An Attorney's Conflict of Interest in Divorce and Child Custody Cases

> *Conflict of interest is almost certain in divorce litigation. No type of action involves more confidences or is more susceptible to advantage based on privileged communications.*[1]

Attorneys involved in divorce and child custody litigation should anticipate the application of the Code of Professional Responsibility[2] in any case that poses a potential conflict of interest situation. The preliminary motion to disqualify an opposing counsel has become increasingly popular[3] while client malpractice claims in this area have also escalated.[4] Although a conflicts dilemma could present itself in a variety of contexts,[5] this article

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1. *In re* Themelis, 117 Vt. 19, ____, 83 A.2d 507, 510 (1951).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE].

3. *See generally* Hilliker, *Attorney Disqualification Motions*, 26 PRAC. LAW. 11 (1980).

4. Professional liability insurers reported that conflicts of interest were the cause of less than five percent of malpractice claims in 1976 compared to twenty-two percent in 1978. Stern & Martin, *Mitigating the Risk of Becoming a Defendant in a Malpractice Action by Your Former Client*, 39 ALA. LAW. 258, 260 (1978).

5. For example, the most obvious situation is created when an attorney attempts to simultaneously represent the husband and wife in a divorce. A dilemma is created as attorneys are frequently urged to represent both parties of a divorce by their clients although warned by commentators and courts to avoid dual representation. *See generally* Holmes v. Holmes, 145 Ind. App. 52, 248 N.E.2d 564 (1969); Gardine v. Cotley, 360 Mo. 681, 230 S.W.2d 731 (1950). N.Y.S.B.A. COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 258 (1972) ruled 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. *See also* Walzer, *The Role of the Lawyer in Divorce*, 3 FAM. L.Q. 212, 217 (1969). If an attorney wishes to meet with the couple after being retained by one client he may escape conflict if the adverse spouse is carefully advised of his/her position. *See* Wilbanks v. Wilbanks, 234 S.E.2d 915 (Ga. 1977). At least one state bar association has incorporated within its rules the requirements necessary to avoid a conflict claim in the dual representation—divorce situation:

> (C) In the situation covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if he reasonably determines that he can adequately represent the interest of each and if each consents to repre-

shall focus upon the more subtle[6] situation created by representation of a present client to the disadvantage of a former client.

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sentation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each:

1. Except that in no event shall a lawyer represent both parties in divorce or domestic relations proceedings, whether or not contested, or matters involving custody of children, alimony or child support. (A lawyer shall be deemed to have complied with this paragraph by obtaining and filing the same in the proceedings a writing from the non represented party in which the non represented party acknowledges:

a. That the attorney does not and cannot appear or serve as the attorney for the non represented party.

b. That the attorney represents only his or her client and will use his or her best efforts to protect his or her client's best interests.

c. That the non represented party has the right to employ counsel of his or her own choosing and has been advised that it may be in his or her best interest to do so.

d. That having been advised of the foregoing, the non represented party has requested the lawyer to prepare an answer and waiver under which the cause may be submitted without notice and such other pleadings and agreements as may be appropriate.)

ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105 (amended Nov. 2, 1981).

Also, if a criminal defendant is involved, certain constitutional implications must be considered. *See* Granger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Lee v. State, 349 So. 2d 134 (Ala. Crim. App. 1977); Cassady v. State, 249 Ark. 1040, 463 S.W.2d 96 (1971); People v. Miller, 46 Ill. App. 2d 882, 361 N.E.2d 373 (1977); Matter of Fisher, 400 N.E.2d 1127 (Ind. 1980); Kerr v. State, 584 S.W.2d 626 (Mo. 1979).

6. "Subtle" should not be equated with unimportant in the family law situation.

> The attorney handling the legal problems involved in family law is dealing with a body of law highly charged with emotions, desires and aspirations of the client. ("People Problems"). These "people problems" all too often interfere with the client's ability to appreciate the attorney's legal proficiency in handling the client's problems. Misunderstandings arise between the client and attorney which have caused an increase in the number of complaints submitted to our grievance committees.

Albano, *How to Avoid Grievances in Family Law Related Cases*, 36 J. OF MO. B. 217, 217 (1980).

The Code

Three specific canons are relevant in considering a potential conflict of interest problem[7] and it is often their combined effect that determines the outcome of cases and analysis employed by courts.[8] Canon 4 exhorts lawyers to "preserve the confidences and secrets of a client."[9] This principle encourages communication between client and attorney, with the client assured that information he related to his attorney will never be used to his disadvantage.[10] Canon 5 provides that an attorney must exercise independent professional judgment on the client's behalf. A zealous representation of the client's cause can best be obtained when the attorney's work is untainted by the conflicting interests of another.[11] All actions must further be considered in light of Canon 9 and its admonition that attorneys must "avoid even the appearance of impropriety."[12]

Application of the Code and its Ideals

The predominant test developed by the courts in considering conflict of interest claims is the "substantial relationship test."[13] Under the rule first enunciated in *T.C. Theatre Corp. v. Warner Brothers Pictures*,[14] if an attorney represents someone opposed to a former client, the court must determine if the current action is substantially related to the work done for the former client.

