NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1998-99/15
Conflict of Interest: Joint Petitions in Domestic Relations

Presented to the Board of Governors 3/23/00

RULE REFERENCES:

*1.6
*1.7
*4.3

SUBJECTS:

*Adverse Effect on Professional Judgment
*Adverse Representation
*Confidentiality
*Conflict of Interest
*Consultation
*Domestic Relations
*Dual Representation
*Harsh Reality Test
*Independent Judgment
*Multiple Representation

ANNOTATIONS:

A lawyer may not represent both parties with respect to the preparation or filing of a joint petition in a domestic relations matter.

QUESTION PRESENTED:

May an attorney with the consent and participation of both parties prepare and/or file a Joint Petition in a Domestic Relations matter?

RESPONSE:

Introduction and Background: Between 1996 and 1998, the Supreme Court promulgated new rules for domestic relations proceedings in both the Family Division Pilot Program and the Superior Court. (The Superior Court Rules, titled "Rules for Regulating the Practice in Domestic Relations", are temporary, and replace former Superior Court Rules 144 – 159-C.) In most respects, the Family Division Rules and the Temporary Domestic Relations rules are similar, and both significantly modify past procedures relating to domestic relations' practice in New Hampshire.

Historically, divorces were equity actions commenced by way of a "libel for divorce", with the familiar adversarial case name: Jane Doe v. John Doe. Under both the Domestic Relations Rules and the Family Division Rules, divorces are now commenced by way of "petition", with the name format: In the matter of Jane Doe and John Doe. Domestic Relations Rule 4 and Family Division Rule 2 also both allow parties to file "joint petitions" (Dom. Rel. Rule 4 allows for joint petitions in all domestic relations matters, whereas Fam. Div. R. 2, by its terms, is

limited to divorce actions). Among the perceived advantages of the joint filing are: no need for service of process, answers or cross-petitions, and the subtle suggestion that a divorce need not be adversarial.

Joint petitions may well be most helpful and appropriate in uncontested matters, or in cases where there are no significant issues in dispute. Neither rule limits its application to such cases, however, and joint petitions are being used in contested cases as well, particularly where the parties initially believe they are in agreement. But it is the propriety of lawyers preparing joint petitions in any case, including the simple or even uncontested cases, which raises the ethical issue discussed here.

Under Rule 1.7 (a), before an attorney can represent two parties with adverse interests, the attorney must have a reasonable belief that representation of each of the two parties would not be adversely affected by the attorney's independent responsibilities to the other party, and the two parties must each consent to the dual representation with knowledge of the consequences. Because of the significance of the question to the fundamental notion of zealous and independent advocacy in our system, the Committee has adopted the "harsh reality test" which the attorney should apply in making the threshold determination whether to proceed with representation. Under the test, the attorney should ask him or herself whether:

> [i]f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent . . . If this 'harsh reality test' may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline [the dual] representation…..

EO 1988-89/24; <u>see</u> <u>also</u> EO 1989-90/17. In the context of domestic relations matters, the Committee has uniformly determined that the harsh reality test can not be satisfied, and, likewise, that an attorney can not provide legal services to both parties. <u>Cf. Walden v. Hoke,</u> 429 S.E.2d 504 (W.Va. 1993) (court found dual representation of both spouses in contested divorce improper although attorney had obtained full disclosure and consent of both parties).

In 1978, the Committee had the occasion to consider whether an attorney could assist husband and wife with the preparation of a stipulation when both parties were in full agreement as to terms. The Committee, however, concluded that "it would be improper for a lawyer to represent both the husband and the wife in a marital dispute regardless of the legal basis for [a] proposed separation or divorce." EO 78-5/10 (printed at 4 N.H.L.W. 341 (1978)). As part of that opinion, the Committee set forth a procedure or guidelines for attorneys to follow when representing a client in an uncontested divorce where the other party is unrepresented. (Those guidelines are reprinted as an appendix to this Opinion.) Although the Committee did not expound in that opinion on the reasons or rationale behind the conclusion, the bases may be found in a series of opinions in which the Committee had the opportunity to review the ethical considerations relative to licensed attorneys serving as "marital mediators". <u>See</u> EO 90-91/9; 89-90/15; EO 87-88/3; EO1986-87/2; EO 1983-84/4; EO 1982-83/16.

Throughout the 1980's the Committee repeatedly took the position, first under the former Code of Professional Responsibility, and then, later, under the present Rules of Professional Conduct, that it was impermissible for an attorney to act as a marital mediator. <u>See</u> EO 87-88/3;

EO1986-87/2; EO 1983-84/4; EO 1982-83/16. The grounds for the Committee's several decisions were several, with the most frequently cited being client expectations, client loyalty, client confidentiality, and most significant, the inherently divergent interests of divorcing clients. See, e.g., EO 1983-84/4.

