

COMMITTEE OF PROFESSIONAL RESPONSIBILITY  
OF THE BOSTON BAR ASSOCIATION.

formerly the Committee on Ethics

BOSTON BAR ASSOCIATION - COMMITTEE ON ETHICS

OPINION #78-1

SUMMARY OF OPINION

FACTS

A lawyer proposes to provide legal services to a married couple considering divorce. He intends to limit his role to mediation and to the drafting of a separation agreement and related documents setting forth the terms agreed upon in the mediation. The mediator will refrain from representing either of the parties in any proceedings between them and he will also advise each of them to obtain review of all documents or agreements before signing by a lawyer of each spouse's own choice.

We have been asked to advise as to the propriety of the proposed course of action.

DISCUSSION

We are, strictly speaking, considering here a request for advice from an attorney who proposes to act not as an attorney but as a mediator. An attorney is certainly free to act as mediator, and there is nothing in the Code of Professional Responsibility that governs his conduct in that office. Ethical Consideration 5-20 specifically permits an attorney to act as

mediator and provides only that he may not thereafter represent in the dispute any of the parties involved. This condition will as already stated be satisfied by the lawyer who requested our opinion.

This then leaves only the question of whether in our view the proposed approach is so likely to be harmful, that no lawyer should participate in it, even though he is not doing so as an attorney. Our committee perceives problems with the proposed conduct, and these will be explained later in this opinion. However, there are problems with each possible approach and the disadvantages of the one proposed here do not seem to be so grave and overwhelming as to preclude a husband and wife from choosing it, particularly if they are advised of the various alternatives and the benefits and drawbacks of each.

A husband and wife may agree on the terms of their divorce in pro se proceedings, or they may each be represented by counsel in every aspect of the proceeding or they may try to work out a settlement through mediation or arbitration. A number of combinations among these approaches is, of course, also possible.

Each approach has its advantages and disadvantages. The pro se proceeding is likely to be the least expensive, at least in the short run. However, in ignorance of the applicable laws and customary methods of dealing with the problems, the parties may agree on arrangements that are entirely inappropriate and

quite likely unnecessarily disadvantageous to one or even both.

A proceeding in which husband and wife are each represented by competent counsel is most likely to assure that all considerations favorable to a client will be brought forward and given their due weight, regardless of the possibly unequal personal bargaining power of the parties. However, the cost of this proceeding both in time and in the emotional toll to the participants may be substantial.

A mediation approach should give the clients a better basis of information as to the applicable law and the normal terms of separation, support, child visitation, taxation and the like than would be available if the parties proceeded without legal advice and may possibly do so at a lower cost both in money and in emotional distress to the participants than full scale legal representation.

Because of these potential benefits of the mediation approach we do not feel that it should be barred: If the parties are to be advised as to the legal aspects by a person not engaging in the improper practice of law, that advice must be given by an attorney.

We want to make it clear, however, that as already indicated we foresee problems with the approach, problems both to the mediator, the parties involved and the attorneys that they may consult.

The mediator may find himself charged at some time following the conclusion of the proceeding that he did not fully explain to the complaining party all applicable considerations and that as a result the complainant was lead to agree to a settlement that he or she would not otherwise have accepted. The risk of such complaint against the mediator strikes us as greater than the risk of a similar complaint against an attorney. In the case of the mediator, the complainant may be concerned about the mediator's possible bias in giving advice. This is a concern that is less likely to arise in the mind of a client represented by an attorney free from conflict of interest.

The problem with the suggested approach for clients is that often because of differences in their personality or economic circumstances, their bargaining power is not equal. They may find that in the mediation, where they did not have the benefit of the advice and assistance of counsel, they made commitments that they subsequently regret and which are difficult, time consuming and expensive to renegotiate.

We can also foresee problems for the attorneys that may be consulted by the parties. A separation agreement cannot really be evaluated by one who has not participated in the negotiations leading to it and, therefore, cannot judge whether it appropriately reflects the views, needs, strengths and weaknesses of each of the parties. For this reason, some lawyers

may decline to advise the parties once they have negotiated a draft agreement with the assistance of the mediator. Other attorneys may undertake a full scale review leading to a reopening of the negotiations with additional expense to all concerned. Still other attorneys may be inclined under the circumstances to focus on the form of the agreement rather than its substance, with resulting potential risk both to their clients and themselves.

In the light of the problems cited, we cannot enthusiastically endorse the approach here suggested. On the other hand, we recognize that it may be beneficial in some cases and we would not therefore wish to preclude a lawyer from cooperating with clients who wish to experiment with it.

We are aware of the many authorities that hold that in a divorce proceeding a lawyer may not as attorney represent both parties. We have no quarrel with those authorities : An attorney is supposed to "represent a client zealously within the bounds of the law." Canon 7. The potential conflicts in a divorce are clearly too great to permit representation of both parties. The lawyer acting as mediator, however, does not represent either party, and he must make clear that he will not do so. As a result the weaker, less secure spouse may well give up in mediation what he or she would not have given up if competently represented at all stages. But as already indicated, in our view, the selection of the approach is up

to the parties and a lawyer may properly participate as mediator provided the lawyer makes sure that the parties understand what they are doing.

CONCLUSION

Based on the foregoing considerations, it is our opinion that an attorney may act as mediator in connection with the divorce and preparation of a separation agreement between husband and wife and in that connection may prepare either a separation agreement or the draft of a separation agreement. The lawyer should caution both of the parties that he will not be acting as attorney for either of them either in the mediation proceedings or in any subsequent proceedings relating to the matter. He should further explain fairly the benefits and disadvantages of the mediation approach and if the husband and wife indicate that they wish to retain attorneys at some stage of the proceeding, he should suggest that they speak to these attorneys at the outset both to obtain their advice on whether to follow the procedure and to determine whether the attorneys will, in fact, be willing to do the work the parties have in mind for the lawyers.

Robert J. Muldoon, Jr.  
Chairman