Divorce and conflicts

By

Susan M. Humiston
Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* – July 2018

Divorce and conflict: two words that go easily together. But what about amicable or friendly divorces? Are they conflict-free?

Conflicts are a frequent source of questions on our ethics hotline. In 2017, 30 percent of hotline calls involved a conflict of interest question. One issue I have been routinely surprised to hear on the hotline involves attorneys representing both parties in a divorce. In these instances, the caller was not calling to see if this was permissible in the first place. In fact, the representation had been ongoing because the divorce was "friendly," and the clients had signed a "waiver." The callers were calling because of some other question and the joint representation was just the background, or they were calling because the "friendly" divorce was turning unfriendly, and they were trying to figure out if they had a conflict. Needless to say, the callers have been surprised when I explained that it is the longstanding position of this Office that representation of both parties in a divorce is a non-consentable conflict of interest and therefore not ethically permissible.Ftn1 Given the surprising frequency with which this has arisen, I thought it would be helpful to outline the analysis.

Rule 1.7(a): Is there a conflict?

Rule 1.7, Minnesota Rules of Professional Conduct (MRPC) provides that, except where certain circumstances are met, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."Ftn2 The rule defines a concurrent conflict of interest as an instance where "the representation of one client will be directly adverse to another client"Ftn3 or "there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client, or a third person or by a personal interest of the lawyer."Ftn4

Divorce proceedings, even amicable ones, are the classic example of "directly adverse" representation, because divorce—even one proceeding by joint petition—is still litigation.Ftn5 Moreover, the "materially limited" prong is also met because even in the most amicable of divorces, there is a strong likelihood that differences will arise between the parties, usually in areas the parties have not thought about because they are not lawyers familiar with divorce law. Given the presence of a concurrent conflict of interest under Rule 1.7(a), the next stop is to review Rule 1.7(b), which describes the circumstances that must be met when a concurrent conflict is one to which consent can be provided.

Rule 1.7(b): Is it consentable?

Four specific conditions must be met to make a conflict consentable: (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.Ftn6 Because divorce, as noted, is a litigated matter before a tribunal even when jointly brought, Rule 1.7(b)(3) cannot be satisfied and consent is not permissible.

This makes sense. Even an amicable division of property is a "zero sum proposition."Ftn7 Further, as many a caller to the hotline has realized belatedly, it is extremely difficult to serve both clients zealously without favoring one or the other when inevitable differences in point of view arise. Lawyers are not neutrals when they are representing clients, and they should not pretend they are. You are not simply a disinterested authority on the law. Each client is entitled to your undivided loyalty and independent judgment.Ftn8 In this scenario, lawyers are even incentivized to moderate the representation and advice so as not to highlight or bring forward potential points of contention in order not to disrupt the common representation.

It is also no comfort to push the final responsibility for the fairness or adequacy of the representation to the judge who is approving the parties' agreement. Courts are concerned about the integrity of the judgments they enter as well as their finality. Questions can and usually do arise when parties are not given the benefit of conflict-free advice, especially when they think that is what they paid for.

Alternatives?

Obviously, one alternative is to represent only one party to the divorce, and follow Rule 4.3 regarding contact with the unpresented party. Rule 4.3 sets forth specific requirements in dealing with an unrepresented party. Paraphrased, they are: (1) Don't act like you are disinterested; (2) tell the unrepresented party that the parties' interests are adverse; (3) if you think there is a misunderstanding, clarify who you represent; and (4) don't give the unrepresented party legal advice, other than the advice to secure counsel.Ftn9

I recognize that this may be an unsatisfactory alternative. When one party has a lawyer, the other party often feels the need to get a lawyer. Often there is simply no money for that. Or matters can become needlessly complicated if the attorney is the unhelpful kind that manages by their mere presence to make a mostly amicable matter something different.

Given the calls I have taken on this subject, it is also true that this has presumably worked out for some lawyers even if it is impermissible. One lawyer has told me he has been doing this on and off for a number of years; sometimes it works out, sometimes it doesn't. Fortunately for him, it has never resulted in a disciplinary complaint or malpractice claim.

Another alternative endorsed by the Restatement that really concerns me is the proposition that a lawyer can represent both parties (with informed consent) in the property

negotiations portion of the matter where only property is at issue, but consent would not allow the lawyer to represent both parties before the court in securing the final decree. According to the Restatement, the parties could additionally agree that the lawyer will only represent one party before the tribunal, and the other party would be represented by another lawyer in the adjudicative phase or would appear as unrepresented.Ftn10 While I think this is theoretically possible, and avoids the Rule 1.7(b)(3) issue, I am not sure how you could obtain informed consent—because such consent would require an attorney to disclose and detail all of the ways in which the representation of both is materially limited. Remember, informed consent requires a lawyer to provide adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.Ftn11 It is never sufficient to say—as most people do—we discussed the presence of a conflict, and you have given informed consent. Providing enough information to obtain ethically sufficient informed consent usually highlights for the parties the inadvisability of the planned course of conduct. I certainly do not recommend it, and I bet your malpractice carrier does not either.

Conclusion

Do not add your own conflict to the conflicts present in a divorce proceeding by attempting to represent both spouses. As always, if you have any questions about your ethical obligations, call the ethics hotline for an advisory opinion at 651-296-2963.

NOTES

1. *See* Michael Hoover, "Report: Lawyers Professional Responsibility Board," *Bench & Bar* (March 1980) (applying Disciplinary Rule 5-105(c)); Marcia A. Johnson, "Conflict Admonitions 1995," *Bench & Bar* (March 1996) (applying Rule 1.7).
2. Rule 1.7(a), MRPC.
3. Rule 1.7(a)(1), MRPC.
4. Rule 1.7(a)(2), MRPC.
5. *See* Illinois State Bar Association Advisory Opinion on Professional Conduct 98-06 January 1999, *aff'd* January 2010 ("A divorce, even when uncontested, is litigation. It involves the filing of a lawsuit and judgment being entered against both parties."); Hazard & Hodes, *The Law of Lawyering*, §12.05 ("Despite the fact that the relationship between the parties appears to be personally non-antagonistic, it is surely 'directly adverse' in the legal sense.").
6. Rule 1.7(b)(1)-(4), MRPC.
7. Hazard & Hodes, §12.05 at 12-19.
8. Rule 1.7, comment [1], MRPC.
9. Rule 4.3(a)-(d), MRPC.
10. Restatement of Law Third, §122, Illustration 8 at 274.
11. Rule 1.0(f), MRPC.