

## Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 116

Approved June 25, 1992

**Issue:** Under what circumstances may an attorney represent both parties in a divorce?

**Opinion:** An attorney may not concurrently represent both parties in a divorce under any circumstances.

### Analysis:

#### 1. Discussion of the Rules of Professional Conduct.

Rule 1.7(a) of the Utah Rules of Professional Conduct prohibits concurrent representation of clients with directly adverse interests.<sup>1</sup> The rule establishes an exception when the attorney reasonably believes that the representation of one client will not adversely affect "the relationship" with the other client. This phrase, "the relationship," establishes a broader scope for possible conflicts than if the rule applied only to the clients' adversely affected interests.<sup>2</sup> Under Rule 1.7(a), the attorney's reasonable belief may be created by the client's statements.<sup>3</sup> Only after his reasonable belief is established may the attorney consult with both clients and obtain their consent to the dual representation.

Rule 1.7(b) prohibits representation of a client where other responsibilities limit the attorney's ability to adequately represent that client. This rule focuses on the quality of the attorney's representation rather than on the quality of the lawyer-client relationship. The rule requires the attorney to judge for himself the adequacy of his representation of both parties to a divorce. When applied by a conscientious lawyer, this rule should be interpreted more stringently than Rule 1.7(a), because it relies entirely on self-examination rather than the clients' statements.<sup>4</sup>

Rule 2.2 provides that a lawyer may assume the role as an intermediary between clients. Under this rule, the lawyer is representing neither party separately but each party as part of a group. The rule implies that the parties have a common interest that overrides their separate interests. In addition to the requirements of Rule 1.7, this rule requires that there be

"little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful."<sup>5</sup> The provisions of Rule 2.2 with respect to an intermediary are to be distinguished from the occasion when the lawyer acts as an arbitrator or mediator. As stated in the Comment to Rule 2.2, "The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer . . ." (Emphasis supplied.)

In the divorce context Rule 2.2 is difficult to satisfy, since any unsuccessful efforts as intermediary will require the intermediary attorney to withdraw from representation of both parties.<sup>6</sup> In divorce, with its special flavor of personal fault, the risk of failure as an intermediary is particularly great. With failure comes the cost of obtaining separate counsel, adding that expense to the expense of the failed intermediation. Further, the failure of intermediation may create additional acrimony between the parties, putting the parties in a worse situation than they originally occupied.<sup>7</sup>

#### 2. Arguments Favoring Dual Representation in Divorce.

Divorcing spouses usually seek dual representation because of financial considerations. This is a special problem for indigent spouses, whose only source of representation may be Legal Aid. Where Legal Aid offices are small, the only solution may be for the court to appoint attorneys to represent the spouse who is not represented by Legal Aid. In an amicable divorce, such an appointment should not be too great a burden.<sup>8</sup>

Dual representation is promoted as a way to facilitate the court's disposition of uncontested divorces. One attorney acting as a representative for both parties may present the court with a fait accompli. This argument is of small value since a truly uncontested divorce takes up little of the court's time in any case.

The final reason advanced in favor of dual representation is that the parties should be allowed to waive their right to separate representation. This argument assumes that both parties are equally informed of the disadvantages of dual representation. That assumption is not valid when one party dominates to the extent of controlling the other party's power to decide and to participate in disclosure of potential conflicts. Such dominance is often the case in dissolving marriages and may not be apparent to the attorney who only sees both parties when they are together.<sup>9</sup> The putatively amicable divorce could be replete with undisclosed conflicts.

#### 3. Arguments Opposing Dual Representation.

Allowing dual representation tends to erode confidence in

the courts as a tool for equitable resolution of disputes. The risk of the appearance of impropriety is great in divorce cases where the inherent adversity of the parties is so obvious.<sup>10</sup> Furthermore, the court is presented with only one view of the facts in the divorce, substantially reducing the court's ability to protect both parties.

