

Ethics Opinion

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QUESTIONS PRESENTED:

1. Is it necessary to communicate the potential for conflict of interest under Rule 1.7¹ to all married couples who jointly retain an attorney for estate planning services?
2. Is it necessary to obtain a written conflict waiver from such a couple?

SHORT ANSWERS:

1. Absent an existing conflict or evidence that the lawyer's independent professional judgment is likely to be adversely affected by the representation, no. However, if a conflict becomes evident or independent judgment is restricted, then the lawyer must satisfy his or her responsibilities under Rule 1.7.
2. Although neither Montana law or Montana's Rules of Professional Conduct require a written conflict waiver, we believe that for the lawyer's purpose it is wise practice to obtain a written waiver.

DISCUSSION: Rule 1.7 does not apply if there is no evidence of conflict between the spouses in the estate planning process². The status of marriage alone is not sufficient to create a substantial potential for a material limitation upon the lawyer's representation of either spouse. If Rule 1.7(b) were applicable merely because two clients were married to each other, no lawyer could accept representation of the couple without a waiver.

The Rules are a starting point for regulation of lawyer conduct; they do not and cannot provide a guideline for all conduct in all situations. Any interpretation of the Rules requires the lawyer to apply fundamental assumptions and reasoning about human behavior and its consequences. The fact of marriage does not by itself suggest a limitation on the lawyer's duties of independent judgment and loyalty. It is appropriate to view the couple as unified in goals and interests until shown otherwise.

Rule 1.7(b)(2) states that "when representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." However, Rule 1.7(b)(2) only applies where the representation "may be materially limited by the lawyer's responsibility to another client or to a third party".

The marital relationship itself is not in most cases adversarial in nature and no conflict inherently exists in representing both parties. Generally speaking, the fact that the clients are married does not materially limit the responsibilities to either client. Therefore, it is not necessary to advise a couple of the possibility of a potential conflict unless there is evidence suggesting such advisement is appropriate.

Conflict occurs when spouses disagree on issues in which only one spouse can succeed. "A lawyer with loyalties to both spouses in joint representation may find that he or she will require a conflict waiver...because he or she will decide...that accomplishing the goals of one spouse creates legal or emotional difficulties for the other." *Id.* at 773.

In the event that a lawyer perceives conflict or potential for conflict, it is wise for that lawyer to explain the lawyer's obligations under Rule 1.7(b) and the client's choices of representation with the lawyer; among them, joint or separate representation, or declination of representation by the lawyer. The lawyer should explain that if they are represented jointly, the lawyer may assume that either the two spouses will agree or they have independence of property or other rights that do not require agreement. If the couple chooses separate representation by the lawyer, each spouse is entitled separately to the lawyer's counsel for his or her own interest. The lawyer does not mediate between them³, but rather, the counseling of each with respect to his or her disposition of assets are separate lawyering transactions.

The lawyer's view of his or her mode of representation of the couple alters each spouse's rights and duties with respect to the other spouse and also dictates certain rights and duties of the lawyer's counseling the couple. For example, if there is litigation in a joint representation, each spouse is a holder of the attorney-client privilege with respect to confidential information exchanged in that representation. Litigation in the context of separate representation differs significantly because all confidential disclosures by either spouse to the lawyer outside the presence of the other spouse carry the protection of privilege from disclosure to the other spouse, as well as to third parties. Because the lawyer's exposure to conflicting interests is greater in a joint representation than in a separate representation, the lawyer will sooner reach the threshold of conflict.

Once a substantial potential for a material limitation on the lawyer's representation of either spouse - the equivalent of a material potential for conflict - exists, Rule 1.7 (b) applies and the lawyer must obtain consent to the representation. Though neither the Rules nor Montana law require a written conflict waiver, we believe it is advisable for the lawyer's purposes to obtain a waiver in writing.

There are many points of disagreement that may not rise to the level of a conflict for purposes of a Rule 1.7(b) conflict waiver. Conflict does not necessarily exist when spouses differ in their objectives. For example no actual conflict can be said to exist if one spouse wants to benefit the couple's children sooner than does the other, or if the couple's plans differ as they are in a second marriage in which each spouse wants to make separate arrangements for children from a prior marriage. Different choices made by each spouse with respect to his or her own assets typically do not rise to a material potential for conflict.

Representation of husbands and wives requires the lawyer's continuing sensitivity to changing goals and interests. This in turn mandates flexibility after the lawyer's initial assessment of each situation for actual potential for conflict. In the event actual potential exists or develops, the better practice under Rule 1.7 is discussion and agreement (preferably in writing) between lawyer and couple as to the alternatives available for the lawyer's continued representation, including the possibility of declination of representation.

THIS OPINION IS ADVISORY ONLY

ENDNOTES

1. (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- 1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and*
- 2) each client consents after consultation.*

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

- 1) the lawyer reasonably believes the representation will not be adversely affected; and*
- 2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.*

2. The questions presented are examined thoroughly in the Report of the Special Study Committee on Professional Responsibility, Comments and Recommendations on the Lawyer's duties in Representing Husband and Wife, 28 Real Property, Probate and Trust Journal 765-802 (1994).

3. In the event a lawyer chooses to mediate, the lawyer should examine Rule 2.2, which sets out the parameters for lawyers as intermediaries.