In 1989, RSA 328-C was enacted, and, among other things, specifically indicated that the marital mediator, by definition, is an "impartial third person" to the process. RSA 328-C:2, V. The statute also included provisions removing the Committee's earlier concerns that communications otherwise protected under Rule 1.6 may arise during mediation sessions, RSA 328-C:9. Accordingly, in 1989 the Committee revised its position and determined that a lawyer could serve as a marital mediator as long as the attorney "strictly adhered" to ten separate conditions. EO 1989-90/15; see also EO 1990-91/9 (the ten conditions of EO 1989-90/15 reduced to nine). However, the Committee's change in position was inexorably linked to the statutory requirement that the mediator be an impartial third party – by necessary implication, not a representative or attorney for either party. The Committee in no way retreated from its steadfast position that it is impermissible for an attorney to provide legal services or representation to both parties in a divorce, nor does the Committee see any reason to do so now.

To represent the two principal parties in a domestic relations matter is analogous, yet more perilous, to the parties and to the attorney than representing both buyer and seller in a real estate transaction. Both pairings may well have generalized objectives which are identical; however, their individual interests are, or in most cases will be, exactly the opposite. See, e.g., EO 1990-91/9; EO 1987-88/3; EO 1986-87/2; 1983-84/4 (all relative to divorce). Often times, the obligation of client confidentiality will preclude the ability of the attorney to make the disclosures necessary to obtain the informed consent required under Rule 1.7 for dual representation. Add to the domestic relations case the "often deeply emotional and personal issues involved in every divorce, coupled with the reality that every divorce involves judicial proceedings," EO 1986-87/2, and the dual representation situation is fundamentally flawed.

> The vast differences of interest of the two divorcing clients create an impermissible conflict of interest for the consulting attorney. Given a finite amount of income, property, children and visitation time, the differing interests of the divorcing persons are highly apparent.

EO 1987-88/3 (quoting 1983-84/4); see also EO 1990-91/9. The emotional aspects also impact the inherent need for trust in communications between attorney and client. As the Committee noted in both the 1983 and 1986 Opinions (relating to attorneys serving as mediators):

> Even if it is not an adversary proceeding, the divorce of a marriage involves deep feelings that could not be probed unless the attorney had the client's undivided confidence.

NH Op 1986-7/2; NH Op 1983-3/16.

Another factor in a domestic relations case not often present in most other types of practice is the fact that as long as there are children who have not graduated from college, or as long as there is a potential for future alimony, the case is not over. It is no secret to domestic relations practitioners that post-divorce proceedings are in many cases far more emotional and acrimonious than the original proceeding had been. As many post divorce cases turn on the

question of full disclosure the first time around, the dangers to the practitioner and to the clients should be self-evident.

The Rules of Professional Conduct are obligations imposed on all attorneys as they practice in this State. While "they presuppose a larger legal context shaping the lawyer's role," Preamble Rules of Professional Conduct, they apply in concert with that larger legal context. As to attorneys, the Rules are superimposed upon that context. The Rules apply at all times, in Court proceedings or out. Unlike RSA 328-C, there is nothing in either the Domestic Relations Rules or the Family Division Pilot Program Rules, which suggests that an attorney can act in any capacity (e.g., "impartial third party") other than a single party's attorney in domestic relations matters. As such, it is impermissible for a lawyer to represent both parties with respect to the preparation or filing of a joint petition in a domestic relations matter. Rather, an attorney asked by his or her client to assist in the filing of such a petition should follow a procedure similar to the guidelines first expressed in the EO 78-5/10 relative to the filing of stipulations when one of the parties in a divorce is unrepresented. See also Rule 4.3, Dealing with Unrepresented Person. Accordingly, an attorney who determines it is in his or her client's best interest to have the client and the client's spouse file a joint petition, should, at a minimum:

- Obtain the necessary information for the petition and other filings required for commencement of the action from the client;
- Prepare the joint petition and other documents without the assistance of the client's spouse;
- Forward the joint petition to the client's spouse by way of a letter in which the attorney:
- Strongly urges the client's spouse to obtain independent counsel; and
- Informs the client's spouse that the sending attorney represents the interests only of the client, and in proposing the joint petition is not in any way considering the interests of the client's spouse.

The attorney should not under any circumstance rely on his or her client to act as a conduit of correspondence between the attorney and non-client spouse. In further communications with the non-client spouse, the attorney should reiterate the sole representation statement, and repeat the suggestion that the non-client spouse seek independent counsel.

APPENDIX

Excerpt from EO 78-5/10

As a maximum permissible relationship between one attorney and two spouses, the following was suggested. After obtaining the information from the client as to his or her spouse's willingness to proceed with the divorce and to execute a stipulation, the attorney might legitimately write to the opposing spouse , advise him or her to obtain counsel, but enclose a proposed stipulation to be shown to counsel. The letter might also legitimately state, "If you are perfectly satisfied with the enclosed stipulation, you understand its full significance, and you still do not wish to obtain counsel, you may, if you wish, execute it and return it to the clerk of court in the envelope addressed to the clerk which is enclosed. If you decide to follow this procedure, it will also be necessary to execute a pro se appearance card, which means that you are electing to act as your own attorney and are filing the necessary formal appearance card with the clerk. For your convenience, such a card is enclosed, and you may execute and return it with the stipulation if you desire to do so. You will understand that if you do so, and the court grants a divorce, the respective rights of yourself and your spouse will be governed by the terms of the enclosed stipulation.