
E-79-2 Mediation of divorces

Facts and Question

A lawyer proposes to provide mediation services to married couples considering divorce. The lawyer proposes to (1) educate the parties as to their legal rights and responsibilities, (2) mediate any disputes which may arise in the course of the settlement negotiations, and (3) draft a separation agreement and related documents and appear in court to process the divorce. The lawyer further indicates s/he will refrain from representing either of the parties in any proceedings between them in the event an agreement cannot be reached and that each of the parties shall obtain an independent evaluation of any proposed marital settlement agreement by legal counsel other than the lawyer-mediator. The question before the committee is whether this conduct is ethical.

Opinion

While EC 5-20 specifically permits the attorney to act as a mediator and provides only that he should not thereafter represent in any dispute any of the parties involved, the proposed mediation agreement extends the duties and responsibility of the lawyer beyond that contemplated by the provision, and beyond the role normally associated with a mediator. The mediation agreement specifically states that the lawyer "will educate" each of the parties as to their legal rights and responsibilities. Thus, the lawyer in the educational process will be perceived by the parties as performing the traditional role of advice-giving, presumably for the good of each individual party. Given the adversary nature of the proceedings, the advice given for the benefit of the wife such as acceptance of child support payments as child support as opposed to family maintenance or the advice to seek maintenance, may be contrary to the best interests of the husband and vice versa. The committee also feels it would be difficult for the lawyer-mediator to advise a husband not to pay an agreed-upon figure for child support if too high or a wife not to accept an amount agreed upon as child support which is too low and not be subject to severe criticism by the party or avoid being accused of favoring the interest of the spouse over the interest of that party.

The committee recognized that divorce proceedings are highly emotional experiences for the parties, and that frequently a party, whether because of guilt

or other reasons, will be willing to promise more than s/he can afford or would legally be compelled to accept. After the passage of time, the financial promises made at the time of the divorce become financially burdensome and onerous which invariably leads to future litigation. The committee believes that neither the public's interest or the parties' is best served by the creation of future litigation.

Thus, the proposed agreement asks too much of the lawyer. It asks him to serve as a legal advisor not only for each of the parties but then to ultimately resolve the dispute in the best interest of each party. This no person can successfully do without criticism. Thus, the committee does not believe an attorney can serve as legal counsel for parties in the mediation process and give to the parties the representation each will expect. The committee concludes that the proposed mediation agreement places the lawyer in an unresolvable conflict position and cannot therefore approve the mediation agreement.