Some courts have applied the substantial relationship analysis in divorce situations. A recent example of this application is *Gause v. Gause*,[15] which illustrates a situation that did not merit the

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7. Note, *Attorney Disqualification*, 56 CHI.-KENT L. REV. 1211, 1212 (1980).

8. *See* Note, *Motion to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEX. L. REV. 726, 730 (1978).

9. ABA CODE, Canon 4, Ethical Consideration [hereinafter cited as EC] 4-1 to 4-6, and Disciplinary Rule [hereinafter cited as DR] 4-101.

10. The oft quoted statement underlying this ideal is from United States v. Costen, 38 F. 24, 24 (C.C.D. Colo. 1889): "Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that the lawyer's tongue is tied from ever disclosing it. . . ."

11. ABA CODE, Canon 5, EC 5-1 to 5-24, and DR 5-101 to 5-107.

12. ABA CODE, Canon 9, EC 9-1 to 9-6, and DR 9-101 to 9-102.

13. Note, *supra* note 8, at 730.

14. 113 F. Supp. 265 (S.D.N.Y. 1953).

15. 613 P.2d 1257 (Alaska 1980).

granting of a disqualification motion. In this case, the Kay law firm represented husband and wife in a suit to collect a debt in 1979 and defended Mr. Gause in a small claims action in 1978. In 1980, the wife filed a divorce action and the Kay firm represented the husband. The court denied the wife's motion for disqualification since it failed to find (1) any substantial possibility that knowledge gained in such prior representation could be used against Mrs. Gause in the divorce suit or (2) that the subject matter of the divorce case had a substantial relationship to that prior representation.[16] The court outlined the evidenciary aspect of the test: "If the nature of the [prior] litigation indicates such a relationship, no further evidence would be necessary for a movant to prevail. . . . It is still possible, however, that despite the lack of apparent relationship, confidences creating a conflict may be revealed to counsel."[17] However, in this case, the court found the wife's affidavit on this point to be unpersuasive.[18]

In *Cleland v. Cleland*,[19] the court granted the wife's motion to disqualify her husband's attorney from the divorce proceeding. The husband's law firm had previously represented the wife in connection with the preparation of her will, which obviously included plans involving her finances. Since the dissolution proceeding included a contest over alimony and necessarily involved a hearing as to the financial status of the parties, the court *presumed*[20] that actual confidences had been disclosed that would dis-

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16. *Id.* at 1258.

17. *Id.*

18. The wife testified that "financial disclosure was required for the representation mentioned, although I cannot at this time recall specific financial facts which I may have disclosed." *Id.*

19. 35 Conn. Supp. 215, 404 A.2d 905 (1979).

20. "The theory behind presuming confidential disclosures once a substantial relationship is found is that any rule requiring proof of actual disclosure would itself undermine the policy of encouraging free communication by forcing the client to divulge his confidences in court as part of his proof." *Id.* at ____, 404 A.2d at 907. *Contra* Braun v. Valley Ear, Nose and Throat Specialist, 611 S.W.2d 470 (Tex. Civ. App. 1980) (Attorney files action against doctor for breach of employment contract after advising doctor on enforceability of out-of-state divorce decree). This court assigned the trial court broad discretion in the disqualification context, stating further that "[i]t will not be presumed by us that confidences were disclosed so as to preclude any delving into the nature of the relationship . . . [t]he trial court must be able to examine the subject matter of the prior representation without being barred by the attorney-client privilege so that the substantial relationship test can be applied." *Id.* at 473. *See also* Lott v. Ayres,

advantage the firm's former client.[21]

The *Cleland* court further defined the basic requirements for a moving party (in the disqualification situation) to anticipate proving: (1) that he had in the past enjoyed an attorney-client relationship with his opponent's attorney; (2) that the subjects of the attorney's former and present employment are substantially related and therefore that the interests are adverse; (3) that the information obtained by the attorney during the prior relationship was of a privileged nature; and (4) that he had neither waived his right to object to nor consented to the attorney's current representation.[22]

