REPORT . . . LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

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In 1979, the Uniform Dissolution of Marriage Act became effective. Since then, we have been asked frequently whether one attorney may represent both petitioners when there is a joint petition for dissolution.

Under the old law, of course, there was only one petitioner even in so-called friendly dissolutions. Even after the Uniform Act, there continued to be many one-petitioner dissolutions. In such cases, an attorney may represent either the petitioner or the respondent, but may not represent both.

Attorneys have never been ethically permitted to represent two parties in the same proceeding where those parties have actual conflicting interests. This long standing rule is unaffected by the new statute. Thus, where joint petitioners have actual conflicts on custody, support, property division, or other issues, one attorney cannot ethically represent both petitioners.

Joint petitions, however, usually contemplate substantial, if not total, agreement by the petitioners concerning the issues involved in the dissolution proceeding. The question has thus arisen whether a single attorney can simultaneously represent both petitioners in a dissolution proceeding in which the petitioners have "agreed about everything".

Disciplinary Rule 5-105(C) sets forth the applicable rule concerning simultaneous representation:

> ". . . 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."

In order to make the full disclosure and obtain the knowledgeable consent required by DR 5-105(C), the lawyer must be familiar with the specific case. In familiarizing himself with the case, the lawyer will almost always obtain confidential information from one or both parties. Thereafter, it is unlikely that the lawyer can make the full disclosure contemplated by DR 5-105(C) to both parties without also disclosing the confidences or secrets of one or both of the parties. See DR 4-101.

Even if the full disclosure and consent are possible, simultaneous representation is still impermissible unless the adequacy of the representation is obvious. Other states have held that dissolution cases in which identical interests are present are so rare as to be exceptional. Under such circumstances, the likelihood of prejudice makes impossible adequate representation of both spouses, even where the dissolution is "friendly" and uncontested. *See*, for example, *New York State Bar Association Opinion No. 258* (1972).

One of the problems with simultaneous representation is that the attorney may abnegate his responsibility to advise *either* side as to the probable future problems with a proposed stipulation, or as to the fundamental fairness of the agreement. The attorney who agrees to draft papers to put the parties' prior stipulation into effect without advising either of them is changing his role from that of an independent legal counselor to a mechanical scribe. Instead of both parties having the adequate representation required by DR 5-105(C), neither may have it.

Proponents of simultaneous representation often argue that it will simplify the dissolution process and save money. In fact, if simultaneous representation were permitted, it would be counter-productive in many cases. Experienced domestic law practitioners know that many initial agreements subsequently break down because of second thoughts, inability to perform, or changed circumstances. Where such actual conflicts erupt, the attorney representing both parties would be required to withdraw totally from the case and send each party off to another attorney. The involvement of not one or two, but three, attorneys dashes all hope of a simple and inexpensive dissolution.

We have advised attorneys concerning simultaneous representation as follows:

1. A single lawyer or law firm may not establish an attorney/client relationship with both petitioners in a joint petition situation because of the likelihood of prejudice and because the adequacy of simultaneous representation is not obvious within the meaning of DR 5-105(C).

2. A single attorney or law firm may draw a joint petition for the signature of both husband and wife provided the parties are in agreement on all issues, and provided the attorney makes clear that he represents only one of the petitioners. If disagreements arise, or if the unrepresented party seeks advice from the lawyer, he must advise the unrepresented party to consult other counsel. In the pleadings, the attorney should appear as counsel only for the represented petitioner.

3. The new law makes no change in the way an attorney should deal with an unrepresented party in a dissolution. The attorney should explain to the unrepresented party that he can and will represent and advise only his client and that the unrepresented party should seek other legal counsel. The attorney may prepare a stipulation for the signature of both parties provided that he allows the unrepresented party adequate opportunity to seek counsel concerning the stipulation, and provided

that he does not advise the unrepresented party concerning its fairness, legal effect, and the like.

While the foregoing rules are very general in nature, I hope they will provide some answers to the most frequently asked questions in this area.