Besides an appearance of impropriety, dual representation can foster actual impropriety by facilitating a fraud on the court, either with or without the attorney's collusion.<sup>11</sup> The potential for fraud enlarges when one spouse dominates in the marriage.<sup>12</sup>

Additionally, the attorney representing both parties has a financial disincentive to inquire too closely into the details of the property settlement he is arranging, because he must withdraw from the case entirely if he discovers a conflict.<sup>13</sup> Failure to scrutinize the transaction may allow a defrauding party to conceal assets which a separately represented spouse would have discovered.<sup>14</sup> Financial incentives and time pressures magnify the understandable tendency to accept a divorce as "amicable" and conduct only a superficial inquiry.

Even in the absence of fraud, dual representation discourages full disclosure. If the attorney's questioning reveals that one party has some slight advantage over the other in the property settlement, pointing out this advantage may cause the parties to become adversarial. The attorney then would be required to withdraw from representation of either party.

Additionally, unforeseeable conflicts may arise between the divorcing spouses during or long after the dissolution of the marriage. For instance, one spouse may have a change of mind after obtaining dual representation.<sup>15</sup> Unforeseen difficulties also arise when one of the spouses gains a financial advantage after the divorce because of occurrences during the marriage.<sup>16</sup> Because hindsight is always perfect, the unforeseen event may give rise to recriminations between the parties and a malpractice action against the lawyer.

#### 4. Analysis of Utah Precedent.

As the Utah Supreme Court has noted, "[t]here [are] relatively few reported [Utah] decisions . . . applicable to professional conduct . . ." <sup>17</sup> In fact, there appear to be only two reported Utah cases which deal with concurrent representation.<sup>18</sup>

In *Margulies*, Jones, Waldo, Holbrook & McDonough ("Jones Waldo") undertook representation of plaintiff Jason Margulies in a medical malpractice action in October 1982.<sup>19</sup> The malpractice defendants in that case were three doctors, Upchurch, Woolsey and Chichester, and St. Marks

Hospital. In approximately September 1983, David Sundstrom, a co-general partner of Diversified Energy, a private drilling fund, retained Jones Waldo as counsel for the fund. Woolsey and Chichester were limited partners of Diversified Energy, and Upchurch was a "stockholder, former officer, and director of Intermountain Capital, a corporation that [was a] co-general partner in Diversified Energy."<sup>20</sup> As a result, as of September 1983, Jones Waldo was representing Margulies against Upchurch, Woolsey and Chichester and, arguably, by representing Diversified Energy, was also representing Upchurch, Woolsey and Chichester.

Based on Jones Waldo's concurrent representation of Margulies and Diversified Energy, Upchurch, Woolsey and Chichester filed a motion to disqualify Jones Waldo in the malpractice action. The trial court found that "Jones Waldo had a conflict of interest in violation of the Utah Rules of Professional Conduct in undertaking its representation in both cases."<sup>21</sup> Nevertheless, citing "great inconvenience and problems of delay," the trial court refused to disqualify Jones Waldo. On appeal, the Utah Supreme Court upheld the trial court's finding that a conflict of interest existed and, further, held that Jones Waldo, in fact, should be disqualified.<sup>22</sup>

In holding that Jones Waldo should be disqualified, the court initially addressed Jones Waldo's assertion that it did not have an attorney-client relationship with Upchurch, Woolsey and Chichester.<sup>23</sup> Upon deciding that an attorney-client relationship, in fact, existed, the court went on to address the question whether concurrent representation of Margulies and Upchurch, Woolsey and Chichester created an impermissible conflict of interest. As stated above, the trial court had held that a conflict of interest existed. The Utah Supreme Court not only affirmed the trial court's holding regarding the existence of the conflict of interest, the court also reiterated the trial court's pronouncement that "[t]he law has long recognized that an attorney is held to the highest duty of fidelity, honor, fair dealing and full disclosure to a client."<sup>24</sup> On that basis, citing Canons 4, 5 and 9 of the Code of Professional Responsibility, the Utah Supreme Court found that Jones Waldo had not fulfilled its obligations to Upchurch, Woolsey and Chichester.<sup>25</sup>

