professional Conduct are available at HTTPS://azbar.org/for-lawyers/ethics/

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court, and he practices at David D. Dodge, PLC in Phoenix.

reputation of the defendant and the amount of money the plaintiff is demanding ensure that we haven't heard the last of the matter.

Finally, this column was never intended or designed to provide legal advice to readers. That said, it might be a good idea to determine who in your firm is presently serving or who has recently served as a mediator, arbitrator or third-party neutral in a matter and to put the names of the parties involved into your firm's conflict system. The same goes for any laterally transferring lawyer who might be joining your firm—even if only as "of counsel."[11]

endnotes

1. This would presumably include assignments provided for in Rule 73, ARIZ.R.CIV.PRO.
2. *Delaney v. Sullivan & Cromwell LLP,* Index No. 657556/2019, Supreme Court for New York County, New York (Dec. 18, 2019); ABA/BNA LAW. MAN. OF PROF. CONDUCT, Current Reports (Dec. 25, 2019).
3. Rule 42, ARIZ.R.S.CT. Both New York and Arizona have adopted the ABA Model Rules of Professional Conduct, with minor exceptions not relevant here.
4. *See Security Gen'l Life Ins. Co. v. Superior Court,* 718 P.2d 985, 987 (Ariz. 1986) (lawyer who served as Director of Department of Insurance, and who merely signed and issued orders prepared by others, had no personal or substantial involvement in the investigation to warrant disqualification as counsel for insurance company).
5. A defined term. *See* ER 1.0 (Terminology) at subsection (e).
6. *See* discussion on this point in HAZARD, HODES & JARVIS, THE LAW OF LAWYERING §17.02 (4th ed. 2014).
7. Another defined term. *See* ER 1.0 at subsection (k).
8. Note that this definition differs slightly from the acts required by ER 1.10(d)(3).
9. There is nothing in the legislative history of the rule to indicate there is presently a distinction if in fact there ever was one. *See* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 (ABA Center for Prof. Resp. (2013)) at 299.
10. *See Roosevelt Irrigation Dist. v. Salt River Project Agric. Improvement & Power Dist.,* 810 F.Supp.2d 929, 949-50 (D. Ariz. 2011) (describing the screening notice that must be given to the parties and the tribunal, keeping in mind that ER 1.12 was amended in 2016 to add the requirements the firm must provide when giving notice to the parties and the tribunal, including a description of the screening procedures, when they were adopted, a statement that the screen has not been breached and that any inquiry or objection to the screening procedures described will be promptly addressed).
11. *See* Ariz. Ethics Op. 16-01 (Of Counsel; Fee Splitting) (April 2016) (lawyer who is "of counsel" to firm is "associated" with firm for purposes of ER 1.12(c).