

NEW HAMPSHIRE BAR ASSOCIATION ETHICS COMMITTEE  
Advisory Opinion #1987-88/3  
Marital Mediation/Consultation by Retired Attorney  
November 10, 1987

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RULE REFERENCES:

- \*Rule 1.5(f)
- \*Rule 1.7
- \*Rule 1.8

SUBJECTS:

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

ANNOTATIONS:

An attorney may not properly render services in a divorce mediation service. (Rules 1.7; 1.8)

Separate law office and divorce consultation offices would not cure a Rule 1.7 and 1.8 ethical conflict. (Rules 1.7; 1.8)

Fee divisions between counsel may be made only with client consent after full disclosure; in reasonable proportion to the services performed or responsibility or tasks assumed by each, and the total fee of the lawyer is reasonable. (Rule 1.5(f))

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I. Introduction

The inquiring attorney has advised us that she plans to retire from the active practice of law by year end. She is interested in pursuing two alternatives upon her retirement: a) providing divorce mediation services to parties interested in an alternative to litigation and b) serving as a consultant to attorneys in matrimonial matters. We shall address these proposals separately,

II. An Attorney's Involvement in Mediation Program After Retirement From Active Practice Of Law

The inquiring attorney has asked the following specific questions:

1. As a mediator, can I tell parties what, in my experience, a Court would be likely to do given the factual circumstances of their particular cases.
2. Can I assist parties in formulating a Permanent Stipulation.
3. Can I advise clients concerning the mechanics of filing an uncontested divorce.

4. Can I provide assistance to parties who wish to file an uncontested divorce by supplying forms and instructions.
5. As a divorce mediator, can I retain my name on the letterhead of my firm, so long as the word "retired" appears in parentheses after my listing on the letterhead.
6. Can I continue to receive financial remuneration from my law firm based on previously performed services and/or new cases originating as the result of my reputation.

While the inquiring attorney has indicated that the lawyer intends to retire from the active practice of law, it does not appear from the letter that the lawyer intends to resign as an active member of the New Hampshire Bar Association and give up the attorney's license to practice law in this State.

Under the former Code of Professional Responsibility, the Ethics Committee has previously determined that attorneys may not properly render services in a divorce mediation service. See NH Op 1983 - 4/4. More recently, the Committee reached the same conclusion under the New Hampshire Rules of Professional Conduct. See NH Op 1986 - 7/2. We continue to believe that the rationale of these opinions is fully consistent with the Rules of Professional Conduct. See Rule 1.7 and Rule 1.8. As the opinion states:

The vast differences of interest of the two divorcing clients create an impermissible conflict of interest for the consulting attorney. Given a finite amount of income, property, children and visitation time, the differing interests of the divorcing persons are highly apparent.

It appears that the expertise the inquiring attorney will be offering in mediation is based primarily on her legal training and experience. As such, it does not appear that any waiver or disclaimer by the parties involved in mediation services would be sufficient to overcome the ethical problems inherent in the relationship. The difficulty in delineating the attorney's role as mediator from the attorney's position as an advocate would be exacerbated if the attorney were to continue to maintain a position on the letterhead of an active law firm and provide legal consulting services.

Accordingly, we are of the opinion that so long as the inquiring attorney holds a license to practice in New Hampshire, the attorney may not properly participate in a mediation service.

### III. Service As A Consultant In Matrimonial Cases

The inquiring attorney has asked the following specific questions:

1. Is this contemplated consultant service acceptable to the committee?
2. Can I offer this service at the same time I am mediating divorce cases so long as I utilize separate offices and separate addresses?

The second question can be easily disposed of in light of our discussion in Section II, above. Since we do not believe that the inquiring attorney can ethically be involved in providing mediation services, separate offices and addresses for a consultant practice would not cure the ethical problems.

With respect to the first question, the Committee can only indicate whether based on the facts presented, the proposed consultant arrangement would be consistent with the Rules of Professional Conduct. We do not believe that any Rule would prohibit an arrangement as described. The Rules do prescribe certain requirements for proper disclosure to clients about the scope of representation and the fee to be charged for services rendered. For example, Rule 1.5 (f) provides as follows:

A division of fee between lawyers who are not in the same firm may be made only if: (1) the client consents to employment of the other lawyer after a full disclosure that a division of fees will be

made; (2) the division is made in reasonable proportion to the services performed or responsibility or tasks assumed by each; and (3) the total fee of the lawyer is reasonable.

Any consulting arrangement would have to comply with this and any other pertinent Rule.