

11/19/91

N. H. ETHICS OPINIONS ANNOTATED

FO 1989-90/15

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1989-90/15
Marital Mediation: Representing Both Parties
July 25, 1990

RULE REFERENCES:

- *Rule 1.6
- *Rule 1.7
- *Rule 2.2

SUBJECTS:

- *Conflict of Interest
- *Consultation
- *Domestic Relations
- *Law Firms
- *Mediation
- *Referrals

CODE REFERENCES:

- *DR5-105 (b)

STATUTORY REFERENCES:

- *RSA 328-C

ANNOTATIONS:

A member of the bar may serve as a marital mediator so long as the attorney complies with those provisions of the rules of professional conduct that apply at all times to attorneys in any capacity. (Rule 1.7; Rule 2.2)

An attorney serving as a marital mediator pursuant to RSA 328-C is not serving as an attorney for either party and is, therefore, not acting as an intermediary between clients. (Rule 2.2)

An attorney serving as a marital mediator shall not give legal advice to either party, and shall so inform both parties. Should any mediation agreement be reached, the attorney-mediator should advise each party to have the agreement reviewed by an independent attorney.

QUESTION:

May a practicing New Hampshire attorney act as a marital mediator with the consent of a divorcing couple; i.e, as an impartial third person to assist and enable the divorcing couple to work together to reach a mutually satisfactory settlement of the issues involved in their divorce?

BRIEF RESPONSE:

It is permissible for a practicing New Hampshire attorney, with the consent of the parties to a divorce to assist and enable those parties within the framework of RSA 328-C to work together to reach a mutually satisfactory settlement of the issues involved in their divorce provided that the attorney adheres to, and takes reasonable steps to assure ongoing compliance with all provisions of the rules of professional conduct.

RESPONSE:

1. Prior Decisions and Introduction

The Ethics Committee has been asked to reconsider whether under any circumstances a practicing attorney may serve as a "marital mediator" as now defined by statute pursuant to RSA 328-C (effective January 1, 1990).

Heretofore, the Committee, in formal and advisory opinions, has held that it was not proper for an attorney to serve as a marital mediator. However, these opinions, some of which relied on the prior Code and some on the present Rules of Professional Conduct, all dealt with specific proposed mediation structures. Specific reference is made to NH Op #1983-4/4, NH Op #1986-7/2, and NH Op #1987-8/3. The proposed mediation structures set forth in these prior inquiries placed the attorney in the position of rendering legal advice to both parties of a divorcing couple, thereby threatening violation of Disciplinary Rule 5-105 (b) under the prior Code, and Rules 1.6 (maintaining client confidentiality) and 1.7 (maintaining loyalty to the client) of the present Rules of Professional Conduct. The Committee also analyzed whether under Rule 2.2 a lawyer may act as intermediary between two divorcing clients, and concluded that Rule 2.2 was neither appropriate nor intended to apply to domestic disputes.

The Committee is of the opinion that pursuant to RSA 328-C and subject to the guidelines hereinafter set forth, an active member of the bar may with the consent of the parties to a divorce, assist both parties in working to reach a mutually satisfactory settlement of the issues involved in their divorce.

2. Discussion

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The Committee acknowledges that not every divorcing couple desires to resolve the differences raised by their divorce within the context of litigation. Some couples would prefer to participate in a process of divorce mediation with trained marital mediators to assist them in a less adversarial setting than might otherwise be the case within the context of litigation. The present number of divorce and domestic cases pending in the New Hampshire Superior Courts often results in parties having to wait months for any type of temporary or final hearing. This situation can result in additional destructive pressures being placed upon the parties as well as any minor children. Alternative methods of resolving disputes which arise between divorcing couples, such as mediation, may be desirable. Lawyers, because of their training and experience, may be well suited to act as mediators for a divorcing couple desiring to participate in the mediation process.

The Committee acknowledges that an attorney may be qualified to serve as an impartial third person to assist the parties in arriving at a mutually satisfactory resolution of the issues in their divorce where that attorney is experienced in the law relating to domestic disputes. Under such circumstances, it would appear to serve no purpose that a member of the bar be disqualified from serving as a marital mediator simply because he or she is a lawyer.

