

Divorce Mediation

Ethics Committee Formal Opinion

March 16, 1982

Reviewed by Board of Governors 3/25/82

Question: The attorney requesting the Opinion has proposed conducting a divorce mediation service between present clients who are husband and wife, prior to either party filing for divorce. The attorney plans not to represent either client if mediation breaks down, and to require an agreement that he will not be called as a witness of one party unless the other party consents.

Discussion: The Committee does not approve the private divorce mediation proposal as submitted for it raises ethical problems for which adequate safeguards have not been proposed.

1. Private divorce mediation as stated in the submitted question does not adequately safeguard the potential for a violation of DR 5-105 which prohibits employment that "would be likely to involve an attorney in representing differing interests except to the extent allowed by DR 5-105C" which permits such multiple representation "if it is obvious that the attorney can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." See DR 105 (A-C); E 5-14, EC 5-15 and EC 5-16; ABA Informal Opinion 1157 (July 10, 1970).

2. The secrets or confidences of both clients will undoubtedly be expressed to the mediator in divorce mediation and it is doubtful that under the present status of "mediators" in our judicial system whether the mediator could invoke the attorney client privilege to prevent disclosure of secrets of and confidences of the clients in subsequent divorce litigation or other litigation. This causes attorney/mediator problems under Canon 4 dealing with the preservation of confidences and secrets of a client.

3. Given these facts, where an attorney has previously represented both clients, subsequent divorce mediation by that attorney should not be undertaken in our opinion because of Canon 9. However, no opinion is rendered on other mediation formats with multiple mediators or no previous attorney client relationship with the mediator.

The Committee limits this Opinion only to the private mediation proposed in this question. Other mediation plans for divorce or other purposes with adequate safeguards may have no ethical problem. Any attempt at mediation should clearly delineate the lawyer's role as mediator versus his role as an advocate and make certain there are adequate safeguards for any previous or subsequent nexus between these roles with either party to the mediation. Judicial recognition of mediators as quasi judicial officers would greatly aid the Canon 4 problem.