

Ethical Problems in Marital Practice

NATHAN M. CRYSTAL*

TABLE OF CONTENTS

I. INTRODUCTION	323
II. CONFLICTS OF INTEREST—REPRESENTATION OF BOTH SPOUSES IN AN UNCONTESTED DIVORCE	325
A. <i>Is Representation of Both Spouses in an Uncontested Divorce Always Ethically Improper?</i>	325
B. <i>When is Dual Representation Ethically Proper?</i>	328
1. The Need for Advocacy	329
2. The Need for Independent Counsel	329
3. The Lawyer's Ability to Act Neutrally ..	329
C. <i>Undertaking Dual Representation—The Requirement of Consent by the Clients After Full Disclosure</i>	330
1. Advantages of Dual Representation ..	330
2. Disadvantages of Dual Representation ..	331
3. Consent	332
III. CONFLICTS OF INTEREST IN CONTESTED DIVORCES	332
A. <i>Simultaneous Representation</i>	332
B. <i>Subsequent Representation</i>	333
1. General Principles ..	333
2. The Rule in Divorce Cases	334
3. Waiver	335
C. <i>Vicarious Disqualification: The Problem for Legal Services Attorneys</i>	336
IV. ETHICAL PROBLEMS CAUSED BY THE LACK OF GROUNDS FOR DIVORCE	338
A. <i>Collusion and Connivance</i>	338

* Assistant Professor of Law, University of South Carolina School of Law. B.S., University of Pennsylvania, 1968; J.D., Emory University, 1971; L.L.M., Harvard University, 1976. The author wishes to express appreciation to several members of the faculty, Randy Chastain, Pat Hubbard, John Freeman, Bill McAninch, John Montgomery, and Walter Reiser, who took the time to read and comment on earlier versions of this article. The idea for this article developed from presentations that the author made to members of the South Carolina bar at continuing legal education seminars held during the summer of 1978. This article more fully develops some of the views presented at those seminars.

<i>B. The Lawyer's Speech to the Client</i>	340
<i>C. Migratory Divorce</i>	340
1. The Meaning of "Counsel or Assist" ...	341
2. When Does a Lawyer "Know" That a Migratory Divorce is Fraudulent?	342
(a) Fraud on the Tribunal of the Divorc- ing Jurisdiction	342
(b) Fraud on Third Persons	344
(i) Bilateral Domestic Divorces ...	345
(ii) Ex Parte Domestic Divorces ...	345
(iii) International Divorces	345
3. The Effect of the Uniform Divorce Recog- nition Act on the Ethical Propriety of Participation by Attorneys in Migratory Divorce	346
4. The Effect of the Doctrine of Estoppel on Ethical Propriety of Participation by Lawyers in Migratory Divorce	347
V. ETHICAL PROBLEMS CAUSED BY THE POSSESSION OF CONFIDENTIAL INFORMATION THAT INVOLVES FRAUD OR ILLEGALITY	348
<i>A. General Principles</i>	348
<i>B. Past Fraud by a Client</i>	348
<i>C. Past Fraud by a Person Other than a Client</i>	351
<i>D. Past Conduct by a Client not Constituting Fraud</i>	352
<i>E. Past Versus Future Conduct</i>	352
VI. RELATIONS WITH OPPOSING PARTIES AND OTHER LAWYERS	354
<i>A. General Considerations</i>	354
<i>B. Unrepresented Parties and the Uncontested Divorce</i>	354
<i>C. Represented Parties</i>	356
<i>D. Disgruntled Clients</i>	358
VII. FINANCIAL ASPECTS OF MARITAL PRACTICE	358
<i>A. Fee Setting</i>	358
<i>B. Fee Collection</i>	359
VIII. CONCLUSION: CHANGE IN THE PROFESSIONAL RESPONSIBILITIES OF THE DIVORCE PRACTITIONER	361

ETHICAL PROBLEMS IN MARITAL PRACTICE

I. INTRODUCTION

Evidence indicates that many if not most lawyers are specializing in one or more areas of legal practice.¹ This article addresses the needs of matrimonial law specialists by discussing the ethical problems that they are likely to encounter. It examines conflicts of interest in contested and uncontested divorces, the propriety of participation by a lawyer in a migratory divorce, a lawyer's duty to disclose confidential information, ethical problems in the relationship between a lawyer and opposing counsel or parties, and the ethics of fee setting and collection. While malpractice cases are discussed to the extent that they provide standards for lawyer conduct, the article does not contain a complete treatment of attorney liability for negligence in divorce cases.²

1. While the regulation of specialization is a subject of current debate in the profession, evidence indicates that specialization is in fact a reality. *See, e.g., Ill. Bar Ass'n, Economics of Legal Services in Illinois*, 64 ILL. B.J. 73, 102 (1975).

2. The standard of care for attorneys in divorce cases appears the same as that for other fields. A lawyer must exercise the skill and care of a reasonably prudent lawyer to protect his client's interests. *See generally* Annot., 78 A.L.R. 3d 255 (1977). For example, lawyers have been held liable for failure to research legal questions adequately, *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), and for inadequate protection of a client's claim for property, *Rhine v. Haley*, 238 Ark. 72, 378 S.W.2d 655 (1964) (negligence for lawyer to fail to include lien on property to secure payments by husband).

Many divorce cases include complicated tax questions, thus creating a major area of potential malpractice liability. For a discussion of tax aspects, see E. Sander & H. Gutman, *Tax Management, Divorce and Separation*, Pamphlet 95-3rd (1975). Lawyers who are not knowledgeable in tax questions should associate competent counsel to avoid this risk. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE [hereinafter cited as DR] 6-101(A)(1) (1976) requires a lawyer to associate competent counsel when the lawyer is called on to handle a matter in which he knows that he is not competent. Of course, client consent would have to be obtained to associate counsel. *See* DR 4-101, 2-107.

