

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
OPINION NO. 583
September 2008**

QUESTION PRESENTED

May a lawyer enter into an arrangement to mediate a divorce settlement between parties who are not represented by legal counsel and prepare the divorce decree and other necessary documents to effectuate an agreed divorce if the mediation results in an agreement?

STATEMENT OF FACTS

A lawyer is hired by the parties in a divorce case to mediate a settlement and prepare all of the documents necessary to effect an agreed divorce if an agreement results from the mediation. Under the proposed arrangement, the lawyer will conduct the mediation and, if an agreement is reached, prepare the decree of divorce and other documents, which may include conveyances of real property, various releases, child support provisions and visitation schedules. The parties to the divorce are not represented at any time by their own separate legal counsel. The lawyer/mediator advises both parties that the lawyer/mediator does not represent either party during the mediation or in the preparation of the documents to implement the agreed terms of the divorce. The parties agree that the fee of the lawyer/mediator will be paid one-half by each.

DISCUSSION

Under the Texas Disciplinary Rules of Professional Conduct, mediation does not constitute the practice of law but instead constitutes action as an “adjudicatory official.” The Terminology section of the Texas Disciplinary Rules of Professional Conduct defines “Adjudicatory Official” to mean a person who serves on a “Tribunal” and defines “Tribunal” to include a mediator engaged in resolving or recommending resolution of a particular dispute or controversy.

As an “adjudicatory official” under the Texas Disciplinary Rules of Professional Conduct, a lawyer acting as a mediator is subject to the requirements of Rule 1.11. Since the proposed arrangement for mediation followed by document preparation is to be agreed on by the parties before the mediation begins, the proposed arrangement would be in violation of Rule 1.11(b), which provides in pertinent part that “[a] lawyer who is an adjudicatory official shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a pending matter in which that official is participating personally and substantially.” Thus under Rule 1.11(b) a lawyer/mediator may not enter into an agreement with the parties to a divorce to provide both mediation and legal services with respect to the divorce. (Rule 1.11(a), which applies to representation in a matter as to which a lawyer has previously acted as an adjudicatory official, would not be applicable to the circumstances here considered since here the mediation and document preparation services are agreed to when the mediation begins.)

Although acting as a mediator with respect to a divorce does not constitute the practice of law, the preparation of documents to implement an agreement for divorce reached in a mediation clearly involves the provision of legal services by the lawyer/mediator. If a lawyer who is also a mediator chooses to act solely as a lawyer with respect to a particular divorce, the lawyer may represent only one of the two

parties in preparing documents to implement an agreement for divorce. A divorce, no matter how amicable or uncontested, is a litigation proceeding under Texas law. In the circumstances here considered, the preparation of documents for both otherwise unrepresented parties in a divorce to effect an agreed settlement would constitute representation of both parties in the divorce litigation. Because a divorce in Texas necessarily involves litigation, a lawyer in the case of a divorce could not provide legal services to both parties as an “intermediary” under Rule 1.07. Rule 1.07(d) provides that, for purposes of Rule 1.07, “a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.” Since under Texas law a divorce is a litigation matter, the parties in a divorce do not have merely “potentially conflicting interests” and consequently a lawyer could never be an intermediary for the parties with respect to a divorce. Instead, representation of parties in a divorce is governed by Rule 1.06(a), which provides without qualification that “[A] lawyer shall not represent opposing parties to the same litigation.” Hence, even if a lawyer/mediator did not propose to provide mediation in the case of a particular divorce, the lawyer/mediator could not in any circumstances act as a lawyer representing both parties to prepare documents to effectuate an agreed divorce.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effect an agreement resulting from the mediation. Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce.