

FORMAL OPINION NO. 66

Mr. Donald J. Chisholm, president of the Fifth Judicial District Bar Association, has asked for an opinion of the Committee on the following:

1. May a lawyer representing the plaintiff in a divorce action prepare a form for admission of service of the opposing party and take the acknowledgment of the other party if the form contains a consent to jurisdiction and entry of default and a statement of refusal to plead further in the case?
2. Does the answer to the first question in any way depend upon whether the form of admission of service bears the attorney's name at the top or his designation as attorney for plaintiff?
3. Is it ethical for the plaintiff's attorney in a divorce action to prepare an admission of service and take the acknowledgment of the defendant if the admission of service contains nothing more than an admission of receipt of a true copy of the complaint and summons?

The above questions call for interpretation of DR 7-104 of the Code of Professional Responsibility which provides as follows:

"During the course of his representation of a client, a lawyer shall not: (2) 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."

As long as there is strict observance with the requirements of the above professional code provision, it is not improper for the plaintiff's attorney to prepare and

take the defendant's acknowledgment of service of summons but if there is added to that acknowledgment a consent to jurisdiction and consent to entry of default it would seem contrary to the above quoted provision of the code. The acknowledgment of service of summons by the defendant presumes that the attorney has directly or indirectly asked the defendant to execute the document and the code provision directs that such plaintiff's attorney should advise the defendant at the same time to secure counsel; to ask the additional concessions respecting jurisdiction and consent to entry of default would, we believe, be inconsistent with the mandate of the above code provision.

Whether the acknowledgment of service bears the plaintiff's attorney's name and designation would not make any difference, but since any divorce case would present the possibility of a conflict of interest we think the plaintiff's attorney should adhere strictly not to give advice except advise the defendant to secure counsel.

It is, of course, possible that the defendant will determine to represent himself and if he has indeed made such an election, it would be proper for plaintiff's attorney to prepare a stipulation for the parties which might then include a consent to jurisdiction and entry of default as well as other provisions customarily found in divorce settlement stipulations. Ordinarily this would be a development that comes about only after service of summons. Certainly, in such cases the plaintiff's attorney must scrupulously avoid misleading the unrepresented defendant concerning the law or the facts.

DATED this 20th day of July, 1973.