

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 92-18
December 21, 1992

The Ethics Committee received a request for an opinion from [REDACTED] of [REDACTED]. The issue presented is:

May different lawyers in the same firm separately represent the husband and wife in a default divorce proceeding if:

- (1) the husband and wife have agreed on terms for the division of their minimal property and for custody and support of their one child; and
- (2) the husband and wife have been separately advised of:
 - (a) the other's consultation with another lawyer in the same firm;
 - (b) the potential conflict of interests arising from representation of both by the same firm; and
 - (c) the implications of this conflict of interests, including the fact that the firm will not represent either the husband or wife if they do not agree on all matters.

The issue involves the interrelationship of Rules 1.7, 1.10, and 2.2 of the North Dakota Rules of Professional Conduct. This complex interplay of rules arises in the context of a marriage dissolution, a proceeding typically ripe for potential conflict notwithstanding the apparent amicability of the parties.

Under rule 1.10, two "[l]awyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so" N.D.R.P.C. 1.10(a). Since the lawyers representing the husband and wife are in the same firm, the rules on conflict of interests apply as if one lawyer were simultaneously representing both.

Simultaneous representation of clients with potentially conflicting interests is permitted under certain conditions by Rules 1.7(c) and 2.2. "Some states ... permit dual representation of spouses in limited circumstances provided that certain concerns, such as those enumerated in Rule 2.2, are met." Ctr. for Professional Responsibility, Am. Bar Ass'n, Annotated Model Rules of Professional Conduct 305 (2d ed. 1992).

Rule 1.7 requires a determination by the lawyer that a conflict will not arise and consent by the client after careful consultation. N.D.R.P.C. 1.7(c). Rule 2.2 elaborates on these requirements and adds three other conditions: that the lawyer reasonably believes that the matter can be conducted "impartially and without improper effect on other responsibilities" to the clients, N.D.R.P.C.

2.2(a)(3); that the lawyer consult with each client in a manner that will allow each to make informed decisions, N.D.R.P.C. 2.2(b); and that the lawyer withdraw and represent neither side if either client requests withdrawal or if consent, nonadversity, or impartiality cannot be maintained, N.D.R.P.C. 2.2(c).

First, under Rule 1.7, the lawyer must reasonably believe that the representation of one client will not adversely affect the representation of the other. N.D.R.P.C. 1.7(c). Rule 2.2 is even more demanding. The lawyer must reasonably believe "that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful" N.D.R.P.C. 2.2(a)(2).

In forming this reasonable belief, the lawyer must consider the inherent potential for adversity in a divorce, especially one involving issues of child custody and support. "Most states view divorce as inherently conflicting, despite any superficial harmony between the parties, rendering dual representation improper in all circumstances." Ctr. for Professional Responsibility, Am. Bar Ass'n, Annotated Model Rules of Professional Conduct 304 (2d ed. 1992). The fact that the husband and wife have consulted separate lawyers, though both are in the same firm, should raise even greater concerns about the "superficial harmony of the parties" than where one lawyer is asked to represent both.

Second, the lawyer must obtain each client's consent after consultation. N.D.R.P.C. 1.7(c)(2). "Consultation" is defined generally in the Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." N.D.R.P.C. Terminology. For representation of multiple clients in a single matter, the lawyer must explain the implications of the common representation and the advantages and risks involved. N.D.R.P.C. 1.7(c)(2). Rule 2.2 adds the important requirement that the lawyer inform the clients of the effect of the arrangement on the attorney-client privilege. N.D.R.P.C. 2.2(a)(1). This disclosure is crucial, since "the prevailing rule is that as between clients participating in an intermediation the privilege does not attach." N.D.R.P.C. 2.2 cmt.

Third, the lawyer must be impartial. N.D.R.P.C. 2.2(a)(3). This is a difficult determination for one lawyer to make, and it is complicated by the fact that the husband and wife have contacted separate lawyers. For example, the lawyer should consider whether a history of representing one party to a greater extent than the other threatens the lawyer's impartiality or at least one client's perception of impartiality. See N.D.R.P.C. 2.2 cmt. If separate lawyers are involved, the prior relationship of each lawyer with that lawyer's specific client might seem to balance out, so that some sort of composite impartiality results. A more likely result, however, is that each party expects his or her own lawyer to be partial if a conflict arises.

Fourth, Rule 2.2 requires continuing consultation with each client throughout the representation, so that each client can make informed decisions. N.D.R.P.C.

2.2(b). The involvement of separate lawyers for the husband and wife seems inconsistent with this requirement. At best, the two lawyers will communicate information differently to the separate clients. At worst, the clients and lawyers will communicate as if each client is independently represented and is protected by the rules of confidentiality and the attorney-client privilege, when in fact they are not.

