New York State Bar Association

Committee on Professional Ethics

Opinion 736 (1/3/01)

Modifies: N.Y. State 258 (1972)

Topic: Mediation; matrimonial matters

Digest: Lawyer-mediator may not draft and file separation agreement and divorce papers on behalf of spouses as joint clients unless the lawyer can satisfy the "disinterested lawyer" test of DR 5-105(C)

Code: DR 5-101(A)
DR 5-105(A) & (C)
EC 5-20

QUESTIONS

May an attorney engaged in matrimonial mediation draft and file a separation agreement and divorce papers that incorporate terms agreed upon by the marital parties in the course of the mediation?

OPINION

As we have recognized in the past, a lawyer who serves as a mediator to assist in the resolution of a possible dispute does not "represent" either party as a client for purposes of the conflict-of-interest rules and other rules governing the lawyer-client relationship. Therefore, even in many situations where a lawyer could not properly represent two clients with differing interests, the lawyer may serve them both as a mediator. This is true in matrimonial as well as other legal contexts. In N.Y. State 258 (1972), although we concluded that a lawyer may not jointly represent the spouses in a divorce proceeding, we also observed, "A lawyer approached by husband and wife in a matrimonial matter and asked to

represent both, may . . . properly undertake to serve as a mediator or arbitrator." *Accord* N.Y. City 80-23 (1981) ("The Code's recognition that lawyers may serve as mediators (EC 5-20), as well as ethical aspirations which recognize a lawyer's duty to assist the public in recognizing legal problems and aiding those who cannot afford the usual costs of legal assistance (EC 2-1; EC 2-25), make it inconceivable to us that the Code would deny the public the availability of non-adversary legal assistance in the resolution of divorce disputes").

This is not to say that all matrimonial disputes are appropriate candidates for mediation. Matrimonial mediation may be undertaken in many circumstances, but in some circumstances, as the Association of the Bar of the City of New York recognized in N.Y. City 80-23 (1981),

> 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 or 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 illusory.

Thus, there will be situations where the lawyer-mediator must not initially undertake, or must thereafter end, the mediation because a party's interests cannot fairly be protected without obtaining independent legal advice, or because a party needs a lawyer's assistance to protect against overreaching. However, the fact that the parties may begin with differing interests that would preclude a joint representation does not, in and by itself, foreclose the possibility of mediation.

The question now before us is whether, at the conclusion of any mediation, having assisted the parties in achieving the general terms of a settlement (which the lawyer-mediator would typically outline in a document), the lawyer-mediator may then proceed to represent the parties and draft and file legal documents on their behalf – in particular, the separation agreement and divorce papers. At that point, of course, the lawyer would be representing two clients who expect to become facial adversaries in a matrimonial litigation, and the representation would be subject to DR 5-105(A) and (C), which address the joint representation of clients with differing interests.

Ethical Consideration ("EC") 5-20, on its face, might appear to foreclose any aspect of a joint representation, inasmuch as it provides:

> A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity after disclosing such present or former relationships. *A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.*

(Emphasis added.) In our judgment, however, this provision is directed at situations in which the mediation does not successfully resolve the dispute between the parties, and the lawyer-mediator proposes to go from being a mediator between the two parties to representing only *one* of the parties "in the dispute." Thus, as we recognized in Opinion 258 in the matrimonial context in particular, a lawyer who serves as mediator in a matrimonial dispute may not later represent one party against the other if the dispute is not successfully resolved in mediation. We do not believe, however, that it is categorically improper for a lawyer, after successfully concluding a mediation, to represent both parties to the mediation with the consent of each, if there is no longer a "dispute" between them.

As to whether a lawyer-mediator – or, for that matter, any other lawyer – may represent parties to a divorce for the limited purpose of drafting and filing a settlement agreement and divorce papers, or whether such a joint representation is categorically forbidden by DR 5-105(A) and (C), we turn first to Opinion 258, where we opined :

> It would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of both parties. The likelihood of prejudice is so great in this type of matter as to make impossible adequate representation of both spouses, even where the separation is "friendly" and the divorce uncontested.

We reasoned that dual representation would never satisfy the then "obviousness" test of DR 5-105(C)[1] because of the "substantial likelihood of prejudice or professional conflict of interest in every matrimonial problem."

We now modify our previous view to the extent reflected in this opinion. There can be no question that the representation of parties who are on opposite sides of a divorce case invariably involves representation of "differing interests" for purposes of DR 5-105(A). Therefore, DR 5-105(C) would forbid the dual representation unless, in any particular case, a disinterested lawyer would believe that the lawyer can competently represent the interests of each spouse *and* each client consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. However, because there will be occasions when a "disinterested

lawyer" would believe that the lawyer-mediator can competently represent the interests of each spouse by preparing and filing the settlement agreement and divorce papers, we reject the dictate of Opinion 258 that the joint representation is *per se* impermissible in any and all circumstances.

We remain convinced, however, that in the generality of cases, even if the spouses agree on the broad outlines of a settlement at the conclusion of the mediation, a disinterested lawyer will *not* be able to conclude that he or she can competently represent the interests of each spouse. Although there is general agreement on broad settlement terms, many particulars may remain to be worked out in the course of drafting a settlement agreement. Even with respect to the terms on which there appears to be agreement, one or both spouses may benefit from a disinterested lawyer's advice as to whether the agreement meets with the spouse's legitimate objectives and what other procedural alternatives may be available to achieve more favorable terms. One or both spouses may thus benefit from a disinterested lawyer's advice as to (1) his or her legal options, (2) how the settlement terms will or will not meet the client's interests, and (3) alternative ways to fashion a settlement agreement. Likewise, one or both may benefit from the assistance of a disinterested lawyer in negotiating the terms and/or thereafter drafting the terms.

