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N. H. ETHICS OPINIONS ANNOTATED

AO 1988-89/6

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Advisory Opinion #1988-89/6  
Conflict of Interest: Representation of Separated Parties  
November 10, 1988

RULE REFERENCES:

- \*Rule 1.7
- \*Rule 1.8 (b)
- \*Rule 1.13(e)
- \*Rule 2.1

SUBJECTS:

- \*Adverse Effect on Professional Judgment
- \*Adverse Representation
- \*Client Communications
- \*Confidentiality
- \*Conflict of Interest
- \*Consultation
- \*Domestic Relations
- \*Multiple Representations
- \*Representation
- \*Spouses

ANNOTATIONS:

A conflict of interest may arise for an attorney handling pension and estate planning matters in the dual representation of a husband and a wife who are separating. (Rules 1.7; 1.8(b))

In representing both separating spouses, if the lawyer has gained information from one spouse which could be used in a manner detrimental or adverse to the other, then the lawyer should decline representation of both. (Rule 1.7)

Informed consent by both spouses to a lawyer's continued dual representation may not be possible if the clients' interests are fundamentally antagonistic within the scope of the proposed representation. (Rule 1.7; 1.8(b))

An attorney may represent an organization, either incorporated or unincorporated, and any of its members or other constituents subject to the provisions of Rule 1.7, Rule 1.13(e), Rule 2.1. (Rules 1.7; 1.13; 1.13(e); 2.1)

When the attorney representing multiple clients believes that such representation will not be adversely affected, the attorney must still communicate the risks and consequences of common representation to both clients. (Rule 1.7(a))

FACTUAL BACKGROUND:

The inquiring attorney's law firm has represented a husband and wife for a number of years. The husband and wife operate a small business together. Recently, the husband and wife consulted the attorney with respect to revisions in their small business pension plan and their personal estate plans. At this meeting, the husband and wife informed their attorney that they planned to live separately but do not plan to divorce.

QUESTION:

Is it ethical for the attorney to represent both the husband and the wife in matters of estate planning and pension planning?

ANALYSIS:

The question presented requires the same analysis as any dual representation situation. See Rule 1.7.

The Rules specifically acknowledge that under certain circumstances, a conflict of interest may arise in the dual representation of husband and wife in pension and estate planning. Rule 1.7 and comment.

The fact that the husband and wife plan to live separately, is a significant factor to be considered in determining whether their interests may differ with respect to the subjects of pension and estate planning.

Rule 1.7 states:

"(a) A lawyer shall not represent a client if the representation of the 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 and with knowledge of the consequences.

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities 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 and with knowledge of the consequences. 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."

The attorney is already familiar with some of the clients' situation, and has a duty to inquire of the clients as to any factors that might adversely or materially affect the other. The attorney must then carefully weigh all of the factors known and must decide whether or not the dual representation can be continued in compliance with Rule 1.7. In addition, if there is a material risk that the dual representation will compromise the lawyer's independence of professional judgment, the lawyer should decline to represent both parties. If the parties contemplate divorce or dissolution of their business, the attorney should decline to represent either. See Ethics Committee Advisory Opinion #1987-88/3, Marital Mediation/Consultation by Retired Attorney.

In the event that the lawyer has already acquired information from one of the clients which could be used in a manner detrimental or adverse to the other client, the attorney should decline representation of both the husband and the wife, absent the informed consent of both clients. Rule 1.8 (b). However, the attorney should be aware that, depending upon the differences between the clients, they may not be able to provide such informed consent. If the attorney concludes their interests are fundamentally antagonistic within the scope of the proposed representation, the attorney should decline representation.

In addition, the attorney must be cognizant of considerations relating to the business organization as well as to the husband and wife individually. Rule 1.13(e) permits a lawyer to represent an organization, either incorporated or unincorporated, and any of its members "or other constituents" subject to the provisions of Rule 1.7. Also see Rule 2.1.

In the event that the attorney reasonably believes that the representation will not be adversely affected, the lawyer must communicate the risks and consequences of common representation to the clients, so the clients will have actual knowledge of the consequences that could occur as a result of the lawyer's divided loyalties. The clients must consent to the dual representation.

CONCLUSION:

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The lawyer should more completely assess the existence and scope of the conflict, if any, after consultation with the husband and wife and then determine the appropriate scope of representation with the foregoing rules in mind.