Having said this, the Committee believes that a member of the bar who wishes to serve as a marital mediator does so outside of the role of a practicing attorney. Rather than representing the interests of only one party, a marital mediator represents no one and works with both parties for the purpose of arriving at a negotiated settlement of the issues involved in the divorce. The roles of attorney and mediator are mutually exclusive. One cannot serve as an attorney and mediator in the same case. Although an attorney who is serving as a divorce mediator must comply with those provisions of the Rules of Professional Conduct that apply at all times to attorneys in any capacity, RSA 328-C sets forth the legal definition of a "marital mediator", and provided that an individual serves in that capacity and not in the capacity of an "attorney", a practicing attorney may be deemed as serving as a "mediator" and not as an "attorney". Accordingly, the Committee reaffirms its prior holding that Rule 2.2 is not an appropriate vehicle within which to conduct marital mediation.

The concept of a practicing attorney shedding that title and serving as a marital mediator raises the question of dual practice. The Committee has dealt with this issue in the attorney/realtor context, and has previously opined that a lawyer cannot conduct a real estate brokerage business from the lawyer's law office, but that a non-practicing lawyer may engage in an active and full time real estate business without violating the rules of professional conduct. Earlier opinions in 1970 and 1975 held that lawyers engaged in the active practice of law should not be permitted to engage in a dual attorney/realtor practice. (See, inquiry 1989-90/12 for a more detailed discussion of the dual practice issues implicated in the attorney/realtor context.) The "potential pitfalls" involved in permitting a practicing attorney to conduct a real estate brokerage business

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are numerous. Given the private nature of real estate transactions and the personal and financial stake which a realtor has in the outcome of every transaction, the ethical problems impacting upon the attorney's ability to exercise independent professional judgment are not easily amenable to solution by the imposition of standards and guidelines short of a prophylactic prohibition, and are never subject to neutral third party review, absent subsequent litigation.

A final divorce agreement, however, requires judicial review and approval based upon standards of equity and fairness. The Committee, therefore, concludes that a member of the Bar may serve as a marital mediator, as defined by RSA 328-C, but only so long as the following requirements are strictly adhered to so as to avoid conflict with the rules of professional conduct:

1. Before serving as a marital mediator, the attorney shall meet all certification requirements set forth in RSA 328-C.
2. The attorney may not give legal advice to either party involved in the mediation process.
3. The attorney shall not serve as a marital mediator when either party to a divorcing couple is or has been a client of the attorney.
4. An attorney shall not serve as a mediator to a divorcing couple if the attorney has rendered advice or discussed the parties marital problems with either of the divorcing parties.
5. The attorney should strongly suggest that each of the divorcing parties maintain ongoing consultation with an attorney during the mediation process.
6. A written agreement should be entered into between the attorney and the divorcing parties clearly setting forth that the attorney will not be rendering legal advice to either party and will be limiting his or her role to that of being a marital mediator as defined by RSA 328-C.
7. That the aforesaid written agreement should make specific provisions for payment of the mediator, and should specifically state that the attorney is being paid for his or her services as a marital mediator only and is not being compensated for the purpose of rendering legal advice to either of the parties.
8. The attorney must inform both parties from the outset that he or she shall not represent either or both of them in Court divorce proceedings.

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9. In the event an agreement is reached by the parties through mediation, the attorney should advise the parties that they should each have the agreement reviewed by an independent attorney of each persons own choosing.

10. The attorney shall adhere to the confidentiality requirements set forth in RSA 328-C:9 pertaining to the privileged nature of the mediation proceedings and must inform both parties of this from the outset.

CONCLUSION:

An attorney may serve as a marital mediator within the meaning of RSA 328-C so long as he or she adheres to the Rules of Professional Conduct and the guidelines set forth in this opinion. An attorney serving as a marital mediator is not serving as an attorney for either divorcing party and therefore is not serving as an intermediary within the meaning of Rule 2.2. Neither of the divorcing parties are clients of the attorney-mediator.

The mediator who is a practicing attorney is still subject to the rules of professional conduct that apply at all times to attorneys in any capacity.