

REPORT . . .
Lawyers Professional
Responsibility Board

By

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A wife comes to an attorney's office to ask for representation in a dissolution of the marriage action. May the lawyer represent the wife if:

1. The lawyer counseled with the wife's present husband several months previously regarding a possible dissolution?
2. The lawyer has previously represented the wife's present husband in business or other non-domestic legal matters?
3. The wife's present husband is an on-going and substantial business client, but both husband and wife expressly consent to representation of the wife?

The conflict of interest questions arise frequently in the practices of attorneys who represent clients in domestic relations matters. Occasionally an ethics complaint is filed by a spouse who discovers that his former attorney is now appearing on the opposite side of a disputed domestic matter. This complainant often holds a justifiably deep feeling of betrayal. Confidences and secrets, it is alleged, were entrusted to the attorney, who now has placed himself in a position to use those confidences against a former client.

The clearest conflict exists when a lawyer who has previously counseled one spouse in a domestic matter subsequently agrees to represent the other spouse in a dissolution action without the consent of the former client. In *In re Opacak*, 257 Minn. 600, 101 N.W.2d 606 (1960), an attorney counseled a husband regarding a possible divorce action in September, 1954. A fee was charged for this consultation, but no action was commenced. In April, 1955, the husband retained another attorney and the divorce was started. The husband's first attorney then represented the wife, without the husband's consent, throughout the ensuing contested proceedings. The Minnesota Supreme Court issued a "severe reprimand and censure" to the lawyer and ordered him to pay the cost of the disciplinary proceedings.

The rationale underlying the *Opacak* decision is that a lawyer who receives confidences or secrets from one client should not place himself in a position in which those same confidences may be used against the former client in adversary proceedings. There need not be simultaneous representation of conflicting parties to give rise to a conflict of interest. The confidences bestowed in earlier representation may create a

continuing obligation not to represent a party on a related adverse matter.

Similar conflicts of interest can exist even when the previous representation of one spouse has been in a non-domestic matter, such as a prior business venture. At first glance, the relationship between a previous business matter and a pending domestic dispute may appear to be too remote to give rise to a conflict. However, as most domestic relations practitioners realize, almost any facts regarding the past, present, or future financial dealings of either spouse are highly relevant to issues which will be raised in a contested dissolution action. The lawyer's knowledge of a former client's assets, liabilities, income, business practices, or accounting procedures is usually confidential client information. The lawyer who obtains any such information by representing one spouse in business matters is ethically precluded from representing the other spouse in any proceeding in which that information is likely to be relevant. It should be noted that the conflict is not eliminated by mere non-disclosure of prior confidences. Whether or not confidences are revealed, the previous representation places the lawyer in a conflict of interest situation. Only knowing consent of the previous client after full disclosure of all pertinent facts would permit the lawyer's acceptance of the new client.

Even specific consent to representation may be insufficient to avoid the conflict of interest in some cases. For example, if one spouse is an on-going business client of the lawyer, it is almost impossible for that lawyer to exercise independent professional judgment in advising that client's spouse in a domestic matter, whether contested or not. Disciplinary Rule 5-105 (C) sets forth a two-part rule which is applied here:

“ . . .A lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the Exercise of his independent professional judgment on behalf of each.” (Emphasis added)

This rule clearly indicates that there are categories of conflicts to which clients cannot consent. In every case, it must be “obvious” to the lawyer that each of the two potentially conflicting parties can be adequately represented. The rule calls for the exercise of discretion by the lawyer going beyond the formal consents of both clients. As in all conflict of interest cases, no absolute rules may be stated. The facts of each potential conflict situation must be evaluated in the light of the general principles quoted above.