The court focused on the obligations created by Canon 5, specifically, Disciplinary Rule 5-105,<sup>26</sup> which the court quoted in part as follows:

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.<sup>27</sup>

According to the court, "The first requirement of DR 5-105(C) is that it be 'obvious' that the attorney be able to represent both clients adequately."<sup>28</sup> In this case, Jones Waldo had obtained important financial information regarding Upchurch, Woolsey and Chichester. This fact alone, the court noted, "should have raised some doubt in the minds of firm members as to the propriety of undertaking the federal action." Accordingly, the court found: "The readily apparent nature of the problem indicates that it was not 'obvious' that the firm could represent both clients adequately."<sup>29</sup>

The court went on to note that "[t]he second requirement of DR 5-105(C) is that the attorney obtain consent to the dual representation after 'full disclosure of the possible effect of such representation.'"<sup>30</sup> Jones Waldo argued that it essentially obtained the requisite consent when the co-general partner of Diversified Energy, who had been informed of the malpractice action, retained Jones Waldo. However, the court found that such consent was not valid:

For client consent to be adequate in a conflict of interest situation, the attorney must not only inform both parties that he is undertaking to represent them, but must also explain the nature and implications of the conflict in enough detail so that the parties can understand why independent counsel may be desirable.<sup>31</sup>

As additional support in holding that Jones Waldo should be disqualified, the court also referred to Canon 9 of the Code. Canon 9 prohibits lawyers from engaging in practices that may appear to be unethical, specifically providing that "[a] lawyer should avoid even the appearance of professional impropriety." On this point, the court noted: "Litigants are highly unlikely to be able to maintain this confidence [in the integrity of the legal system] if their attorney in one matter is allowed simultaneously to sue them in another."<sup>32</sup>

In conclusion, the court in *Margulies* noted that *Hansen* established "the principle that an attorney should become identified solely with the rights of his client and [should] not use, or appear to use, his position to take advantage of his client's confidence in him."<sup>33</sup> This appears to be the essential principle of *Margulies* and also of *Hansen*.

As has been noted above, and to summarize the existing Utah precedent, there are no reported Utah cases that directly address the issues created by concurrent

representation in the context of divorce. Nevertheless, under *Margulies*, prior to representing both parties in a divorce, a lawyer would be required (1) to determine that it was "obvious" that the lawyer could "represent both clients adequately," and (2) to obtain both clients' consent after "full disclosure of the possible effect of such [dual] representation." Of course, "full disclosure" would require the lawyer "not only [to] inform both parties that he is undertaking to represent them, but [the lawyer] must also explain the nature and implications of the conflict in enough detail so that the parties can understand why independent counsel may be desirable."<sup>34</sup>

The Utah requirements for concurrent representation outlined in *Margulies* are based, as noted above, on the requirements contained in Canon 5 of the Code of Professional Responsibility. The Code, however, is no longer applicable under Utah law. The Rules of Professional Conduct were adopted by the Utah Supreme Court, effective January 1, 1988. Accordingly, it is not clear that the requirements outlined in *Margulies* are presently applicable. Given this, it is likely that the Utah Supreme Court would reformulate its analysis to reflect the requirements regarding concurrent representation contained in the Rules. In any event, however, the court certainly will require lawyers to adhere to the highest standards "of fidelity, honor, fair dealing and full disclosure to . . . client[s]."<sup>35</sup>

**Conclusion:** The concurrent representation of both parties in a divorce is an ethically unacceptable practice. There is a substantial danger of improper influence exercised by a dominant spouse to prevent adequate disclosure of conflicts. The practice lends itself to both the appearance and the fact of impropriety. There is an enhanced opportunity for attorneys to participate in fraud and a financial incentive to blind themselves to possible conflicts. The danger to the parties and the courts outweighs the advantages of cost and convenience advanced as reasons for adoption of a rule allowing dual representation.

#### Footnotes

1. 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.