Advertising and specialization are both topics of current debate in the profession as ways in which the delivery of low cost, competent legal services can be improved. Lawyers should be aware, however, that advertising and specialization of legal services may raise the standard of practice that will be expected of lawyers and may result in increasing malpractice risk. If a lawyer advertises, he may impliedly warrant the quality of the service. Steinberg & Rosen, *Lawyers' Advertising and Warranties: Caveat Advocatus*, 64 A.B.A.J. 867 (1978). Specialization of legal services is likely to affect the standard of practice for both specialists and nonspecialists. Specialists will probably be held to the standard of care of a reasonably prudent specialist. Nonspecialists will be required to recognize matters that should be referred to specialists because they are beyond their expertise. If they undertake representation in such matters, they will probably be held to the same standard as a specialist. Thus, indirectly, even the nonspecialist will be held to the standard of the specialist.

In this article it is assumed that a lawyer acts ethically if he complies with the positive law of professional ethics,³ which consists of court decisions in disciplinary and malpractice cases. In those cases most courts rely on the standards of professional ethics set forth in the Code of Professional Responsibility of the American Bar Association (the Code).⁴ Opinions of ethics advisory committees of bar associations, particularly the Committee on Ethics and Professional Responsibility of the American Bar Association, are persuasive authority concerning the positive law of professional ethics.⁵ When the positive law is unclear or in need of change, a view of what the law should be is offered.

3. This article does not discuss the relationship between positive law and customary behavior, *e.g.*, how an attorney should act when the norms of the profession conflict with customary practice. DR 1-103 requires a lawyer to disclose to disciplinary authorities unprivileged knowledge of a violation of a Disciplinary Rule by another attorney, but the rule is widely ignored in practice. See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 167 (1970). The article also does not discuss the relationship between ethical theory and professional norms. For an illuminating discussion of these questions, see Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).

4. The Code of Professional Responsibility was adopted by the American Bar Association in 1969 after a study of the Canons of Ethics, which the ABA had adopted in 1908. See ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], *Preface* (1978). The ABA does not have regulatory authority over the practice of law. That authority rests in courts before which attorneys practice. Thus, the legal effect of the Code depends on its adoption as a standard of conduct by local courts. See, *e.g.*, S.C. SUP. CT. R. 32.

The Code is divided into three parts: Canons, which are axiomatic norms of conduct; Ethical Considerations, which are standards toward which all lawyers should aspire; and Disciplinary Rules, which are minimum standards of conduct for violation of which attorneys may be subject to disciplinary action. ABA CODE, *Preliminary Statement*. The dichotomy between the binding nature of Disciplinary Rules and the aspirational character of Ethical Considerations should not be regarded strictly because the Ethical Considerations often elaborate, limit, or define the scope of Disciplinary Rules. See ABA CODE, ETHICAL CONSIDERATIONS [hereinafter cited as EC], 5-14 to 5-20.

5. Opinions of state and local bar associations are digested in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1970). Supplements through 1975 have recently been issued) [hereinafter cited as MARU]. While these opinions are advisory, they provide guidance to attorneys. Failure to adhere to the standards announced in an opinion could result in disciplinary action against an attorney.

Local bar associations frequently rely on the opinions of the Committee on Ethics and Professional Responsibility of the American Bar Association. The opinions are maintained currently through a looseleaf service available at the ABA's headquarters in Chicago. Opinions are classified as either formal or informal. Formal opinions deal with matters of general interest to the bar; informal opinions answer specific inquiries from local bar associations. See ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, R.P. 3.

II. CONFLICTS OF INTEREST—REPRESENTATION OF BOTH SPOUSES IN AN UNCONTESTED DIVORCE

It is not uncommon for a lawyer to be asked to represent both spouses in what appears to be a friendly divorce. With few exceptions lawyers have the right to refuse to undertake representation regardless of reason.⁶ To some lawyers the disadvantages of dual representation so outweigh the advantages that they would refuse this request regardless of the circumstances.⁷ Others, however, may be willing to undertake simultaneous representation if it is ethically permitted. The following discussion, in which it is assumed that the lawyer is willing to undertake representation of both spouses, addresses three questions. Is representation of both husband and wife in an uncontested divorce always improper? If not, when is it proper? If such representation is proper, what steps must the lawyer take before accepting employment?

A. Is Representation of Both Spouses in an Uncontested Divorce Always Ethically Improper?

Although some bar associations have advised that it is *always* improper for a lawyer to represent both spouses in an uncontested divorce,⁸ most courts have decided that such representation is not prohibited per se, even if the divorce is a complex one that involves minor children or substantial property.⁹ Fur-

6. EC 2-26. The Ethical Considerations state that a lawyer should not decline employment because the client or his cause is unpopular, EC 2-27, or because the lawyer personally wishes to avoid adversary alignment against influential members of the community such as judges, EC 2-28.

7. Dual representation exposes the attorney to an increased risk of a malpractice or disciplinary action. To many attorneys these risks outweigh the financial advantage of earning a fee and the personal satisfaction resulting from helping the individuals involved in the divorce.

8. Conn. Bar Ethics Comm., Formal Opinion 27, *cited in* [1977] 4 FAM. L. REP. (BNA) 2029; N.Y. St. Bar Ass'n, Opinion 258, 44 N.Y. ST. BAR J. 556 (1972), *summarized in* MARU No. 9018; Ohio Bar Ass'n, Opinion 30, 48 OHIO BAR 780 (1975) (MARU No. 9679), *reprinted in* [1975] 1 FAM. L. REP. (BNA) 3109. *But see* Ore. St. Bar Ass'n, Opinion 218 (June 15, 1972) (MARU No. 9779) (proper for attorney to represent both spouses under no-fault divorce law if (1) lawyer makes full disclosure of possible conflict, (2) parties understand that attorney will withdraw if conflict develops, (3) parties are in full agreement about securing divorce, (4) divorce does not involve minor children or substantial assets or debts, (5) disposition of nominal assets and debts has been settled before consultation with lawyer, and (6) no other apparent conflicts of interest exist).

