

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1990-91/9  
**Marital Mediation: Clarification re: Certification Requirement**  
May 9, 1991

**RULE REFERENCES:**

- \*Rule 1.6
- \*Rule 1.7
- \*Rule 1.12
- \*Rule 2.2

**SUBJECTS:**

- \*Adverse Effect on Professional Judgment
- \*Confidentiality
- \*Conflict of Interest
- \*Domestic Relations
- \*Mediation

**STATUTORY REFERENCES:**

- \*RSA 328-C

**ANNOTATIONS:**

The Rule 1.6 potential for confidential communications given in the course of marital mediation not to be privileged is eliminated by RSA 328-C:9.

RSA 328-C allows marital mediation services to be provided by a lawyer, without such services becoming representation of either party leading to a conflict of interest. (Rule 1.7)

A lawyer may serve as an arbitrator or mediator in a dispute among parties who are not his or her clients. (Rule 2.2).

Representation of clients by a former arbitrator in a case is regulated by rule 1.12.

**QUESTION:**

Do the Rules of Professional Conduct permit a lawyer to serve as a marital mediator?

**RESPONSE:**

The Ethics Committee has been asked to reconsider whether a practicing attorney may serve as a "marital mediator" as now defined in RSA 328-C.

The Committee, in a series of opinions over a number of years, held that it was not proper for an attorney to perform marital mediation under each of the specific circumstances presented. In our most recent opinion on the topic, NH Op 1989-90/15, the Committee held that a lawyer could serve as a certified marital mediator, provided that ten conditions were met, as follows:

1. Before serving as a marital mediator, the attorney shall meet all certification requirements as set forth in RSA 328-C.
2. The attorney shall not give legal advice to either party involved in the mediation process.
3. The attorney shall not serve as a marital mediator when either party to a divorcing couple is or has been a client of the attorney.

4. An attorney shall not serve as a mediator to a divorcing couple if the attorney has rendered advice or discussed the parties marital problems with either of the divorcing parties.
5. The attorney should strongly suggest that each of the divorcing parties maintain ongoing consultation with an attorney during the mediation process.
6. A written agreement should be entered into between the attorney and the divorcing parties clearly setting forth that the attorney will not be rendering legal advice to either party and will be limiting his or her role to that of being a marital mediator as defined by RSA 328-C.
7. That the aforesaid written agreement should make specific provisions for payment of the mediator, and should specifically state that the attorney is being paid for his or her services as a marital mediator only and is not being compensated for the purpose of rendering legal advice to either of the parties.
8. The attorney must inform both parties from the outset that he or she shall not represent either or both of them in Court divorce proceedings.
9. In the event an agreement is reached by the parties through mediation, the attorney should advise the parties that they should each have the agreement reviewed by an independent attorney of each persons own choosing.
10. The attorney shall adhere to the confidentiality requirements set forth in RSA 328-C:9 pertaining to the privileged nature of the mediation proceedings and must inform both parties of this from the outset."

Before the enactment of RSA 328-C:9, a significant part of the Committee's past concern for the lawyer as marital mediator rose from the danger that communications in the course of the marital mediation would not be privileged. RSA 328-C:9 eliminates this concern. In NH Op 1989-90/15, published after the enactment of RSA 328-C:9, the Committee applied Section 9 as if it applied only to certified marital mediators. We now recognize that, while RSA 328-C establishes the procedure for designation of a marital mediator as "certified", the statute does not provide any clear distinction between certified versus non-certified marital mediators in the application of the privileged communication s rules set out in 328-C:9. On reexamination, we find that the "certified" designation, while meaningful in promoting higher standards of marital mediation, does not affect the application of the Rules of Professional Conduct to the mediator's activities. The Committee therefore removes the first requirement listed above.

The Committee further modifies any prior opinions to recognize that a lawyer's provision of marital mediation services, within the limits described above, does not make the divorcing couple clients of that lawyer, or amount to a representation of either party, as was suggested in NH Op 1983-84/4. This distinction, and the requirement of a strong recommendation of independent counsel for each of the parties, resolves our concern in that opinion and in other opinions that "one attorney's rendering of legal services to both parties of a divorcing couple in the circumstances set forth is not ethically proper. The vast differences of interest of the two divorcing clients create an impermissible conflict of interest for the consulting attorney. Given a finite amount of income, property, children, and visitation time, the differing interests of the divorcing persons are highly apparent." *See also* NH Op 1986-87/2 and NH Op 1987-88/3. Also, the requirement of judicial review and approval of the final agreement resulting from the mediation substantially mitigates the likelihood of prejudice to the parties which concerned us in our prior opinions.

The ethical considerations facing the lawyer acting as marital mediator are not significantly different from the ethical considerations facing the lawyer as arbitrator. As the New Hampshire Comments to Rule 2.2 state, "Neither these Rules nor the former Code of Professional Responsibility prohibits a lawyer from serving as "arbitrator" or "mediator" in a dispute among parties who are not his clients." *See, for example, Rule 1.12, which regulates the representation of clients by a former arbitrator in a case.*