

When Lawyer-Mediator May Draft Divorce Papers

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NYSBA Opinion 736

The NYSBA Committee on Professional Ethics has reviewed the duties of a lawyer-mediator who resolves the terminal dispute between husband and wife and then is asked to draft a separation agreement and divorce papers incorporating the terms of their agreement.

The Committee first reiterated its support for the lawyer's role as mediator in matrimonial disputes:

As we have recognized in the past, a lawyer who serves as mediator to assist in the resolution of a possible dispute does not "represent" either party as 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 mediator. This is true in matrimonial as in 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 under- take to serve as mediator or arbitrator." ...

The Committee cautioned, however, that all matrimonial disputes do not lend themselves easily to mediation. It cited a 1981 Opinion of the City Bar (80-23):

...the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular issues, and the inequality of bargaining power resulting from the 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.

When, in the proper exercise of his role as mediator, the lawyer finally succeeds in resolving all the issues facing the parties, he will generally outline the terms of agreement in a memorandum. May he then proceed to draft and file the separation agreement and divorce documents?

The Committee's answer was, "Yes," but if and only if:

- The terms of the divorce documents and the separation agreement are "mutually acceptable";
- The 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).

The Committee modified its earlier stand in Opinion 258 (supra): “We reject the dictate of Opinion 258 that the joint representation [of parties on the opposite side of a divorce case] is per se impermissible in any and all circumstances.”

But the Committee cautioned that only rarely will a lawyer in a matrimonial matter meet the standards of a “disinterested lawyer”:

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... 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....

For these reasons, the Committee concluded:

...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 handle the settlement agreement and the divorce documents. ...both spouses [must] consent to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

The Committee added the following comments:

- Because the “disinterested lawyer” test is not easy to meet, a lawyer-mediator should not consider it his “regular practice” to prepare and file the separation agreement and divorce papers “on behalf of spouses who are not otherwise represented.”
- A lawyer may not state in his advertising or retainer agreements that he will prepare and file divorce papers “in the ordinary course” following successful mediation of a dispute.
- When the lawyer-mediator is permitted to draft and file divorce papers following the mediation, he should ensure that he discloses his role to the court if he does not make a formal appearance.