9. In *Halvorsen v. Halvorsen*, 3 Wash. App. 827, 479 P.2d 161 (1970), a wife sued to set aside a property settlement agreement drafted by a lawyer who represented both parties. At the time of the agreement the wife had been under psychiatric care. Nonetheless, the court upheld the validity of the agreement because of a finding that the plaintiff

had the capacity to understand the agreement and had received adequate representation from the attorney. It commented on the practice of dual representation:

Whether an attorney can in good conscience represent both parties to an agreement is preeminently a question of his own conscience and whether there is an apparent conflict of interest. If his decision is challenged in court, the matter is a fact question to be determined by looking to the reasonableness of the activity, under the whole circumstances of the case.

Id. at 830-31, 479 P.2d at 163.

In *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977), a California appellate court recently discussed the question of dual representation. In an uncontested divorce, an attorney represented both the husband and wife, who had agreed to joint custody without child support. The trial judge granted an interlocutory decree and awarded custody in accordance with the agreement, but because the wife was receiving AFDC payments from the county, he referred the case to the county's family support division. The division recommended that the court order the husband to pay to the county \$25 per month per child (total \$50) for support. At the hearing on this recommendation counsel indicated that she was prepared to represent the husband against the county, even though a support order might be beneficial to the wife if she stopped receiving AFDC payments. The judge refused to allow the attorney to represent the husband, even after the attorney filed a written consent to dual representation signed by both parties. The appellate court reversed, holding that although a conflict of interest between the spouses might exist in the future, no actual conflict existed. Under those circumstances dual representation was proper if the parties knowingly and intelligently consented. *Id.* at 898-99, 142 Cal. Rptr. at 512.

But see *Columbus Bar Association v. Grelle*, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968). In that case the respondent attorney had represented the husband in a personal injury action. In a subsequent divorce action he prepared a separation agreement on behalf of both parties that provided that the wife was entitled to receive one third of the proceeds of the settlement of the tort action. The terms of this agreement had been decided by the parties, and the lawyer merely drafted it in accordance with their wishes. Later, the lawyer prepared a divorce petition on behalf of the wife and represented her at the final hearing, in which the separation agreement was approved. When the personal injury action was settled, the proceeds were paid to the attorney. The wife requested that he tell her the amount of the settlement, but he refused to do so without the husband's consent. When the wife subsequently brought suit to obtain her share of the settlement, the attorney represented the husband. The wife then filed a complaint with the state grievance committee, which recommended that the lawyer be suspended indefinitely. The supreme court, however, reduced the punishment to a reprimand. While the court noted that the attorney had fully disclosed his relationship to the parties and had never represented to the wife that he was representing her other than in a limited capacity, it pointed out that such relationships were fraught with the potential for misunderstanding. It concluded:

There is no claim that there was any representation that attorney Grelle would represent her or protect her interest in that fund upon distribution. It is understandable, however, that Mrs. Perine might have concluded that this was to be one of Mr. Grelle's functions. The fact that such misunderstandings are likely to occur under such circumstances must lead to the conclusion that only in the clearest cases should counsel hazard to represent interests which are or may become adverse, even after disclosing his dual representation.

In retrospect, this was not such a case. Too many experienced lawyers have accepted such employment in separation or divorce matters under such circumstances, only to ultimately abandon the interest of one or the other of their clients. In such instances of dual representation, a party disappointed in the financial results, as was Mrs. Pinto, may validly argue after the fact that the dual representation brought about the omission from the agreement of specific

ther, as a matter of policy, dual representation should not be absolutely prohibited. Clients often have legitimate reasons for asking an attorney to represent both parties: a desire to save legal fees, and trust and confidence in the attorney.¹⁰ The reasons given in support of an absolute bar do not withstand analysis.

One reason frequently given to prohibit dual representation in divorce cases is that an attorney cannot ethically represent both sides in litigation.¹¹ Dual representation is, of course, improper if a court proceeding involves a contested issue. Each party requires the services of an advocate, and an attorney cannot simultaneously advocate opposing interests.¹² Not all divorce cases, however, involve contested issues. Further, nothing in the Code of Professional Responsibility absolutely prohibits dual representation merely because a court proceeding is involved.¹³

Another reason given to justify an absolute prohibition of dual representation in divorce cases is that the friendly or uncontested divorce is a myth because all divorces have significant areas of disagreement.¹⁴ This argument proves too much, however. If dual representation is improper because disagreements exist, dual representation will almost always be precluded. Yet lawyers know that they often perform their most valuable function by helping clients resolve disagreements.¹⁵ The question that the lawyer must answer in deciding whether to undertake dual representation is not whether disagreement exists, but whether he

language protecting her upon distribution of the anticipated settlement fund.
Id. at 212, 237 N.E.2d at 300.

10. For a discussion of these considerations, see section II(C)(1).

11. See Conn. Bar Ethics Comm., Formal Opinion 27, *cited in* [1977] 4 FAM. L. REP. (BNA) 2029.

12. *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977).

As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.

Id. at 898, 142 Cal. Rptr. at 512.

13. EC 5-15 indicates that dual representation in *some* court proceedings is permissible. "A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests."

14. See [1976] 2 FAM. L. REP. (BNA) 2687-88; *Trend Analysis: The "Changed Landscape" of Divorce Practice as Ethical Minefield*, [1977] 3 FAM. L. REP. (BNA) 4031, 4034-36.

15. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 78 (1978).

can adequately represent the interests of all parties despite their disagreements.

B. When is Dual Representation Ethically Proper?

If dual representation is not prohibited per se, the lawyer must decide whether to accept such employment. The attorney does not have unfettered discretion to do so because the Code provides in Disciplinary Rule (DR) 5-105(C) that a lawyer may undertake representation of 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." The use of the word "obvious" contains a warning: in case of doubt the lawyer should not undertake dual representation. Further, lawyers should be aware that what is obvious to them may not be obvious to a disciplinary body in a subsequent disciplinary proceeding or malpractice case.

