

ADVISORY ETHICS OPINION 80-12

SYNOPSIS:

Subject to certain limitations, an attorney is not ethically prohibited from incorporating with a social worker for the purpose of performing family separation and divorce mediation services.

FACTUAL BACKGROUND:

An opinion is requested by an attorney who proposes to provide a mediation service to couples seeking an alternative process for amicably resolving issues connected with their divorce and separation. The attorney's role in this service would be strictly that of mediator. It would be the policy of the service to advise all parties to have any documents and agreements reviewed by an attorney of their choice. Neither party would be represented by the attorney-mediator at any proceeding between them on the divorce matter.

Within the framework of this service, and independent of the attorney's general law practice, the attorney would work and incorporate with a clinical social worker with expertise in children's services.

DISCUSSION:

Two separate questions are presented for consideration:

- 1) May the attorney serve as a mediator between parties to a divorce and
- 2) May the attorney, in such capacity, incorporate with a trained psychologist?

As to the primary question we find nothing in the Code of Professional Responsibility which would prohibit an attorney from acting in the role of a mediator. In fact, EC 5-20 expressly authorizes an attorney to serve as a mediator provided that he discloses any former or present relationship with either party and that he does not thereafter represent in the present dispute any of the parties involved. No doubt recent trends favoring mediation and/or arbitration in labor and other contractual disputes will provide more and more opportunity for the attorney to act as mediator or arbitrator. The acceptance of the attorney-mediator in the area of marital disputes and in situations as is here under consideration is becoming more widespread. Programs such as the immediate proposal are presently operating in among other places. Cambridge, Massachusetts; Atlanta, Georgia and Phoenix, Arizona. Reference is made to Opinion 78-1 of Boston Bar Association wherein approval to such a proposal is given.

As the guidelines of EC 5-20 suggest, the attorney who assumes the role of mediator must strictly confine himself or herself to that assumed role within a particular dispute. What the actual boundary of permissible activity in the mediation role might be is beyond the scope of this opinion. However, in a general fashion, it may be stated that the mediator must refrain from giving any legal advice, leaving that to the parties' respective attorneys. While a mediator may direct the parties' attention to problems which need to be solved prior to entering a separation agreement, and may work with the parties to reach an agreement on difficult issues, the final drafting of all agreements should be done by the parties' attorneys. Ultimate decisions should be made by the parties themselves and any unresolved issues should be referred to their attorneys. Likewise, their attorneys must be responsible for drafting and filing all pleadings, petitions and motions with the court.

Several of the ethical canons and disciplinary rules speak directly to partnerships and corporations in which attorneys and non-attorneys are associated. (See, notably EC 3-8, DR 3-103, DR 5-107). DR 3-103, for example, expressly bars an attorney from forming a partnership with a non-attorney, "if any of the activities of the partnership consist of the practice of law." For purposes of this opinion it is assumed that the activities of an attorney mediator who carefully restricts his role to that of mediator will not constitute the practice of law, and that the attorneys will not advertise in such a way as to lead the public to believe legal services are offered by the corporation. The parties are free, within this framework, to form any legal entity permitted by the Vermont statutes.

CONCLUSION:

The attorney may act as a mediator in accordance with the guidelines set out above, and may incorporate with a trained psychologist in any manner permitted under Vermont law.