

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1986-87/2
Representing Both Parties in Marital Mediation
(2nd Consideration of Opinion)
October 14, 1986

RULE REFERENCES:

- *Rule 1.6, comments
- *Rule 1.7
- *Rule 2.2

CODE REFERENCES:

- *DR5-105(b)
- *DR5-105(c)

SUBJECTS:

- *Adverse Representation
- *Attorney-Client Privilege
- *Conflict of Interest
- *Confidentiality
- *Domestic Relations
- *Mediation
- *Multiple Representation
- *Spouses

ANNOTATION:

An attorney rendering mediation service to both parties in a divorce, will probably be violating both Rule 1.7 (conflict of interests and representation adverse to another client) as well as Rule 2.2 (outlining situations whereby attorney can properly act as an intermediary between clients). (Rules 1.7; Rule 2.2)

QUESTION:

The Ethics Committee issued a formal opinion dated October 11, 1983, discussing the ethical aspects of attorneys rendering services in a divorce mediation program. The opinion of the committee as set forth therein was based on the New Hampshire Code of Professional Responsibility in effect at that time. Do the present Rules of Professional Conduct adopted January 16, 1986, mandate a different result?

RESPONSE:

Under the prior code it was the opinion of the Committee that one attorney's rendering of legal services to both parties of a divorcing couple in the circumstances set forth was not ethically proper inasmuch as this would constitute representation of "clients with differing interests" which was precluded under DR5-105(b), and that "no disclosure under DR5-105(c) would be sufficient to cure the conflict...". The Committee noted that its answer would be the same under Rules 1.7 and 2.2 of the 1983 American Bar Association Model of Rules of Professional Conduct.

Rule 1.7 of the New Hampshire Rules of Professional Conduct prohibit representation of a client if the representation will be directly adverse to another client, or if the representation may be materially limited by the lawyer's responsibilities to another client or third person. Although Rule 1.7 sets forth categories of exceptions to these general rules, the Committee doubts that the exceptions justifying representation can be satisfied in the circumstances set forth in the original inquiry.

Likewise, the circumstances set forth in the original inquiry cast doubt upon the ability of an attorney to act as intermediary within the parameters set forth in Rule 2.2. As the 1983 Committee opinion stated: "Even if it is not an adversary proceeding, the divorce of a marriage involves deep feelings that could not be probed unless the attorney had the client's undivided confidence."

Under Rule 2.2, a lawyer may act as an intermediary only if certain specific preconditions are met. First, the attorney must warn each client of the implications of joint representation, and obtain their consent. Second, the lawyer must reasonably believe that a mutually agreeable resolution of the issues can be achieved, and that each client has the capability of making informed decisions with little risk of material prejudice to either of their interests. Third, the lawyer must reasonably believe that he can represent both parties impartially without improper effect on his responsibilities to either client.

While in some instances an attorney may be able to satisfy each of the aforementioned requirements, in most cases the answers will be, at best, unclear. Further, loss of attorney-client confidentiality in the mediation process, if the process fails, could later severely prejudice one or both of the parties. See ABA Comments to Rule 1.6 New Hampshire Rules of Professional Conduct.

Domestic disputes are qualitatively different from the examples of permissible mediation discussed in the comments to Rule 2.2.

Given the often deeply emotional and personal issues involved in every divorce coupled with the reality that every divorce involves judicial proceedings, the Committee strongly believes that there are few instances in which it would be ethically permissible for an attorney to serve as an intermediary in a domestic dispute.