NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #478 - 1/25/78 (132-77) Topic: Communication with adverse party unrepresented by counsel; divorce and matrimonial matters.

Digest: Under certain circumstances, lawyer may prepare and transmit separation agreement to unrepresented adverse party for signature; lawyer may discuss settlement of a pending matrimonial litigation with unrepresented adverse party where that party appears *pro se*.

Code: EC 7-5, 7-7, 7-8, 7-10, 7-18; DR 7-104(A)(2)

QUESTION

A lawyer represents a client having matrimonial problems whose spouse refuses to obtain counsel.

Under the circumstances stated, may the lawyer prepare a separation agreement negotiated by the parties without benefit of counsel and transmit the same to his client's spouse for signature?

Should the matter not be resolved and proceed to litigation, if his client's spouse elects to appear *pro se*, may the lawyer discuss settlement with the unrepresented spouse?

OPINION

The Code of Professional Responsibility does not forbid all manner of communication between a lawyer and an adverse party unrepresented by counsel. That which is forbidden is the giving of advice. Hence, EC 7-18 explains in relevant part:

> "If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer."

Consistent with this principle, DR 7-104(A)(2) provides that a lawyer may not:

> "Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

For many years, the position of the American Bar Association has remained consistent with respect to the ethical obligation of a lawyer representing a party in matters of domestic relations against one unrepresented by counsel. The ABA has generally held that, under such circumstances, a lawyer may communicate with an unrepresented adverse

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party, but he may not advise or seek to convince him to pursue any course of conduct related to the subject of the lawyer's representation. Thus, ABA 58 (1931) defines the line between proper and ethically impermissible communications, observing:

> "It would be a violation of [former] Canon 9 [which is substantially similar to DR 7-104 of the Code] for a lawyer consulted by a client who desires to procure a divorce to confer with the adverse party in an attempt to get the adverse party to agree to the divorce.
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> "The proper procedure for the lawyer representing a party seeking a divorce and having occasion to communicate with the adverse party not represented by counsel, would be to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel." (Emphasis supplied)

The ABA has applied these standards to situations revolving about a lawyer's preparation of documents for an unrepresented adverse party's signature. Ultimately, the ABA concluded that while a lawyer could not prepare a "responsive pleading" for an unrepresented adverse party (ABA Inf. 1255 [1972]) or seek to convince an otherwise reluctant adverse party to waive certain procedural rights (ABA Inf. 1140 [1970]), he could properly "submit to an unrepresented defendant for signature a waiver of the issuance and service of summons and the entry of an appearance." The ABA reasoned:

> "As long as these documents are not accompanied by or coupled with the giving of any advice to the defendant, they would constitute only communication with an unrepresented party and, accordingly, would be ethical...." (Emphasis supplied) Id.

Turning to the first of the two questions posed, we find ourselves in basic agreement with the ABA's position. Accordingly, where a lawyer has had no hand in the negotiating process and acts merely as the scrivener of an agreement negotiated by his client, it would not be improper for the lawyer to transmit that agreement to an unrepresented adverse party for signature. In this connection, we believe that the lawyer should take special care to insure that the agreement not only accurately represents the understanding of the parties as communicated to the lawyer by his client, but that the agreement is also drawn in terms which the lawyer has reason to believe will be understood by the unrepresented party. See EC 7-10.

Should the lawyer find that the proposed agreement is not consistent with the best interests of his client, he should so advise him. EC 7-8. If, notwithstanding the lawyer's advice to the contrary, the client insists upon proceeding with the agreement he negotiated with his unrepresented spouse, the lawyer may either withdraw from his employment or proceed on the basis of the client's instructions.

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Cf. EC 7-5 with EC 7-7.

While the lawyer is duty bound to explain fully to his client the consequences of any agreement which the client may negotiate with his unrepresented spouse, the lawyer should not seek to accomplish by indirection that which the Code clearly prohibits him from doing in direct communication with an adverse party. Hence, it would be improper for a lawyer to use his client as an intermediary to communicate advice to the party unrepresented by counsel.

The next of the questions posed presents a somewhat more difficult problem. We find that considerably more flexibility than that which the ABA has to date allowed is required when dealing with litigated matters where an unrepresented party elects to appear pro se. In this connection, we note that to the extent private parties choose to resolve their differences without resorting to judicial process, they may proceed at a pace measured only by what they perceive to be their individual needs. Where one of the parties elects to resort to litigation, however, there is an additional factor with which we must reckon. That is the interest of the public in the proper administration of justice: an interest which requires that the judicial machinery be kept free of unnecessarily protracted litigation.

Circumstances may arise where it is impossible for a lawyer to fulfill his professional responsibility without seeking to convince an adverse party to pursue some course of conduct that he would otherwise not undertake. So it is, when an adverse party elects to appear pro se in a litigated matter, the lawyer may have absolutely no choice but to assume the mantle of advocate for his client's cause and actively enter into the negotiation process.

A more restrictive rule would only serve to deny effective counsel to the party whom the lawyer represents and condemn all pro se cases to a judicial determination without benefit or hope of an earlier settlement.

Throughout, the lawyer should be ever on guard against the temptation to overreach and must not indulge in any conduct having the tendency to mislead those untutored in the law. He can be the advocate for and adviser to only one of the contesting parties. N.Y. State 258 (1972).

For the reasons stated, and subject to the conditions hereinabove set forth, both of the questions posed are answered in the affirmative.