In short, under the disinterested lawyer test of DR 5-105(C), the lawyer may not represent both spouses unless the lawyer objectively concludes that, in the particular case, the parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents. In those circumstances, the *per se* ban of N.Y. State 258 should be relaxed to permit spouses to avoid the expense incident to separate representation and permit them to consummate a truly consensual parting, provided both spouses consent to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.[2]

Because the "disinterested lawyer" test cannot easily be met, the lawyer-mediator may *not* prepare and file a settlement agreement and divorce papers after the conclusion of the mediation as a matter of regular practice on behalf of spouses who are otherwise unrepresented.[3] Nor may the lawyer-mediator, in advertising, a retainer agreement, or other communications with potential clients, state or imply that, in the ordinary course, the lawyer will routinely prepare and file the divorce papers after the mediation is completed. The likelihood that joint representation will satisfy the standard of DR 5-105(C) is so uncertain prior to the start of the mediation that it would be misleading for the lawyer to indicate that preparing and filing the divorce papers for the spouses is part of the lawyer's standard practice.

In reaching our conclusion, we are not unmindful of the decision in *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982), in which the Court of Appeals held that the mere fact that a separation agreement was prepared by one attorney representing both husband and wife was not sufficient, "in and of itself, to establish overreaching requiring a rescission of the agreement." In *Levine*, after a non-jury trial, the trial court "found no evidence of coercion, undue influence or overreaching practiced by the husband," and made specific factual findings "that the agreement was fair" and "that the attorney had 'managed to preserve neutrality' throughout his joint representation of the couple." Under those circumstances, while acknowledging that "the potential conflict of interest inherent in such joint representation suggests that the husband and wife should retain separate counsel," the Court of Appeals stated that "the parties have an absolute right to be represented by the same attorney provided 'there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement.' (*Christian v. Christian*, 42 NY2d 63, 72, *supra*.)"

Although the Court's reference to the parties' "absolute right to be represented by the same attorney" might be read to supersede DR 5-105(A) and (C), we do not believe that was the Court's intention. We are not aware of any published decisions since 1982, when the Court decided *Levine*, that hold, on the basis of the Court's dicta, that a lawyer may represent spouses jointly in divorce proceedings even when the representation would otherwise be forbidden by DR 5-105(C) because a disinterested lawyer would not believe that the lawyer can competently represent the interests of each. Further, we note that, in *Levine*, the Court did not explicitly address the propriety of the joint representation under the disciplinary rules. Rather, the question before the Court was whether a court would grant the extraordinary remedy of rescission on a particular set of facts. The answer did not turn on whether or not the lawyer properly undertook the representation. [4] Even if, after the representation has come to an end, a court in full possession of all relevant facts concludes that there was "an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement," it may nevertheless have been improper to undertake the representation at the outset, in light of the facts then known to the lawyer and the risk that one or both spouses would be disadvantaged by the lack of independent counsel.

Finally, we note that, in cases where it is permissible for the lawyer-mediator to draft and file divorce papers, if the lawyer does not make a formal appearance in the divorce proceeding, the lawyer must ensure that his or her role is disclosed to the court. Otherwise, there is a risk that the court will be misled to believe that the papers were prepared by the parties themselves, and, further, the court will not know which lawyer is responsible in the event it has concerns about the preparation and contents of the legal documents. *See* N.Y. State 613 (1990).

CONCLUSION

An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies the "disinterested lawyer" test of DR 5-105(C).

(9-00)

[ii] [1]The "obviousness" test has been replaced by the "disinterested lawyer" test, which has been codified in DR 5-101(A) and DR 5-105(C).

[2]Full disclosure should include advising both clients of the risk of a legal challenge, since "the absence of independent representation is a significant factor to be taken into consideration when determining whether a separation agreement was freely and fairly entered into" when "the same attorney represented both parties in the preparation of the agreement." *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26, 28 (1982).

[3] If the spouses *are* independently represented by lawyers who are prepared, insofar as necessary, to advise about the settlement terms, negotiate unresolved terms, and review the settlement agreement and other papers, then we see no restriction on the lawyer-mediator serving as drafter and reducing to writing an oral agreement that encompasses a mutually agreeable understanding between the parties on all issues. In essence, the lawyer will then be serving as a mere amanuensis, and will not be exercising independent professional judgment on behalf of one spouse or the other with respect to the settlement terms.

[4] It is well-settled that in a litigation context, the "ethical standards that guide attorneys in their professional conduct . . . cannot be applied as if they were controlling statutory or decisional law". *S & S Hotel Ventures v. 777 S.H. Corp.,* 69 N.Y.2d 437, 515 N.Y.S.2D 735, 738 (1987). Conversely, an ethical violation does not create a cause of action in favor of third parties where the facts do not fit within an acknowledged category of tort or contract liability. *Shapiro v. McNeil*, 92 N.Y.2d 91, 677 N.Y.S.2d 48, 50 (1998).