Fifth, the lawyer must withdraw when requested by either client or if consent, nonadversity, or impartiality cannot be maintained. N.D.R.P.C. 2.2(c). The firm requesting the opinion indicates that the clients have been advised of this implication.

Simultaneous representation of the parties to a divorce is inherently suspect, especially if potentially volatile issues of child custody and support are involved. The Ethics Committee was not asked to consider whether Rule 2.2 might permit simultaneous representation of both the husband and wife in a domestic relations case with less potential for conflict. The American Academy of Matrimonial Lawyers, however, has formed an opinion on this issue. Standard 2.20 of its recently adopted Standards of Conduct states: "An attorney should not represent both husband and wife even if they do not wish to obtain independent representation." Standards of Conduct § 2.20 (Am. Academy of Matrimonial Lawyers 1991). The Comment to Standard 2.20 explains:

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes. Often the attorney is the "family lawyer" and previously represented husband, wife, family corporations, and even the children. Serving as an intermediary between husband and wife is not prohibited by the RPC [Rules of Professional Conduct]. However, it is impossible for the attorney to provide impartial advice to both parties, and even a seemingly amicable separation or divorce may result in bitter litigation over financial matters or custody. A matrimonial lawyer should not attempt to represent both husband and wife even with the consent of both.

Id. § 2.20 cmt. (footnotes omitted).

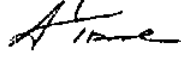
Where the husband and wife have contacted different lawyers, even though they are in the same firm, the likelihood that the parties will ultimately become adverse is even greater than if only one lawyer were involved. Although the requirement of imputed disqualification set forth in Rule 1.10(a) treats the two lawyers as one for purposes of analyzing conflicts of interest, the requirements of Rule 2.2 for intermediation are more difficult for two lawyers to meet than for

one. Nor does the arrangement involving two lawyers appear to offer one of the benefits suggested for intermediation, the avoidance of the additional costs of separate representation. See N.D.R.P.C. 2.2 cmt.

For the reasons set forth, the Committee concludes that the firm should not proceed with the representation because of the likelihood of adversity between the clients in the factual setting of the request. Instead, the firm should withdraw from representation of one or both clients in accordance with Rules 1.9, 1.10, and 1.16.

In those cases where simultaneous representation is permissible as intermediation under Rule 2.2, lawyers should comply with all aspects of the rule. For example, clients should be specifically advised of the effects of the intermediation on the attorney-client privilege. N.D.R.P.C. 2.2(a)(1). Lawyers should also consider carefully the cautionary guidance of the Comment to Rule 2.2, including, for example, the effect of a prior relationship with one client on the lawyer's impartiality. See N.D.R.P.C. 2.2 cmt.

This opinion was drafted by Barry R. Vickrey and unanimously approved by the Ethics Committee on December 21, 1992.


Murray G. Sagsveen
Chairperson 

[REDACTED]

November 20, 1992

Mr. Murray G. Sagsveen, Chairman
Ethics Committee of State Bar Association
P.O. Box 1695
Bismarck, North Dakota 58502-1695

Dear Mr. Sagsveen:

The purpose of this letter is to request an opinion from the Ethics Committee. [REDACTED] and we understand that he cannot participate in discussions regarding this request. Here are the facts.

A husband and wife with one (1) child and minimal personal property contacted separate attorneys of our law firm for the purpose of obtaining a divorce. Both parties are in agreement as to property division, child custody and child support based upon the guidelines as established by the North Dakota Department of Human Services. Both husband and wife are separately advised that another member of the same firm has been consulted by their spouse. A complete disclosure of the potential conflict is made to each of the parties along with the explanation of the implications of the common representation.

In spite of this disclosure and because the parties have agreed as to the relevant matters described above, they both wish to have the respective attorneys proceed to draft necessary documents for a default divorce and property settlement. Both of the clients also agree to acknowledge, in writing, that they have been informed of the fact that another member of the firm has been consulted by their spouse and that notwithstanding such disclosure, they still wish to have the attorneys proceed.

The clients are also advised that if there are any disagreements or matters in which the parties do not agree, that the attorneys cannot and will not represent either party, and they will have to retain separate counsel.

Mr. Murray G. Sagsveen
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It appears that this situation would be governed by Rule 1.7(c) of the North Dakota Rules of Professional Conduct. We request an opinion of the Ethics Committee as to whether or not the attorneys would be in violation of the Rules of Professional Conduct in representing both the husband and wife as set forth above.

Sincerely,

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