MASSBAR ASSOCIATION

Opinion No. 85-3

March 1985

Summary: An attorney may, in certain circumstances outlined, act as a single mediator or as a co-mediator with a lay family counselor in divorce mediation, provided that the attorney takes certain precautionary steps, including explaining to the parties that the attorney is not representing either party, explaining the risks of proceeding without independent legal counsel and obtaining the informed consent of each party.
An attorney may also represent both parties in drafting a separation agreement, the terms of which are arrived at through mediation, but must advise the parties of the advantages of having independent legal counsel review any such agreement, and must obtain the informed consent of the parties to such joint representation.
The attorney may associate with a non-lawyer mediator provided that the services provided by each of them are properly identified and attributed, clients are separately billed for services, and clients are not mislead as to the identity, responsibility and status of the participants.

Facts: An attorney advises that he wishes to engage in providing mediation services with a family counselor associate. He asks if it is proper for the attorney either as single or co-mediator to draft a separation agreement for the mediating parties. He also asks whether he may engage in advertising that identifies him as an attorney, which is undertaken jointly with his non-lawyer associate, and whether use of a trade name would be permitted. Finally, he asks whether payments from the participants in mediation may be divided with the co-mediator.

Discussion: We are asked to address a number of issues relating to professional responsibility problems that arise for lawyers in the context of their involvement in various kinds of divorce mediation. The increasing interest in divorce mediation has been spurred by concern for more efficient, less adversarial, and less costly mechanisms for divorce. At the same time, questions have been raised about the need for lawyers participation in such proceedings by reason of the inherently adversary quality of our present system of divorce, since it it generally results from conflict between the parties and involves a distribution of assets in a setting where whatever is given to one party is taken from the other. These problems are exacerbated by the fact that there are no widely accepted screening devices to help couples decide whether mediation is advisable for them. In addition, there is no standard way to conduct divorce mediation. Indeed, lawyers who participate in divorce mediation play a variety of roles, each of which raises different problems of professional responsibility. It is useful to describe the different models of divorce mediation that involve the participation of lawyers in order to provide some background for consideration of the issues and make clear what issues we are and are not addressing.
A. The Single-Lawyer Mediator. In this model, the attorney acts as sole mediator, undertaking to direct or to facilitate the parties' efforts to discuss, negotiate and compromise the emotional, financial and child-related issues that may be involved. The attorney's task is likely to involve explaining to the parties existing statutory and decisional law relative to divorce, advising each of them concerning probable outcomes in the event they litigate rather than mediate. The parties may or may not request the attorney to draft a separation agreement embodying the terms of any agreement reached in mediation.
B. The Lawyer Co-Mediator. A second mediation model involves the participation of a team of persons (generally, two) who mediate jointly. This model includes situations in which both mediators attempt to facilitate the resolution of all issues, as well as situations in which each mediator takes

responsibility for attempting to resolve some but not all issues. It is most common for one mediator to be an attorney and the other, a mental health professional. Any blending by the attorney co-mediator of the new role of facilitator with the performance of any of the more traditional representative lawyering functions will raise the same, as well as other, issues of professional responsibility as are raised by the single-lawyer mediator model.

C. The Lawyer-Advocate. A third mediation model involves a situation where each of the parties will hire his or her own attorney, who will then function largely, if not fully, in a traditional representative manner. The participation of a more or less traditional lawyer-advocate may take place from the inception of mediation, or even prior to it. Indeed, the lawyer-advocate participant may even initiate the mediation process by suggesting to his or her client that the matter might lend itself to this alternative method of resolution. In the mediation that follows, the lawyer-advocate may stay outside the negotiating process entirely, may participate only from the sidelines (i.e., not during the actual mediation sessions), may participate with the mediator and with the lawyer-advocate for the other party (such sessions may include the parties themselves or, analogously to labor mediation, may involve only the mediator and both attorneys), or may negotiate or even litigate stipulated issues excluded from or unresolved by the mediation. Finally, the lawyer-advocate participant may be brought in at any stage in the mediation process, in the event, for example, that the mediator wishes to shore up the process to equalize an unequal bargaining situation or, for another example, to effectuate the transition to an adversary proceeding if the mediation is headed for failure.

While the lawyer-advocate's role may be defined more narrowly than in a non-mediated divorce case, this third model does not otherwise involve any basic departure from the activities and attitudes embodied in the conventional lawyer-client relationship and does not, therefore, present special problems.

D. The Single-Lawyer Advisor. This fourth model involves the performance by an attorney of certain functions within the mediation process on behalf of both parties. The attorney may be selected by the parties or by the mediators. In fact, the most widely known booklength work in the divorce mediation field proposes that the mediation team should consist of a non-lawyer mediator who utilizes an attorney, chosen from a panel of attorneys who have undertaken some training in this method, to advise both clients on the procedural and substantive law of divorce and to draft the separation agreement that will contain the terms on which the parties have reached agreement through mediation. Coogler, Structured Mediation in Divorce Settlement.

The inquirer in this instance proposes to function as a single mediator or co-mediator, and therefore we address here only the professional responsibility issues raised by these models, separating the mediation services from those involved in drafting a separation agreement. We have not been asked and do not reach in this opinion the question of representation of the parties in subsequent stages of the proceedings.