If a lawyer undertakes simultaneous representation, she has duties of loyalty and care to both clients.¹⁶ She may not advocate the interest of one spouse over the other. Because the lawyer

16. *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966). In *Ishmael* an attorney who had previously represented the husband in several matters prepared a settlement agreement and complaint on behalf of the wife. The agreement was approved by the court and a divorce decree entered. Subsequently, the wife sued the attorney for malpractice on the ground that he failed to discover that property involved in the settlement had been undervalued. The California Supreme Court, reversing the lower court's decision granting summary judgment for the attorney, warned of the dangers of this situation:

Divorces are frequently uncontested; the parties may make their financial arrangements peaceably and honestly; vestigial chivalry may impel them to display the wife as the injured plaintiff; the husband may then seek out and pay an attorney to escort the wife through the formalities of adjudication. We describe these facts of life without necessarily approving them. Even in that situation the attorney's professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband. A husband and wife at the brink of division of their marital assets have an obvious divergence of interests. Representing the wife in an arm's length divorce, an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice. Representing both spouses in an uncontested divorce situation (whatever the ethical implications), the attorney's professional obligations demand no less. He may not set a shallow limit on the depth to which he will represent the wife.

Id. at 527, 50 Cal. Rptr. 596-97.

represents both spouses, she assumes the role of a joint rather than an independent counselor. In substance, the lawyer functions like a mediator. Thus, the attorney should decline dual representation because of her inability to represent adequately the interests of both spouses if it is likely that (1) advocacy will be needed, (2) independent counseling will be necessary, or (3) the lawyer will not be able to function as a neutral intermediary.

1. *The Need for Advocacy.*—If a contested issue develops in a divorce case, advocacy will be required. In deciding whether it is likely that a contested issue will develop, the attorney should consider the following:

(a) The degree to which the parties have discussed significant issues and reached agreement on them, at least in principle. The divorce practitioner should have a list of topics that must be resolved in a typical case. When asked to undertake dual representation, the lawyer should ask the parties whether they have discussed and reached agreement on each of the topics. If they have not, the lawyer should ask them to discuss unresolved issues before he decides to undertake dual representation. Through this approach the lawyer should be able to determine whether a contested issue is likely to develop.

(b) The presence of minor children, substantial debts, or substantial assets. As the divorce becomes more complex, the potential for a contest increases. While mere complexity of the case should not preclude dual representation, if complexity is coupled with lack of agreement or consideration of basic issues, dual representation should be declined because a contested issue is likely.

2. *The Need for Independent Counsel.*—If either spouse is in a dependent condition, the spouse needs the services of an independent advisor. Whether a spouse is in this condition depends on the following:

(a) The emotional condition of the parties. If either person is severely emotionally disturbed because of the crisis of the divorce or otherwise, the lawyer should not undertake dual representation.

(b) The relationship between the spouses. It is not uncommon for one spouse to dominate the other. If the lawyer perceives that one spouse dominates the decisionmaking of the other, dual representation should not be accepted.

3. *The Lawyer's Ability to Act Neutrally.*—As the representative of the spouses, the lawyer has obligations of loyalty and

care to both. The lawyer should not undertake dual representation if his personal relationship with either spouse is such that he cannot fulfill this role. A dangerous situation exists if the lawyer has had a close relationship with one of the parties, for example, as business counselor to the husband, and is asked to handle the divorce on behalf of both. The prior relationship, coupled with the prospects for future legal work from the husband, may undermine the lawyer's neutrality.¹⁷

C. *Undertaking Dual Representation—The Requirement of Consent by the Clients After Full Disclosure*

If a lawyer decides that it is obvious that he can adequately represent the interests of both parties, he may undertake dual representation if the clients consent after the attorney fully discloses the possible adverse effects of such representation.¹⁸ While the disciplinary rule merely requires disclosure of adverse consequences, the lawyer should disclose his analysis of the advantages and disadvantages of dual representation so that the consent is fully informed.

1. *Advantages of Dual Representation.*—Clients usually give two reasons for wanting dual representation: a desire to save legal fees, and trust and confidence in the attorney.¹⁹ If one lawyer handles a complex divorce, legal fees are saved in one sense: the total dollar amount paid for legal services is less than if two attorneys are employed. In another sense, however, fees are not saved. As discussed above, when a lawyer represents both spouses he owes duties to both. The lawyer functions like a mediator rather than an advocate or independent counselor. While clients may rationally prefer to pay X dollars for these services rather than X plus Y dollars for the services of two independent attorneys, they should be aware that it is misleading to state that fees are being saved; different services are being purchased.

17. See *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); *Columbus Bar Ass'n v. Grelle*, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968).

18. DR 5-105(C).

19. See Note, *Simultaneous Representation: Transaction Resolution in the Adversary System*, 28 CASE W. RES. L. REV. 86, 104-05 (1977). The author of the note gives two other reasons to justify dual representation: that the unrepresented party will fail to understand that the lawyer is not protecting his interest and that lawyers tend to act as the representative of both even when they claim to be representing only one of the parties. But surely it is no more difficult for a lawyer to explain whom he represents than it is to explain any other issue. Further, merely because some lawyers fail to make clear that they represent one party is not an argument in favor of dual representation; rather, it argues for more thought and better explanation by these lawyers.

Clients should be advised that their goal of obtaining a divorce for one legal fee could be achieved even if the lawyer does not represent both. The lawyer could represent one spouse, leaving the other unrepresented.²⁰ This approach offers the advantage that the lawyer would not be forced to withdraw if a contested issue developed. It has disadvantages, however. While the attorney may communicate with the unrepresented party, he is ethically prohibited from giving legal advice to that party.²¹ Although this is not a major consideration in simple divorces, in complex cases the unrepresented party is probably seriously disadvantaged by lack of counsel. Moreover, regardless of the complexity of the divorce, the unrepresented party may be troubled by his lack of representation. This may cause the divorce to proceed less smoothly than if the attorney represented both parties.

Trust and confidence of both spouses in a specific lawyer is the second reason usually given by clients who want dual representation. For some clients this reason actually represents an underlying fear that if two lawyers are participating the divorce will become formalized and adversarial. The parties should be informed that the question whether the participation of two lawyers makes a divorce more or less adversarial is problematic. Evidence indicates that some lawyers fail to consider that divorces can be resolved in a cooperative rather than adversarial spirit.²² On the other hand, lawyers often help promote agreements that clients could not have reached on their own.

