NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

Committee on Professional Ethics

Opinion #258 - 9/15/72 (40-72)

Topic: Conflict of interest in uncontested divorce or separation.

Digest: Improper to act for both parties in uncontested divorce, even with consent following full disclosure.

Code*: Canon 4, 5
EC 4-1; 4-2; 4-5; 5-1; 5-14; 5-15; 5-16; 5-20.
DR 4-101; 5-105.

QUESTION

May a lawyer represent both husband and wife in a "friendly" separation or an uncontested divorce even with full disclosure and the consent of both parties?

OPINION

It would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of both parties. The likelihood of prejudice is so great in this type of matter as to make impossible adequate representation of both spouses, even where the separation is "friendly" and the divorce uncontested. The Code makes no material change in the applicable principles under the former Canons, as interpreted by the Court of Appeals in Matter of Kelly, 23 N.Y. 2d 368, 378 (1968). There the Court stated in pertinent part:

> "Even if there were disclosure to and consent by [all] clients *** the circumstances, when fully developed, may indicate an impermissible actual conflict. [Former] Canon 6 expressed the general policy that a client who is made fully cognizant of potential (or, occasionally, actual) conflicts, is entitled to take his chances. But in some instances, because the relationships or interests create a substantial likelihood of profound conflict, or for other policy reasons, representation is not permitted under any circumstances.

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> "Thus, where a lawyer represents parties whose interests conflict as to the particular subject matter, the likelihood of prejudice to one party may be so great that misconduct will be found despite disclosure and consent (Citations omitted).
>
> "Similarly, there are other particular situations where the circumstances establish such delicate conflicting relationships and inescapable divided loyalties that the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct. Where divided loyalties exist, a lawyer may inadvertently, and despite the best of motives, be influenced and act detrimentally to the client, or the appearance of misconduct will be unavoidable. (Citations omitted). Moreover, the unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him (Citation omitted)."

See also, Drinker, Legal Ethics 120 (1953), for numerous opinions under the former Canons where dual representation was held to be improper or unwise, even with disclosure and consent.

The applicable standards as incorporated in the Code are found in Canon 5, EC 5-1, EC 5-14, EC 5-15, EC 5-16 and DR 5-105. Under these provisions, lawyers are to serve their clients free of compromising influences and loyalties and are precluded from accepting or continuing any employment that will adversely affect their judgment on behalf of or dilute their loyalty to any client. Likewise under Canon 4, EC 4-1, EC 4-5 and DR 4-101, lawyers must preserve all confidences and secrets of clients, and not accept employment that would require the use or disclosure of such information.

The Code, like the former Canons, under certain circumstances permits a fully informed client, able to understand all ramifications of a conflict, to consent to dual representation (EC 5-16, DR 5-105) or to the adverse use of secrets and confidences (EC 4-2, DR 4-101). But even with full disclosure and understanding consent, DR 5-105 permits the representation of clients with conflicting interests only "if it is obvious that [the lawyer] can adequately represent the interest of each". Because there is such a substantial likelihood of prejudice or profound conflict inherent in every matrimonial problem, we do not believe that adequate representation of both parties could be had should a lawyer undertake to represent both husband and wife.

It would be improper in a domestic relations case for a lawyer representing one spouse to undertake any form of representation of the other, to give him any legal advice, or even to advise him to consult some specific lawyer. N.Y. County 265 (1928); ABA 58 (1931); ABA 245 (1942); ABA Inf. 1140 (1970). It is simply not possible in such situations to avoid if not actual over reaching at least the appearance of such, to the ultimate dissatisfaction or injury of one or both spouses.

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The inherent conflicts in attempting to represent both sides in matrimonial situations have been well described in Walzer, The Role of the Lawyer in Divorce, 3 Family L.Q. 212, 217 (1969):

> "Lawyers are frequently urged to represent both parties in a divorce. The client may insist that both parties know exactly what they want, and that they have arrived at a complete understanding. All that needs to be done is to put the agreement into written form and to go to court. But the situation in which the parties have identical interests is so rare as to be exceptional. For example, the division of support payments between alimony and child support has long-term financial implications for each of the parties. What is good for the husband is not necessarily good for the wife, and vice-versa. The client who insists the lawyer represent both parties frequently has an axe to grind. The lawyer who represents both clients runs an ever-increasing risk that he will eventually be the defendant in a malpractice suit, brought by a disappointed spouse."

A lawyer approached by husband and wife in a matrimonial matter and asked to represent both, may, however, properly undertake to serve as a mediator or arbitrator. Should he accept such a role, he may not thereafter represent either spouse in the event that his efforts are unsuccessful.

Such service is governed by EC 5-20, which provides:

> "A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved."

It has consistently been held that if one member or an associate of a firm is disqualified from representing a client, all of the partners and associates of the firm are likewise disqualified. N.Y. State 254 (1972); N.Y. State 214 (1971); N.Y. State 203 (1971); N.Y. State 118 (1969); N.Y. State 82 (1968); N.Y. State 40 (1966). This rule may not however be applicable to a large public defender office where there is no actual conflict. See, People v. Wilkins, 28 N.Y. 2d 53 (1971).