2. G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, § 1.7:202-203 (Prentice Hall 2d ed.) (hereinafter Hazard & Hodes).

3. *Id.* § 1.7:305.

4. *Id.* § 1.7:305.

5. Utah R. Prof. Conduct 2.2(a)(2).

6. Utah R. Prof. Conduct 2.2(c). *Margulies v. Upchurch*, 696 P.2d 1195, 1202-03 (Utah 1985).

7. Hazard & Hodes § 2.2:202.

8. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. Rev. 1115 (1982).

9. *Blum v. Blum* 477 A. 2d 289 (Md. Ct. Spec. App. 1984) (dominant husband imposes unfair settlement on wife in dual representation divorce.)

10. *Id.* at 296.

11. *Liles v. Liles*, 711 S.W.2d 447 (Ark. 1986) (attorney colludes with husband to defraud wife); *Hilt v. Bernstein*, 707 P.2d 88 (Or. Ct. App. 1985), cert. denied, 715 P.2d 92 (Or. 1986) (attorney unwittingly prepares documents enabling husband to defraud wife).

12. *Blum*, 477 A.2d at 294.

13. *Margulies*, 696 P.2d at 1202-03.

14. Marriage of *Eltzroth*, 679 P.2d 1369 (Or. Ct. App. 1984) (husband conceals assets from wife and attorney for both parties in "amicable" divorce).

15. *The Florida Bar v. Ethier*, 261 So. 2d 817 (Fla. 1972); *Board of Overseers v. Dineen*, 500 A.2d 262 (Me. 1985), cert. denied, 476 U.S. 1141 (1986); *Welker v. Welker*, 680 S.W.2d 282 (Mo. Ct. App. 1984).

16. *Columbus Bar Ass'n v. Grelle*, 237 N. E. 2d 298 (Ohio 1968) (later events force the parties to become adversarial despite adequate disclosure by the attorney).

17. *Margulies v. Upchurch*, 696 P.2d 1195, 1199 (Utah 1985).

18. *Id.*; *In re Hansen*, 586 P. 2d 413, 415 (Utah 1978).

19. Note, the malpractice action was filed in October 1982 and was scheduled for trial in March 1984. *Margulies*, 696 P.2d at 1198.

20. *Id.*

21. *Id.* at 1199. Note, the court appears to have mistakenly referred to the Rules of Professional Conduct (the "Rules") instead of the Code. In fact, the Rules were not applicable at the time the trial court issued its decision. Accordingly, it is likely that the court meant the Code of Professional

Responsibility.

22. *Id.* at 1200.

23. Note, on this point, Jones Waldo asserted "that a personal request for legal services or advice by the client and an acceptance by the attorney [are] necessary for an attorney-client relationship to be formed." 696 P. 2d at 1200. The Utah Supreme Court, however, upheld the trial court's finding that an attorney-client relationship existed without such a request and acceptance. In fact, the court found that "circumstances may give rise to an implied professional relationship or a fiduciary duty toward the client."

24. 696 P.2d at 1201.

25. *Id.* at 1202-05.

26. Note, in *Hansen*, the Utah Supreme Court also focused on Disciplinary Rule DR5-105. 586 P.2d at 415. In that case, the primary issue was whether or not the client had consented to concurrent representation.

27. 696 P.2d at 1203, quoting Utah Code of Professional Responsibility, DR 5-105(B), (C) (1977) (emphasis added by the court).

28. *Id.*

29. *Id.*, citing Utah Code of Professional Responsibility, DR 5-105(C), and *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F. 2d 1384, 1387 (2d Cir. 1976).

30. Note, "[t]he burden of showing full disclosure rests upon the attorney undertaking adverse employment." *Margulies*, 696 P.2d at 1203, citing *Hansen*, 586 P.2d at 415.

31. 696 P.2d at 1203-04.

32. *Id.*

33. *Id.* at 1204.

34. *Id.* at 1203-04, citing *In re Boivin*, 533 P.2d 171, 174 (Or. 1975).

35. *Id.* at 1201.

Rule Cited:

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