2. *Disadvantages of Dual Representation.*—The clients should be informed of three possible detrimental effects of dual representation. First, although the parties intend a friendly divorce, a dispute may arise. If this should occur, the lawyer would be required to withdraw from the case.²³ Each of the parties would then be forced to hire new counsel. As a result, total legal fees would probably exceed the fees that would have been paid if separate counsel had been hired initially. Second, several court decisions have overturned separation agreements when one law-

20. See section VI(B) *infra*.

21. DR 7-104(A)(2).

22. See H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING 203-08 (1972) (the case of "Bovine and the Buxom Nurse"); N.Y. ST. TRIAL LAWYERS ASS'N CODE OF PROFESSIONAL RESPONSIBILITY FOR MATRIMONIAL LAWYERS, reprinted in [1975] 1 FAM. L. REP. (BNA) 3115 (Sections 6(b) and (c) are aimed at limiting the use of excessive or unconscionable demands or offers); *Ethical Issues in Divorce, Death, Make Deep Rifts in ABA Family Law Section*, [1976] 2 FAM. L. REP. (BNA) 2682, 2685 (problem of "bombers").

23. See EC 5-15; section III *infra*.

yer handled the divorce on the ground that the lawyer did not adequately protect the interests of both parties.²⁴ While having one lawyer handle the case does not automatically make the agreement invalid, the parties should be aware that dual representation makes it more likely that a court will not enforce the agreement if one of the parties subsequently becomes dissatisfied with it. Third, by asking the lawyer to represent both, the parties waive their attorney-client privilege for communications made to the attorney by either of them. The attorney might be forced to testify to damaging information if the divorce becomes contested.²⁵

3. *Consent.*—If the clients decide that they want the lawyer to represent both of them after the lawyer has fully discussed the advantages and disadvantages of dual representation, the lawyer should obtain their written consent at the time representation is undertaken.²⁶ The consent should state that the lawyer has explained the advantages and risks of dual representation. A clause evincing consent to the representation should also be included in the separation agreement, and the lawyer should disclose the dual representation to the court at the time of the final decree.²⁷

III. CONFLICTS OF INTEREST IN CONTESTED DIVORCES

A. *Simultaneous Representation*

It is, of course, improper for a lawyer to represent both spouses in a contested divorce proceeding because the lawyer must act as an advocate and cannot advocate the interests of both at the same time.²⁸ On occasion a lawyer who represents one

24. *E.g.*, *Jensen v. Jensen*, 97 Idaho 922, 557 P.2d 200 (1976) (separation agreement overturned because oppressive when husband not represented by independent counsel); *In re Marriage of Kesler*, [1978] 4 FAM. L. REP. (BNA) 2498 (Ohio C.P., May 16, 1978); *cf.* *Gigele v. Gigele*, 64 Ill. App. 3d 136, 380 N.E.2d 1144 (1978) (antenuptial agreement declared invalid because wife was not informed of right to independent counsel).

25. For general statements of the rule, see CAL. EVIDENCE CODE § 962 (West 1935); 8 WIGMORE, EVIDENCE § 2312 (McNaughton rev. 1961).

26. In *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977), the court allowed dual representation by an attorney who used the following clause: "I have been advised by my attorney that a potential conflict of interest exists by reason of her advising and representing my ex-spouse as well as myself. I feel this conflict is purely technical and I request [attorney's name] to represent me." *Id.* at 897, 142 Cal. Rptr. at 511; *see note 9 supra*.

27. This is not required by Disciplinary Rule or Ethical Consideration, but it seems wise to do so for two reasons: (1) candor will serve to protect the lawyer from criticism, and (2) full disclosure on the record will make the agreement safer from attack.

28. *Klemm v. Superior Court*, 75 Cal. App. 2d 893, 898, 142 Cal. Rptr. 509, 512 (1977).

spouse in a non-domestic matter may be asked by the other spouse to represent her in a divorce. For example, if a lawyer represents the husband in a worker's compensation claim, is it proper for the attorney to represent the wife in a contested divorce? Even though the matters are unrelated, such representation is improper. The loyalty that the lawyer naturally feels to his client would interfere with the zealous advocacy that the divorce requires.²⁹

B. Subsequent Representation

1. *General Principles.*—While a lawyer is not always prohibited from representing a person against a former client, such representation is improper if the matters are “substantially related”; the test is whether the same or similar issues are present in both cases.³⁰ The main purpose of the rule is to protect the former client against the possibility that confidential information might be used or disclosed,³¹ but a subsidiary goal is to guard the

29. See *Sokoloff v. Sokoloff*, 82 Misc. 2d 797, 371 N.Y.S.2d 106 (Fam. Ct. 1975), *Memphis & Shelby County Bar Ass'n v. Sanderson*, 52 Tenn. App. 684, 378 S.W.2d 173 (1963).

30. See *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973).

31. See *T.C. Theatre Corp., v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). The court stated that

the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important purpose of the rule of secrecy—to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause. Considerations of public policy, no less than the client's private interest, require rigid enforcement of the rule against disclosure. No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense. The rule prevents a lawyer from placing himself in an anomalous position. Were he permitted to represent a client whose cause is related and adverse to that of his

subsequent client from the danger that the lawyer's zealous advocacy will be lessened because of the prior relationship.

2. *The Rule in Divorce Cases.*—In marital practice lawyers will face the question of when matters are so substantially related that they preclude representation. Clearly, if the lawyer represented one party in a divorce, the lawyer is precluded from representing the other in a connection with that same divorce.³² For example, assume a husband consults a lawyer to obtain a divorce. The lawyer drafts and files a petition, but the husband decides to abandon the action. Subsequently, the wife contacts the lawyer and asks him to represent her in a divorce action against her husband. The lawyer is disqualified from representing the wife. Similarly, if the lawyer represented both parties in a divorce action, he is precluded from representing either spouse in subsequent contested proceedings incident to the divorce.³³

On the other hand, if the divorce is tangentially related to prior representation, the lawyer is not precluded from undertaking representation.³⁴ For example, suppose a lawyer represented both the husband and wife in the purchase of their home. Generally, the lawyer should not be precluded from representing either of the parties in a subsequent divorce action.³⁵ Suppose, however, the lawyer represented the wife in a tort action for criminal con-

former client he would be called upon to decide what is confidential and what is not, and, perhaps, unintentionally to make use of confidential information received from the former client while espousing his cause. Lawyers should not put themselves in the position "where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship." In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6.

