

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-290
Issued: September 1984

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question 1: May an attorney ever represent both sides in a “no-fault” divorce?

Answer 1: Except in rare cases, no.

Question 2: If not, is it proper for the attorney representing one spouse to “talk with” the other spouse and “answer questions”?

Answer 2: Qualified no.

Question 3: May an attorney represent both parties to an ante-nuptial agreement?

Answer 3: Qualified yes.

Question 4: If not, is it proper for the attorney representing one spouse to “talk with” the other spouse and answer questions”?

Answer 4: Qualified no.

OPINION

The questions presented address the conduct of counsel in his or her traditional roles as advocate and advisor. In responding to these questions, we do not address the propriety of mediation or arbitration in which the lawyer does not “represent” either party. *Compare* EC 5-20 and ABA Model Rule 2.2.

The practice of both husband and wife going to see a single attorney to secure a dissolution of their marriage pursuant to the “no fault divorce act is not uncommon. Where the parties have spoken with one another and desire an amicable divorce, it is also not uncommon for both parties to want one attorney to assist them in securing their desired divorce and in preparing what they believe to be their agreement. In such circumstances, the potential clients may believe that having more than one lawyer is a wasteful luxury, and might even serve to exacerbate problems rather than solve them. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702 (1977). On the other hand, just because the couple has already “agreed” to certain terms, it does not follow that there is no conflict of interest, and that a common lawyer need only draft the papers. Because a lawyer must exercise his or her independent professional judgment on behalf of a client,

(n) competent lawyer... would simply accept the terms agreed to by even an individual client without at least exploring available alternatives; therefore, to the extent that lawyer for both spouses is precluded from considering all of the alternatives theoretically available to each, a clear conflict of interest exists.

(Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients, 61 Tex. L. Rev. 211, 250 (1982).)

See also, DR 5-105(A) and (B). In addition to the risk that the lawyer's inability to explore the available alternatives might result in a settlement that is later perceived to be inadequate by one or the other of the spouses, joint representation at the outset will likely prove unsatisfactory because:

- (1) if a subsequent unresolvable conflict develops, counsel would have to withdraw from representing either of the parties, requiring them to engage separate counsel after all; (Tennessee Op. 81-F-16 (1981); North Carolina Op. 298 (1981); Missouri Informal Op. 13 (1979) (MARU doc. 11922); Colorado Op. 47 (1972) (MARU doc. 8000))
- (2) proper representation of both parties would require the lawyer to seek out all relevant information which might otherwise be confidential, and result in a waiver of attorney client privilege if the divorce were later contested (*see, e.g.*, Connecticut Op. 33 (1982));
- (3) joint representation might heighten the degree of judicial scrutiny given to the agreement, and ultimately, its nullification (Moore, at 254). *But see* Levine v. Levine, 54 N.Y.2d 42, 436 N.E.2d 476 (1982); Klemm v. Superior Court, 75 Cal. App.3d 893, 142 Cal. Rptr. 509 (1977).

Because of such concerns we note that many courts and ethics committees continue to presume that there is "a substantial likelihood of prejudice or profound conflict inherent in every matrimonial problem", and that "since there is no such thing as a 'fully agreed' uncontested divorce... any such agreement will always fall apart if counsel does an adequate job of going into all pertinent matters." Moore, at 248. *See* particularly Mississippi Op. 80 (1983); South Carolina Op. 81-13 (1982); West Virginia Op. 77-7 (1977) (MARU doc. 9679); Colorado Op. 47 (1972) (MARU doc. 8000); New York Op. 258 (1972) (MARU 9018). Accordingly, many jurisdictions prohibit joint representation of spouses, even in "no-fault" proceedings (see cases previously cited) or permit dual representation only in situations in which there are no minor children or substantial assets, or where the disposition of all assets and debts has been settled before consultations with counsel. *See* Arizona Op. 76-25 (1976); Oregon Op. 218 (1972) (MARU doc. 9779); Virginia Informal Op. 296 (1978) (MARU doc. 12928).

While we are unwilling to impose a *per se* rule prohibiting joint representation of both spouses in every "no-fault" divorce case, we do conclude that joint representation should be the exception rather than the rule. Moreover, joint representation should be undertaken only after full disclosure and informed consent of both parties. DR 5-105(C); Montana Op. 10 (1980). Full disclosure would include disclosure of all specific areas of potential disagreement. For counsel's own protection, such disclosure and consent should be in writing. Tennessee Op. 81-F-16 (1981). If a dispute later arises, the lawyer should carefully explain why joint representation might be unwise, and if it does not remain obvious" that the lawyer can adequately represent the interests of each spouse, the lawyer must withdraw from representing either.