In *Kurbitz v. Kurbitz*,[23] a court faced the combined effect of the substantial relationship test and the necessity of imputing the guilty attorney's knowledge to his entire law firm. For a number of years, the law firm of Tonkoff, Holst and Hopp represented Mr. Kurbitz in incorporation procedures and trustee-estate matters involving Kurbitz's mother's will. Although the evidence indicated that it was attorney Holst who handled the significant bulk of this representation, and that Holst was now deceased, attorney Tonkoff was nevertheless forbidden to represent Mrs. Kurbtiz in a divorce action.[24] The court recognized that "[t]he relationship of partners in the practice of law is a close and intimate one" and that "[t]he everyday interchange of ideas may inadvertently release information which would have been otherwise kept confidential."[25]

Alternatively, it should be noted that some courts do not apply the substantial relationship test or its related analysis. For instance, the court in *Perlstein v. Perlstein*[26] avoided the use of any

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611 S.W.2d 473 (Tex. Civ. App. 1980); Lott v. Lott, 605 S.W.2d 665 (Tex. Civ. App. 1980). The former husband's claim of legal malpractice was denied in this situation where an attorney initially represented the couple in a lawsuit for damages involved in an abortion and later represented the wife in a divorce action.

21. Cleland v. Cleland, 35 Conn. Supp. 215, ____, 404 A.2d 905, 907 (1979).

22. *Id.* at ____, 404 A.2d at 906-07.

23. 77 Wash. 2d 943, 468 P.2d 673 (1970).

24. *Id.* at ____, 468 P.2d at 676.

25. *Id. See also* Ennis v. Ennis, 88 Wis. 2d 82, 276 N.W.2d 341 (1979). Attorney was disqualified from representation of a woman in a post-divorce action since the attorney's associate's nephew had represented the husband in the underlying action before he left his uncle's employ. *Id.* at ____, 276 N.W.2d at 347; Matter of Conway, 100 Wis. 2d 311, 301 N.W.2d 253 (1981) (Attorney involved in the Ennis case received public reprimand for appearance of professional impropriety).

26. 76 A.D.2d 49, ____, 429 N.Y.S.2d 896, 902 (App. Div. 1980).

tests in upholding the trial court's refusal to hold a hearing on a father's motion to disqualify the mother's counsel in a child custody battle. An associate of the mother's counsel, at the time she was employed in another firm, had interviewed the father regarding this action when he sought the firm's services. Although the mother's attorney denied having any conversations with his associate regarding her interview with the father, it is doubtful that disqualification would have been withheld by a court using a "substantially related" analysis. This court instead proclaimed that "[n]o rigid formula exists by which to establish the necessity for a hearing in instances where an attorney's disqualification is sought on grounds of conflict of interest."[27] Therefore, the appellate court found no abuse of discretion since the lower court "was apparently convinced of the veracity of counsel's representations and saw no possibility of prejudice to the father."[28]

In opinions that avoid reliance on "substantial relationship" language, it is perhaps easier to focus on a key consideration underlying most judicial inquiries into conflict within a divorce proceeding. Specifically, the opinion of *In re McCaffrey*[29] illustrates the court's recognition that where financial information was obtained from a former client presently opposed in a divorce action, "an appearance of a conflict of interest is necessarily created."[30] In reviewing the decision of a disciplinary review board of the state bar, the court noted that the attorney had taken the husband's deposition regarding his business and financial affairs while defending husband's "tax problems" and indiscretions. The attorney's representation of the wife in a divorce action in light of his possession of this financial information earned the attorney a public reprimand.[31]

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27. *Id.*

28. *Id.*

29. 549 P.2d 666 (Or. 1976).

30. *Id.* at 668. Similarly, in a community property state, a court may concern itself with evidence that establishes a relationship between the attorney and the assets potentially involved in a partition at divorce. Teel v. Teel, 400 So. 2d 357 (La. App. 1981) (Wife's attorney disqualified as he had also represented the closely held corporation whose stock made up the greatest portion of the community assets subject to litigation).

31. *In re* McCaffrey, 275 Or. 23, ____, 549 P.2d 666, 668 (1976).

Special Problems

An attorney consulted by the parties of a failing marriage is understandably (if not hopefully) moved to encourage reconciliation.[32] However, should his efforts fail, it may be subsequently improper for him to represent either spouse in the ensuing divorce proceeding. An attorney subject to a disciplinary proceeding, in *In re Braun*,[33] was "sharply reprimanded" for representing the wife in a divorce proceeding after such joint counseling conferences were held.[34]

An aspect of conflicts analysis that may be altered in a divorce situation is that of knowledge of prior employment and consent to the attorney's adverse employment.[35] Arguably, the reasoning utilized in a 1951 Vermont opinion that sanctioned the suspension of an attorney for three months is applicable in many cases today in which "consent" is raised as a defense.[36] Justice Cleary wrote that:

> [K]nowledge of prior employment by the parties might justify an attorney in matters of private interest; but not in a matter of divorce or legal separation. Other interests than those of the parties are involved. Such cases often affect the rights of children, innocent and helpless victims of their parents' selfishness and sin. The attorney's duty to the court and to the public at large must be considered. The due and orderly administration of justice, the honor and purity of the profession, the protection of clients, the dignity and reputation of the court itself are all endangered.[37]

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32. Callner, *Boundries of the Divorce Lawyer's Role*, 10 FAM. L.Q. 389 (Winter, 1977).