Mediation Services: Earlier ethical opinions that have considered these issues analyzed the attorney's role as mediator as involving the attorney in representation of multiple clients, literally applied DR 5-105, which deals with representation of multiple clients, to the attorney as mediator, and tended to conclude that the conflicts inherent in matrimonial proceedings made such representation impossible in most cases. See opinions cited in Silberman, Professional Responsibility Problems of Divorce Mediation, 16 Fam. L.Q. 107, 113-15 (1982). Other analyses have attempted to reconcile DR 5-105 with the code's recognition in EC 5-20 that attorneys may serve "as impartial arbitrators or mediators" and with the legitimate desire to accommodate the right of parties interested in this form of resolution of issues to have the benefit of an attorney's impartial services. E.g. Boston Bar Opinion No. 78-1 (1978); New York City Bar Association Committee on Professional and Judicial Ethics No. 80-23 (1981); District of Columbia Bar Opinion No. 143 (1984).1

We do not view the attorney who acts solely as a mediator as representing either party in the sense that traditional adversarial concepts of "adequate representation" should govern. The role of the mediator is not a representational one vis-a-vis the parties but one of an intermediary, representing neither party and remaining impartial in an effort to help the parties resolve outstanding issues for themselves.

Certainly, to the extent that the attorney provides the mediating parties with information as to the legal consequences of various courses of action and draws upon his legal knowledge in identifying the issues to be resolved, he is using his legal skills. Presumably parties who seek an attorney as mediator as opposed to a lay counselor with expertise in other areas such as mental health do so in order to benefit from the attorney's training and skills. However, his assistance is not being rendered in a traditional attorney-client, representational relationship.

We agree with the views well expressed by the Committee on Professional and Judicial Ethics of the Bar Association of the City of New York, in its Opinion No. 80-23, that although the code should not read so as to bar divorce mediation by attorneys, caution must be taken to assure that the parties involved understand the attorney's limited role and the risks involved. As the committee has pointed out, there may be some circumstances in which a truly informed consent to the attorney's limited, non-representation role is not possible:

[I]n some circumstances, the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions, and the inequality in bargaining power resulting from differences in the personalities or sophistication of the parties make it virtually impossible to achieve a just result free from later recriminations of bias or malpractice, unless both parties are represented by separate counsel. In the latter circumstances, informing the parties that the lawyer "represents" neither party and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances may be illusionary. Whether characterized as a mediator or impartial advisor, the lawyer asked to exercise his or her professional judgment will be relied upon by parties who may lack sophistication to recognize the significance of the legal issues involved and the impact they have on their individual interests. Further, the "impartial" lawyer may in fact be making difficult choices between the interest of the parties in giving legal advice or in drafting provisions of a written agreement which purports merely to embody the parties' prior agreement. Although the parties may consent to the procedure, one or both may not be capable of giving truly informed consent due to the difficulty of the issue involved. In such circumstance, a party who is later advised that its interests were prejudicied in mediation or that the impartial advice offered or written agreement drawn, by the lawyer-mediator, favored the other spouse is likely to believe that it was misled into reliance on the impartiality of the lawyer-mediator. In short, we believe there are some activities and some circumstances in which a lawyer cannot undertake to compose the differences of parties to a divorce proceeding without running afoul of the strictures and policies of DR 5-105--even if the lawyer disclaims representing the interests of any party, purports to be acting impartially and obtains the consent of the parties to the arrangement.

We do not believe that the requirement in DR 5-105(C) that an attorney may represent multiple clients only where it is "obvious" that he can "adequately represent" the interests of each party should be applied to prevent an attorney, with the informed consent of the parties involved, from performing in a non-representational role as a mediator. On the other hand, the policies behind DR 5-105 -- (1) assuring that the parties are fully informed and consent to limitations on the attorney's role, and (2) preventing the attorney, despite consent, from undertaking a limited role where to do so would be inappropriate to the matter or unfair to the parties -- should continue to govern the attorney who provides non-traditional mediation services.

Drafting a Separation Agreement: The drafting of a separation agreement which is the product of mediation involves the attorney in more of a traditional dual representational role. In drafting a contract, the attorney is generally faced with choices in language, choices concerning the allocation of the risk of non-performance, etc., which will generally advantage one party's interests as against the other. While it may be the case that the mediation process was so thorough and the agreement reached so uncomplicated that the drafter's efforts are truly those of a mere "scrivener or secretary," see Maryland Bar Association Opinion 80-55A (1980), this will not usually be the case. The committee views such activity as invoking the dual representation provisions of DR 5-105, so that in each instance the attorney must, at the time he or she undertakes the drafting process, obtain the informed consent of both parties, and the attorney must satisfy himself that the "obviousness" test of DR 5-105(C) has been met -- namely, that the parties' interests, analyzed in light of the extent of their prior agreement on the terms of the separation agreement and against the perspective on informed consent discussed above, can be adequately represented. If there is participation by independent counsel, the degree of such participation will be a factor in determining whether the DR 5-105(C) conditions are met.