Id. at 268-69 (footnotes deleted).

32. *In re Opacak*, 257 Minn. 600, 101 N.W.2d 606 (1960); *In re Themelis*, 117 Vt. 19, 83 A.2d 507 (1951); N.C. Bar, Opinion 835, NCSB II-264 (1973) (MARU No. 9586); Va. St. Bar, Informal Opinion 147 (MARU No. 10077).

33. Opinion 74-19, 3 St. B. ARIZONA NEWSLETTER 2 (1974) (MARU No. 7621). *See also* Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968) (improper for lawyer to represent husband in proceeding by wife to obtain proceeds of tort settlement when lawyer drafted separation agreement that gave wife one third of proceeds).

34. *Compare* Gillett v. Gillett, 269 Mich. 364, 257 N.W. 719 (1934) *with In re McCaffrey*, 275 Or. 23, 549 P.2d 666 (1976).

35. *See* Opinion 216, 94 N.J.L.J. 677 (1971) (MARU No. 8818). *But see* Wash. St. Bar Ass'n 20, Opinion 145 (Nov. 1970) (MARU No. 10148) (if attorney has represented both husband and wife in a matter concerning their property, representation of either in a divorce action precluded).

versation. In a contested divorce action on the ground of adultery, the lawyer would be precluded from representing the husband because both cases involve the same issues.

Lawyers who have had close personal relationships with clients are sometimes asked to provide assistance in dealing with their marital problems. While it is proper for a lawyer, acting as a friend, to help the parties in any way possible, representation of *either* after providing that type of assistance is improper. The risk of disclosure or use of confidential information is too great with such an intimate prior relationship.³⁶

Representation of a party against a former client poses an ethical problem even if the matters are not substantially related. Loyalty to the former client may infect the subsequent relationship. For example, suppose a lawyer has represented a husband in several business transactions. The parties decide to divorce and the husband asks the lawyer to represent the wife, agreeing to pay her fees. The lawyer breaches his ethical duties of loyalty and care if he allows his relationship with the husband to affect adversely his representation of the wife.³⁷

3. *Waiver*.—The ABA's Committee on Professional Ethics appears to have taken the position that the rule against subsequent representation is not waivable. ABA Informal Opinion 1125³⁸ concerns a wife who first contacted attorney A to handle her divorce.³⁹ Subsequently the parties reconciled, but three years later she employed attorney B to represent her in a divorce action, for which the husband employed attorney A. At the temporary hearing the wife, after consultation with her attorney, consented to A's representation of her husband. Shortly thereafter the wife discharged B and retained C. She then sent A a letter requesting that he withdraw because of conflict of interest. The Committee on Professional Ethics concluded that while it was "unfair" for the wife to give and then withdraw her consent, it would be "best" for the attorney to withdraw from representation. Although the reasoning of the opinion is vague, it seems concerned as much with the appearance of impropriety that results from participating in litigation against a former client as with the pos-

36. EC 5-20; Los Angeles Bar Ass'n, Informal Opinion 1958-5 (MARU No. 7759); N.J. Bar Ass'n, Opinion 275, 96 N.J.L.J. 1458 (1973) (MARU No. 8877); see *In re Braun*, 49 N.J. 16, 227 A.2d 506 (1967).

37. *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

38. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION [hereinafter cited as ABA INFORMAL OPINION], No. 1125 (1969).

39. See also *id.*, No. 1157 (1970).

sibility that an actual conflict might develop. This position is unsound. The rule is designed to protect both the present and former client. As long as a waiver is made voluntarily, after full disclosure, it should be effective.

*C. Vicarious Disqualification: The Problem
for Legal Services Attorneys*

If a lawyer is ethically prohibited from undertaking representation because of a conflict of interest, the Code of Professional Responsibility prohibits any lawyer affiliated with him from undertaking representation.⁴⁰ Although this rule is of great importance in the corporate setting, it has only a limited application in domestic practice, applying principally to attorneys engaged in federally funded Legal Services programs.

In 1974 Congress created the Legal Services Corporation, which is authorized to receive funds from both public and private sources and to operate a national legal services program through financing, grants, and contracts with local organizations.⁴¹ Local programs funded by the Corporation handle the full range of civil legal problems that indigents may encounter, including divorce. In the typical divorce case handled by Legal Services, both spouses are indigent. This raises the question of whether in a contested divorce an attorney in the program is precluded from representing one spouse if another attorney in the same program has already undertaken representation for the other. Because of a vast demand for services coupled with limited resources, the programs are not anxious to undertake representation of both sides. Thus, the situation typically arises when a court orders a lawyer from the program to represent the unrepresented spouse.⁴²

The Code of Professional Responsibility seems to preclude such representation because Legal Services attorneys are clearly affiliated.⁴³ An executive director, employed by the board of

40. DR 5-105(D). "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." *Id.*

41. 42 U.S.C. §§ 2996 (1976).

42. In *Borden v. Borden*, 277 A.2d 89 (D.C. App. 1971), the court held that Legal Services attorneys in the same program could not be required to represent opposite sides in a divorce case because such representation violated DR 5-105. See also ABA INFORMAL OPINION No. 1233 (1972), in which the ABA's Committee ruled that a Legal Services program could not represent both an Indian tribe and its members in actions against the tribe. But see *id.*, No. 1235 (1972) (where the Committee ruled that attorneys in a Coast Guard legal office could represent both the Government and defendants).

