

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 93-F-130**

The Knoxville Bar Association seeks guidance on ethical concerns raised by its domestic relations mediation program.

The Knoxville Bar Association (KBA) recently began a service to the community which provides mediation for divorces, child custody disputes and grandparent visitation disputes. There is a small one-time administrative fee and no fee, or reduced fee, for those eligible for pro bono services or legal assistance.

The parties are screened for eligibility and advised of their right to obtain counsel at any time during the mediation process, and also advised of the need of formal court proceedings and judicial action to obtain a divorce. The mediators then formulate the issues to be mediated. When an agreement is reached or when mediation breaks down and there is a need for legal counsel the bar association refers the parties to pro bono attorneys, sliding fee scale panel attorneys, or other attorneys according to the parties' ability to pay.

The parties submit any resulting tentative mediated agreements to their attorneys for review, assurance of understanding, legality and whatever legal advice or counsel required. If differences, disagreements or unresolved issues arise the parties may return to mediation, proceed with litigation in the usual manner or otherwise cease the mediation process. Final mediated agreements are formalized by the attorney for one of the parties in the marital dissolution agreement and an irreconcilable differences divorce or other appropriate proceeding is instituted.

The bar has experienced a greater demand for indigent services than can be met. Some indigent parties who have a mediated agreement are unable to obtain legal assistance through Knoxville Legal Aid Society (KLAS). The problem is compounded by the KLAS policy of not representing both parties in an irreconcilable differences divorce.

The KBA and KLAS are engaged in a joint project, fully funded by KLAS, known as the Volunteer Legal Assistance Program (VLAP). The entire focus of VLAP is to recruit local attorneys to take the overflow pro bono cases which KLAS is unable to handle. A staff attorney of KLAS coordinates the referral of cases to VLAP pro bono attorneys.

There are instances when the KLAS receives initial contact and information from parties who are then referred to the KBA lawyer referral services and/or mediation services. In these instances the initial contact is only with a receptionist who makes no inquiry or record of the information other than name, telephone number and qualifying income information.

Referrals by the KBA mediation program to KLAS go directly to the legal intake staff attorneys and paralegals without pre-screening by KLAS for qualification. The KLAS staff attorney-VLAP coordinator participates in the intake process which involves information as to economic eligibility and review of the mediated agreement. A decision is made as to whether the party will be represented by a KLAS attorney or a VLAP attorney. The VLAP coordinator makes the referrals to a VLAP pro bono attorney if the KLAS attorneys are not available for representation.

KLAS provides malpractice insurance to VLAP pro bono attorneys on the cases referred to them and also pays the court costs for the cases. The pro bono attorneys maintain their own files and are not supervised by KLAS. Pro bono attorneys sometimes receive general information and advice from KLAS attorneys about handling pro bono matters because they have expertise in dealing with indigent persons.

The bar association seeks ethical guidance on providing each indigent party to a mediated domestic agreement with counsel, and/or seeking counsel for both sides of a mediated agreement, when there are ethical concerns as to conflict of interest, confidential information, scope of representation or other ethical concerns. The bar association has identified the following specific questions and concerns:

- 1 May a KLAS attorney represent one party to the mediated divorce and a VLAP pro bono attorney represent the other party on referral from VLAP, (a) if one party has come directly to KLAS and been turned away in the first instance by the receptionist and both are referred by KBA Mediation Service, or (b) if both parties came directly to KLAS initially and were turned away by the receptionist?
- 2 May a KLAS staff attorney represent one party to the mediated divorce and a VLAP pro bono attorney represent the other party on referral from VLAP if both parties are referred to KLAS by the KBA with a mediated agreement where neither party sought KLAS representation to

begin with?

3. May KLAS refer to and VLAP attorneys represent both parties on referral by KLAS if KLAS does its Intake Staff process without any consideration of direct KLAS representation of the parties?
4. May a participating attorney or an attorney outside KLAS and VLAP accept a client solely for the purpose of reviewing and advising with respect to a mediated agreement for divorce in two situations, (a) where no complaint has been filed for the divorce; or (b) where the opposing party has filed for the divorce?
5. If a KLAS attorney and/or a VLAP attorney is involved with parties to mediation, and the mediation ultimately breaks down to the extent that the domestic matter becomes contested, may the respective attorneys continue to represent the assigned parties in the adversarial litigation process?

Tennessee Formal Ethics Opinion 81-F-16 recognized the fact that it is not uncommon for attorneys to act for both parties in certain matters such as partnership agreements, real estate transactions, buyers and sellers, landlords and tenants, etc. The opinion cites and quotes the California Court of Appeal case of Klemm v. Superior Court of Fresno County, 75 Cal.App. 893, 142 Cal. Rptr. 509, 514 as follows:

**Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice.**

The opinion states that an attorney may represent both parties in an irreconcilable differences divorce if there is no dispute or conflict existing and none arises, provided there is full disclosure and informed consent of both parties, preferably in writing, and providing that if a dispute arises the attorney is disqualified from representing either party.

The Board recognized in their formal ethics opinion that the irreconcilable differences divorce laws were created to do away with the idea of fault in dissolving marriages, to minimize their adversary nature, and to eliminate conflicts between the parties instead of creating conflicts when none exist.

Accordingly, the Knoxville Bar Association, its Lawyer Referral Service and its Sliding Fee Scale Panel, the Knoxville Legal Aid Society and/or their Volunteer Legal Assistance Program, and all attorneys involved in any of the programs, are ethically permitted to represent both parties in an irreconcilable differences divorce as provided in Formal Ethics Opinion 81-F-16.

The specific questions and concerns are addressed as follows:

1. (a) Yes; (b) Yes;
2. Yes;
3. Yes;
4. (a) Yes; (b) Yes; and
5. No.

This 11th day of June, 1993.

ETHICS COMMITTEE:

S/Ed E. Williams, III, Chairman

S/C. Richard Dietzen

S/Brenda Y. Hall

**APPROVED AND ADOPTED BY THE BOARD**