General Guidelines: We believe that lawyers should consider the following guidelines in entering into any of the roles presented by the inquiry:

(1) Because many lawyer-activities within the mediation context differ to varying extents from the traditional advocacy-based role that is familiar to the public, the lawyer-participant should discuss with the parties the difference between the contemplated role and traditional advocacy-based lawyering, including that the parties are not being represented by the attorney. The lawyer should also discuss the potential risks to the protection of each party's interests of proceeding without independent legal counsel, as well as the advantages that may inhere in the proposed mediation process

and his or her role therein. In short, the lawyer should attempt to provide the parties to the mediation with the fullest feasible understanding of the process and then obtain their informed consents to the chosen mediation model and to the lawyer's role within it.

(2) Lawyers should also advise the parties to mediation that, because the attorney as mediator is not representing them, their communications will not be protected by privilege unless and until a mediator's privilege is enacted. If the attorney undertakes representation of the parties through the drafting of a separation agreement, he should advise the parties that the attorney-client privilege will apply, although there will be no confidentiality for communciations between each of them and the attorney vis-a-vis the other party.

(3) Where the issues are too complex, or other factors make it unlikely that the parties' consent could be effectively given to the mediation activity, the attorney should decline to undertake the mediation services.

(4) In the event the lawyer chooses to undertake functions traditionally rooted in the adversary process, such as the drafting of separation agreements for both parties, he or she should at that time provide full disclosure of the costs and risks that may emanate from single-lawyer representation in the performance of such tasks, as well as the costs and risks of traditional alternative procedures, and should obtain the clients' informed consents to the chosen procedure. This explanation should include the advantages of having the participation of independent legal counsel, assuming that there has been none up to this point. The lawyer should undertake such a function only in situations where the "obviousness" test of DR 5-105(C) has been met.

(5) Finally, noting the possibility that in many cases the lawyer may start as mediator representing no one and end up representing both parties in drafting a separation agreement, the lawyer should at the outset explain the various alternatives and changes in his role, including the possibility that he or some other lawyer might draft the separation agreement. Moreover, since this whole process is a relatively new one, the lawyer should explain the various possible judicial reactions to the procedure, including the possibility that a court would consider the lack of separate representation in deciding whether to enforce the agreement.

(6) The attorney should advise the parties that he will not represent either party against the other in any future contested proceedings.

Participation with Non-Attorneys: The second part of the attorney's inquiry concerns the ways in which the attorney can ethically collaborate with a non-attorney in the advertising and operation of a mediation service. The attorney wishes to know if he may advertise as an attorney, advertise jointly with a family counselor co-mediator, use a trade name, and finally, divide mediation fees with the co-mediator. The inquiry states that the proposed business arrangements would not involve a partnership between the attorney and the counselor.

An attorney may certainly identify himself as such through the use of such a term as "Esq." where the designation is relevant to the attorney's activities. Since the committee views the mediator role, when undertaken by an attorney, as involving use of the attorney's legal training and skills, such advertising is permissible.

Attorneys may not enter into a partnership with non-lawyers if any of the partnership activities consist of the practice of law. DR 3-103(A). See also DR 5-107(C) on professional corporations and associations. Our jurisdiction as a committee does not extend to questions of unauthorized practice of law. Since the inquiry here does not contemplate the establishment of a partnership, we assume that there will be no formal partnership and that the parties will take steps to avoid structuring their relationship in any way which would result in their being held to have operated as a partnership. In light of this, we address the remaining questions.

All advertising and other public communications engaged in by an attorney must be free of deceptive statements or claims. DR 2-101(A). Letterheads are similarly constrained. DR 2-102(A). The danger in shared letterhead or team advertising is that it may be deceptive if it suggests the existence of a partnership or associational relationship where there is, in fact, none. Advertising and public communications of the type the attorney proposes must, therefore, take care to clarify the lack of any partnership relationship between the participants in such joint communications. The use of a trade name such as "City Mediation Services" would raise similar concerns in terms of the potential for deception.

Under DR 3-102, a lawyer may not share "legal fees" with a non-lawyer. Without relying on the technical question of whether a fee for mediation services conducted by an attorney is a "legal fee," this rule serves an important function in preventing deception of the consumer. The inquiry does not make it clear whether the fee division is to be made as a business profit-sharing, which would probably run afoul of DR 3-102, or whether what is contemplated is the division of a total fee between the co-mediators based on the services rendered by each. We believe the better practice would be to separately charge the participants for the respective services of the lawyer and non-lawyer mediator.

In the committee's view, avoiding the potential for deception depends upon accurately providing information concerning the mediation team members and their relationships. The choice of any term, such as "consultant" or "associate" to describe the relationship between the attorney and non-attorney, should therefore be accurate and avoid possible confusion of the parties as to the nature and source of the services rendered.

Permission to publish granted by the Board of Delegates on June 27, 1985.
As stated in the Rules of the Committee on Professional Ethics, this advice is that of a committee without official governmental status. 1. We note also the adoption by the American Bar Association of Standards of Practice for Lawyer Mediators in Family Disputes. See 18 Fam. L.Q. 363 (1984).