Although many jurisdictions continue to prohibit joint representation of spouses, or permit joint representation only in limited circumstances, many of the same jurisdictions have relaxed the ban against an attorney's contact with the unrepresented spouse. Moore, at 247. EC 7-18 provides in pertinent part that

...a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Moreover, DR 7-104(A)(2) provides that a lawyer shall not

give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Pursuant to these standards, the ABA has consistently adhered to the proposition that a lawyer representing one spouse may not advise the unrepresented spouse or seek to convince that spouse to pursue a particular course of conduct. ABA Formal Op. 58 (1931), "...limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel."; ABA Informal Op. 1140 (1970), "As long as these documents are not accompanied by or coupled with the giving of any advice to the defendant, they would constitute only communication... and ...would be ethical." Nor may the attorney use his client as a conduit for communicating advice to the unrepresented spouse. New York Op. 478 (1978).

On the other hand, it is now clear that some flexibility must be permitted in this area given the fact that many spouses will elect to proceed without separate counsel. For example, counsel should be permitted to prepare a separation agreement negotiated by counsel's client, and submit it to the unrepresented party for signature, assuming that care is taken to draw the agreement so that the other party will understand it. New York Op. 478 (1978). By the same token, it has been recognized that an attorney ought to be able to draw a joint petition for dissolution provided the parties are in agreement on all things, and the attorney makes it clear that he or she is representing only one of the parties. Missouri Op. 9 (1977) (MARU doc. 11773).

Similarly, newer and well reasoned ethics opinions recognize that

Circumstances may arise where it is impossible for a lawyer to fulfill his professional responsibility without seeking to convince an adverse party to pursue some course of conduct that he would otherwise not undertake. So it is, when an adverse party elects to appear *pro se* in a litigated matter, the lawyer may have absolutely no choice but to assume the mantle of advocacy for his client's cause and actively enter into the negotiation process. (New York Op. 478 (1978) MARU doc. 12243)

Accordingly, there is no reason why an attorney may not draw a proposed property settlement agreement for his or her client to be presented to an unrepresented spouse who decides not to be represented, so long as the instrument is not coupled with advice. Missouri Op. 9 (1977) (MARU doc. 11773) ("The opinions do not affect the right to negotiate with the unrepresented party. They merely preclude the attorney from giving advice to the unrepresented party."); Connecticut Op. 27 (1976) (MARU doc. 10700) ("...attorney should clearly inform the

second party that he is not being represented by the attorney and may obtain his own counsel at any time.); Ohio Op. 30 (1975) (MARU doc. 9679) (“...if the other spouse has an independent opportunity to examine and approve the agreement before it is entered.”); Florida Ops 1-2 (1972) (RU doc. 8126); L.A. Co. Op. 334 (1973) (MARU doc. 7689).

The question is deceptively simple - may the attorney representing one party “answer questions” posed by the unrepresented spouse? Given the above authorities, and the fact that much legal “advice” is given in the form of answers to questions, the answer would be no in many, if not in most, instances involving more than the conveying of innocuous information, or response to simple questions of fact or procedure. If the interests of the spouses are sufficiently conflicting to require separate counsel in the first instance, it follows that the door should not be opened that would allow the “answering of questions” concerning the effect of the proceeding on the rights or alternatives of the unrepresented spouse. Counsel can be an “advocate for or an advisor to only one of the contesting parties. New York op. 478, *supra*.

Regarding antenuptial agreements, we note that separate ethical problems may be presented if the particular agreement could be construed to violate public policy. In Jackson v. Jackson, 626 S.W.2d 630 (1981) the Supreme Court cited with approval the following language from R. Petrilli, Kentucky Family Law 13.8:

...Public policy embraces a vital interest in the preservation of marriage. Any provision that looks toward, provides for, facilitates, or tends to induce a separation or divorce after marriage is contrary to public policy and void. A provision for the payment of alimony or a property settlement should a separation and divorce occur after marriage is void and unenforceable “ Kentucky Family Law, Husband and Wife, Sec. 13.8.

See also, Sousley v. Sousley, 614 S.W.2d 942 (1981); Stratton v. Wilson, 185 S.W. 522 (1916). Compare New York City Op. 722 (148) (A lawyer may not insert in contracts provisions which have been held void against public policy by “a court of last resort... as a matter of law.”).

Assuming that the agreement contemplated by the parties does not offend public policy, joint representation may threaten the exercise of counsel’s independent professional judgment if one or the other of the parties is unwilling to be completely forthcoming. Specifically, we note another passage from Petrilli, at 13.5:

During marriage, or after the death of one spouse an antenuptial agreement may be avoided unless... (both parties have) knowledge ...of their legal rights, and knowledge of the effect the antenuptial agreement will have upon their legal rights.

Elsewhere in the same section the author observes that “full frank disclosure to each other of the property held by each of them” is required, and that “it is good practice to make a recital in the antenuptial agreement of the parties holdings of property.” Compare Lipski v. Lipski, 510 S.W.2d 6 (1974) (upholding antenuptial agreement prepared by an attorney representing both parties). If counsel is possessed of confidences or secrets of a party that the other needs to know and that party is not willing to disclose such information, it is obvious that counsel would, at the very least, violate DR 5-105 by purporting to represent both.

Accordingly, joint representation should be undertaken only if each party consents to the representation after full disclosure of the potential problems inherent in such representation. Prudent counsel would obtain such consent in writing. DR 5-105(C).

Finally, we believe that our comments in response to Question 2 are pertinent to Question 4.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.