33. 49 N.J. 16, 227 A.2d 506 (1967). The court did distinguish those instances in which the attorney at all times represents one party and his adversary position is clear to the other spouse. *See generally* discussion at note 5 *supra; see also* Cooke v. Super. Ct. of Los Angeles Cty., 83 Cal. App. 3d 582, 592, 147 Cal. Rptr. 915, 921 (1978) (Attorney-client relationships must first exist in order to gain protection of confidences).

34. *In re* Braun, 49 N.J. 16, ____, 227 A.2d 506, 508 (1967). However, the fact that one parent was represented by an attorney who had originally represented both parents in a custody agreement, did not warrant grounds for reversal of decree changing custody (although counsel should have withdrawn from proceedings). Costello v. Costello, 176 N.W.2d 10, 11 (Neb. 1976).

35. *See generally Development in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1333 (1981).

36. *In re* Themelis, 117 Vt. 19, 83 A.2d 507 (1951).

37. *Id.* at ____, 83 A.2d at 510. *See also* State v. Nielson, 179 Neb. 55, 136

Another potential outcome that may be unsettling to the family law practitioner is the discovery of a conflict that prevents any fee collection. In *King v. King*,[38] an attorney's half hour consultation with the husband, despite the absence of a charge for services or express retainer, made a subsequent representation of the wife improper. Therefore, an award of $6,000 in attorney's fees entered as part of decree of separate maintenance against the husband was reversed. "An attorney cannot recover from the party that he wronged for legal services where he has represented adverse, conflicting and antagonistic interests in the same litigation."[39]

Finally, since divorce litigation is an emotional "people problem" area,[40] an attorney must be aware of social relationships that may constitute an attorney-client relationship subject to the conflict rules. *Kaufman v. Kaufman*[41] described Murray Kaufman's personal relationship with an attorney who ultimately represented his wife against him in a matrimonial action. The court noted that Kaufmann chronicled meetings, dinners and attendance at sporting events during which he maintained that he discussed with the attorney many facets of his career and marriage. Since the matter presented a possible conflict of interest, the issue was remanded for an evidenciary hearing.[42]

Conclusion

Undertaking to represent a client in a divorce or child custody action is a step that should not be taken without mental research on the client's adverse spouse. In a practice that should be ultrasensitive to client emotions, an attorney should not risk prolonging and confusing an already painful experience by risking his own disqualification. Even if disqualification is initially denied or overlooked, a conflict claim may haunt the attorney wishing to be paid pursuant to a divorce decree or return as a visit from the grievance committee of the state bar association.

The legitimacy of a conflict claim can be weighed according to

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N.W.2d 355 (1965) (Attorney disbarred for representing wife against himself in divorce, defending that she gave assent).

38. 52 Ill. App. 3d 749, 367 N.E.2d 1358 (1977).

39. *Id.* at ____, 367 N.E.2d at 1360. *See also* Sokoloff v. Sokoloff, 82 Misc. 2d 797, 371 N.Y.S.2d 106 (1975).

40. Albano, *supra* note 6 at 217.

41. 63 A.D.2d 609, 405 N.Y.S.2d 79 (1978).

42. *Id.* at 610, 405 N.Y.S.2d at 80.

the judicial test employed in a given jurisdiction. If the substantial relationship test is not utilized, much discretion may be given the trial court and evidence of pertinent information relayed to the attorney is necessary.

From the other side of the situation, at least one commentator has described the disqualification motion as an extremely effective litigation tactic.[43] When a disqualification motion is filed, it diverts the opposing attorney's energies from the lawsuit to defending his conduct.[44] Time and money are spent attempting to defeat the motion and/or replacing the attorney and educating his replacement.[45] Ultimately, an attorney is encouraged to force this technical disadvantage by both state professional codes, which encourage lawyers to expose transgressions of ethical norms by their peers, and the attorney's genuine concern that his client must be protected from misuse of confidences entrusted to a former attorney.[46]

Whether this litigation tactic should be employed liberally in situations where both clients are already wary of the judicial handling of their lives is certainly debatable. If, in fact, the family law attorney must balance his duties to the client, to the court, and to society,[47] this potential disqualification weapon should be used sparingly. As in many areas of the law, the conflicts of interest claim in the family law situation should remain a shield rather than a sword.

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43. Hilliker, *supra* note 3 at 13.
44. *Id.*
45. *Id.*
46. *Id.*
47. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443 (1953).