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**REPRESENTING BOTH SPOUSES IN
"IRRECONCILABLE DIFFERENCES DIVORCE"**

LEGAL ETHICS INQUIRY 77-7

You have asked for an opinion with respect to the propriety of an attorney representing both spouses in a divorce in which it is alleged "that irreconcilable differences have arisen between the parties" as permitted by W. Va. Code § 48-2-4(a)(10).

House Bill 806, passed by the Legislature on April 9, 1977, and effective 90 days from passage, provides as follows:

(10) If one party to a marriage shall file a verified complaint, for divorce, against the other, alleging that irreconcilable differences have arisen between the parties, and stating the names of the dependent children of the parties or of either of them, and if the defendant shall file a verified answer to the complaint and admit or aver that irreconcilable differences exist between the parties, the court may grant a divorce, but no order of divorce entered pursuant to the provisions of this subsection (a)(10) shall be entered unless sixty days shall have elapsed after the filing of the complaint. In such case no corroboration of the grounds for divorce shall be required. The court may make such order for alimony, for the custody, support and maintenance of children, and for visitation rights as may be just and equitable, or may approve, modify, or reject any agreement between the parties pertaining to alimony, the custody, maintenance and support of children, or visitation rights; such provision shall not affect the right to obtain a divorce upon the ground of irreconcilable differences between the parties to a marriage.

Some members of the bar apparently feel that this statute authorizes an attorney to represent both spouses in a divorce where as grounds for the divorce it is alleged "that irreconcilable differences have arisen between the parties." This is but a variation of the old question as to whether a lawyer may represent both husband and wife in a "friendly" separation or an uncontested divorce even with full disclosure and the consent of both parties.

It is the opinion of this Committee that it would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of both parties. The likelihood of prejudice is so great in this type of matter as to make adequate representation of both spouses impossible, even where the separation is "friendly" and the divorce uncontested. In our judgment the provisions of W. Va. Code § 48-2-4(a)(10) do not alter the situation.

The statute contemplates the filing of a verified complaint alleging that irreconcilable differences exist and the filing of a verified answer admitting or averring that such irreconcilable differences exist. Someone must advise each spouse in the first instance. Furthermore, matters concerning alimony, the custody, support and maintenance of children, and visitation rights must be resolved.

The applicable standards are found in Canon 5, EC 5-1, EC 5-14, -15, -16 and DR 5-105 of the Code of Professional Responsibility. Under these provisions, lawyers are to serve their clients free of compromising influences and loyalties and

are precluded from accepting or continuing any employment that will adversely affect their judgment on behalf or dilute their loyalty to any client. Likewise, under Canon 4, EC 4-1, EC 4-5 and DR 4-101, lawyers must preserve all confidences and secrets of clients and not accept employment that would require the use or disclosure of such information.

The Code of Professional Responsibility under certain circumstances permits a fully informed client, able to understand all ramifications of a conflict, to consent to dual representation (EC 5-16, DR 5-105) or to the adverse use of secrets and confidences (EC 4-1, DR 4-101). But even with full disclosure and understanding consent, DR 5-105 permits the representation of clients with conflicting interests only "if it is obvious that [the lawyer] can adequately represent the interest of each." Because there is such a substantial likelihood of prejudice or profound conflict in every marital problem, we do not believe that adequate representation of both parties could be had should a lawyer undertake to represent both husband and wife. Various ramifications of this problem have been considered by the Committee on Professional Ethics of the American Bar Association. In Formal Opinion No. 58 it was held that an attorney retained by a client who desires a divorce may not ethically confer with the adverse party, not represented by counsel, in an attempt to obtain the adverse party's consent to the divorce. In Formal Opinion No. 245 the Committee stated that the plaintiff's attorney in a divorce action should not recommend local counsel for the defendant even

at the specific request of defendant's out-of-state attorney. And in Formal Opinion No. 1,140 it was held that a violation of proper ethical conduct would be involved where the plaintiff's attorney in a domestic relations case obtains from the defendant a waiver of the issuance of service of summons and a waiver of any right to contest the jurisdiction or venue of the court and an agreement that the case may be submitted to the court in term, time or in vacation without further notice to the defendant.

In its Opinion No. 258 the Committee on Professional Ethics of the New York State Bar Association held that it would be improper for a lawyer to represent both husband and wife at any stage of a marital problem even with full disclosure and the informed consent of both parties. It is not possible in such situations to avoid if not actual overreaching at least the appearance of such, to the ultimate dissatisfaction or injury of one or both spouses.

The inherent conflicts in attempting to represent both sides in matrimonial situations have been well described in Walzer, The Role of the Lawyer in Divorce, 3 Family L.Q. 212, 217 (1969):

Lawyers are frequently urged to represent both parties in a divorce. The client may insist that both parties know exactly what they want and that they have arrived at a complete understanding. All that needs to be done is to put the agreement into written form and to go to court. But the situation in which the parties have identical interests is so rare as to be exceptional. For example, the division of support payments between alimony and child support has long-term financial implications for each of the parties. What is good for the husband is not necessarily good for the wife, and vice versa. The client who insists that the lawyer represent both parties frequently has an

axe to grind. The lawyer who represents both clients runs an ever-increasing risk that he will eventually be the defendant in a malpractice suit brought by a disappointed spouse.

It has been held that the rule which permits an attorney to represent adverse interests of a private nature by consent of the parties affected does not apply in an action of divorce or separation. 7 Am. Jur. 2d, Attorney at Law, § 155, p. 140; Re Themelis, 117 Vt. 19, 83 A.2d 507; Holmes v. Holmes, 145 Ind. 52, 248 N.E.2d 564. In the latter case, the court said:

Therefore, it is our opinion that the trial court should not permit an attorney to represent both sides in a divorce action. Furthermore, an attorney should not present the trial court with an agreed property settlement or custody and support agreement executed by both sides unless it is satisfactorily shown that the defaulting party has conferred with competent counsel prior to or during the execution of the proffered settlement, or such party is competent to fully understand and does, in fact, understand, the contents of the instrument and its effects, and the same is entered into without compulsion or duress. We believe this procedure is necessary in order to guarantee that each divorce granted and property settlement entered into remains free from any fraud, duress, undue influence, or collusion.

A lawyer approached by husband and wife in a matrimonial matter and asked to represent both may, however, properly undertake to serve as a mediator or arbitrator. Should he accept such a role, he may not thereafter represent either spouse in the event his efforts are unsuccessful.

Such service is governed by EC 5-20, which provides:

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

A second question was asked: whether it would be proper for the plaintiff's attorney to prepare an answer, give it to the plaintiff client, and shift the burden to the client of having the defendant execute it and file it? Our answer to this question is likewise no. This is simply an attempt to do by indirection what cannot be done directly.