43. DR 5-105(D).

directors of the program, supervises the work of staff attorneys, much like the partners in large firms supervise the work of associates. Contact among attorneys is frequent, central files are maintained, and staff meetings are held. The question, therefore, is whether any overriding policy dictates that an exception to the Disciplinary Rule should be made for Legal Services attorneys.⁴⁴

Two reasons for such an exception might be given. First, because Legal Services attorneys are salaried, there is no economic conflict of interest. The prohibition against representing conflicting interest is not, however, based simply on economic grounds. Other pressures of a more subtle nature, such as friendships among the attorneys, could influence the lawyer's independent professional judgment.⁴⁵

Second, it could be argued that the conflict of interest rules should be relaxed for Legal Services attorneys to promote the delivery of legal services. Because both spouses are usually indigent, disqualification of Legal Services precludes one party from having representation. This argument is unsound for two reasons. If legal services attorneys are not appointed, the court could appoint members from the local bar. Surely, undertaking representation in cases in which Legal Services attorneys have a conflict of interest is a limited way in which members of the private bar can fulfill their duty to provide legal services.⁴⁶ Further, if courts appoint Legal Services attorneys the result might be the reduction of delivery of legal services in divorce cases. Most Legal Services programs do not consider routine divorces as priority matters. Other types of cases in which clients face more immediate physical or economic harm, such as landlord-tenant or social security cases, are given preference. If a double expenditure of resources is required in divorce cases, some programs might make the decision not to handle divorces at all.

The structure of Legal Services programs creates another conflict of interest problem. If a member of the board of directors of the program represents a spouse in a divorce case, are staff attorneys precluded from representing the other spouse because the board member and the attorney are "affiliated" under DR 5-

44. Cf. ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS [hereinafter cited as ABA FORMAL OPINION], No. 342 (1975) (where the Committee on Professional Ethics concluded that the public policy in favor of attracting talented individuals into governmental service meant that DR 5-105(D) should not be read literally when applied to attorneys who were employed by private firms after government service.

45. *Borden v. Borden*, 277 A.2d 89 (D.C. App. 1971).

46. See ABA CODE, CANON 2; EC 2-16, 2-24 to -25.

105(D)? A recent ethical opinion holding that such a situation creates a conflict of interest is unsound.⁴⁷ In another opinion, Formal Opinion 324,⁴⁸ the ABA's Committee on Professional Ethics discussed the relationship between the board of directors and the attorneys in a Legal Services program. While the board may establish policies for the program, board members may not exercise control over the decision making of attorneys in individual cases. Based on this opinion as well as the absence of any day-to-day contact between board members and staff lawyers, it seems that there is a sufficient insulation between board members and attorneys to avoid any conflict of interest problem. Furthermore, such a conflict of interest rule would have a detrimental impact on the functioning of legal services in less populous areas where board members would frequently represent parties in cases handled by the Legal Services program.

IV. ETHICAL PROBLEMS CAUSED BY THE LACK OF GROUNDS FOR DIVORCE

As the number of states that provide for no-fault divorce without a significant waiting period has increased, the ethical problems that lawyers encounter because they represent clients without grounds have diminished. Nevertheless, a substantial number of states still require either the establishment of fault for divorce or a significant waiting period or period of separation for a no-fault divorce.⁴⁹ This section examines the ethical propriety of various tactics that might be considered by lawyers who represent clients for whom grounds for divorce do not exist.

A. *Collusion and Connivance*

A distinction should be drawn between collusive and friendly divorces. A collusive divorce is an attempt by the parties acting in concert to obtain a divorce when grounds do not exist.⁵⁰ For

47. ABA INFORMAL OPINION, No. 1395, summarized in 64 A.B.A.J. 911 (1978).

48. ABA FORMAL OPINION, No. 324 (1974).

49. Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1978* [1978] 4 FAM. L. REP. (BNA) 4033-35.

50. In Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1123 (1936), the author identifies three forms of collusion: an agreement by the husband and wife (1) to introduce false evidence to establish a ground for divorce, (2) to commit an act in order to obtain a divorce, or (3) to suppress a valid defense. A careful reading of the authority for the proposition that an agreement to suppress a valid defense constitutes collusion supports the opposite, however. *Id.* nn. 12, 16. Drinker, in his article on professional ethics in divorce cases, concludes that an agree-

example, if the husband and wife agree that the wife will testify that the husband deserted her for the statutory period even though this did not occur, the divorce is collusive. By contrast, a friendly divorce is one obtained by the concerted action of the parties when grounds do exist. Thus, if both spouses have committed adultery, each spouse generally has a recrimination defense against the other's action for divorce.⁵¹ An agreement not to assert this defense does not make the divorce collusive, however, because the grounds for divorce exist.

It is improper for a lawyer to counsel or assist a client in obtaining a collusive divorce. This conduct violates DR 7-102(A)(5) because it is a fraud on a tribunal, and it will lead to the creation of false evidence in violation of DR 7-102(A)(4) and (6).⁵² It is not improper, however, for a lawyer to participate in a friendly divorce. The refusal to assert a defense does not constitute a fraud on a tribunal; nor does such an approach necessarily lead to the introduction of false evidence.⁵³ Similarly, agreements to provide evidence of existing grounds are not ethically improper.⁵⁴

In the absence of valid grounds a client, either with or without the lawyer's assistance, might attempt to create grounds, for example, by entrapping the other spouse into adultery. This conduct constitutes connivance, and a lawyer who participates in connivance is subject to discipline.⁵⁵ If the lawyer proceeds with

ment not to assert a defense does not constitute collusion and is thus not ethically improper. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 447-50 (1953). On what constitutes collusion, see H. CLARK, *LAW OF DOMESTIC RELATIONS* 361 (1968).

51. In some states recrimination has been abolished as a defense. See, e.g., FLA. STAT. ANN. § 61.044 (1976).

52. *In re Reinmiller*, 213 Ore. 680, 325 P.2d 773 (1958) (lawyer disciplined for filing false pleading).

53. See ABA INFORMAL OPINION, No. 869 (1965) (lawyer may bring action for divorce based on adultery even though lawyer knows that defense of recrimination could be raised). See also Drinker, *supra* note 50.

54. Drinker, *supra* note 50, at 450-52. Drinker includes two other situations in his discussion of collusive divorces: arrangements for the defendant's lawyer to be designated by the plaintiff or the plaintiff's lawyer and acceptance by the wife's lawyer of compensation from the husband. Drinker confuses the issues by analyzing these situations under the category of collusion. The fundamental question in such cases is whether the arrangement constitutes an interference with the lawyer's independent professional judgment on behalf of the client. See DR 5-107.

55. The principle behind this is that participation by a lawyer in a fraudulent scheme is ethically improper. See *In re Knight*, 129 Vt. 428, 281 A.2d 46 (1971) (young lawyer acting at direction of senior attorney suspended for three months for taking photographs and electronic eavesdropping of other spouse in order to obtain evidence of sexual conduct with third person who was employed by senior lawyer).

the divorce even when she only has reason to know of the client's connivance, it could constitute grounds for discipline.⁵⁶

B. *The Lawyer's Speech to the Client*

Some divorce lawyers make it a practice before obtaining facts from their clients to make a speech to the client in which the lawyer states the grounds for divorce and informs the client that a divorce cannot be obtained unless grounds exist. This practice should not be followed because it is both unwise and unethical. The speech gives the client the message that if he does not have grounds for divorce the lawyer does not want to know the truth. Tactically, it is unwise for a lawyer not to try to obtain all the facts. In negotiations with the opposing side the lawyer may be disadvantaged if he did not know that the divorce could not be obtained if contested. At deposition or trial, the lawyer may be surprised by statements of the client under cross-examination. Ethically, there is no purpose for the speech other than to inform the client that he should tailor his story to local law. By doing this, the lawyer promotes perjury, a clear violation of the disciplinary rules.⁵⁷

C. *Migratory Divorce*⁵⁸

A lawyer who practices in a state that has restrictive divorce law will probably encounter a client who is considering a migratory divorce. Of course, the attorney must advise the client of the risks of this endeavor.⁵⁹ Furthermore, the attorney may decide to decline representation⁶⁰ or withdraw from the case if the client insists on trying to obtain such a divorce.⁶¹ In the following discus-

56. *Florida Bar v. McCaghren*, 171 So. 2d 371 (Fla. 1965).

57. Whether it is proper for a lawyer to explain the legal consequences of a fact before asking the client about the fact depends on the lawyer's purpose in explaining the consequences. If the purpose is to prod memory or overcome a psychological barrier to the disclosure, such an explanation is proper. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 59-76 (1975).

58. A migratory divorce is a divorce obtained in another state (domestic divorce) or country (international divorce). For previous discussions of the ethical aspects of migratory divorces, see Adams & Adams, *Ethical Problems in Advising Migratory Divorce*, 16 HASTINGS L.J. 60 (1964); Drinker, *supra* note 50, at 454-64. See generally Symposium, *Migratory Divorce*, 2 LAW & CONTEMP. PROB. 289 (1935).

59. See EC 7-8. The major risk is that the divorce will be invalid. The client will have wasted the expenses that are involved. Subsequent marriages may be invalid because the divorce is invalid. A remote risk is that the client could be subject to a bigamy prosecution.

60. EC 2-26.

61. The ground for withdrawal would be that the client refused to follow the advice

sion it is assumed that the lawyer has explained the risks and has decided that he is willing to assist the client in obtaining the divorce if it is ethically proper. The lawyer faces an ethical problem because a migratory divorce may involve fraud on a foreign tribunal or a third person. This is a violation of Disciplinary Rule 7-102(A)(7), which provides that it is improper for a lawyer to "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." The following discussion considers two questions concerning the application of this disciplinary rule to migratory divorces: when does a lawyer "counsel or assist" a client to obtain a migratory divorce, and when does a lawyer "know" that the divorce is fraudulent? In the analysis three types of migratory divorce must be distinguished. The bilateral domestic divorce is a divorce obtained in another state in which the court has personal jurisdiction over both parties. An ex parte domestic divorce is a divorce obtained in another state in which the court has personal jurisdiction over one party and the other is served constructively. An international divorce is a divorce obtained in a foreign country, either ex parte or bilaterally.⁶²

1. *The Meaning of "Counsel or Assist."*—A lawyer acts improperly in connection with a divorce only if he "counsels or assists" his client to obtain the divorce. If a lawyer merely advises the client of the advantages and disadvantages of a migratory divorce, he should not be considered to have counseled or assisted the client to obtain the divorce within the meaning of the Disciplinary Rule. This is because the traditional role of the attorney consists of advising the client of the consequences of a proposed course of conduct, even if it is illegal or fraudulent.⁶³ Moreover, such advice may persuade the client not to try to obtain the divorce. Whether the client asks for information about the migratory divorce or the lawyer raises the possibility himself should be irrelevant. The client is entitled to frankness from his counsel.

If the lawyer becomes actively involved in promoting or procuring the divorce, however, this should be considered counseling or assisting in obtaining it in violation of the Code's proscrip-

of the attorney. DR 2-110(C)(1)(e).

62. The literature on foreign divorces usually discusses the propriety of a lawyer's participation in a Mexican mail order divorce. See Adams & Adams, *supra* note 58; Drinker, *supra* note 50. This no longer seems to be a problem; Mexican law was changed in 1971 to require the filing of a certificate of residency in all divorce proceedings.

63. See EC 7-5 & n.14 to the Ethical Considerations under Canon 7.

tion.⁶⁴ If the lawyer advises the client to seek the divorce (rather than simply giving advice concerning advantages and disadvantages), drafts documents incident to the divorce, such as a separation agreement,⁶⁵ appears in the foreign divorce proceeding *pro hac vice*, or arranges for the divorce by contacting counsel in the foreign jurisdiction, he has assisted in it.

2. *When Does a Lawyer "Know" That a Migratory Divorce is Fraudulent?*—A migratory divorce may entail fraud in two ways: misrepresentation of domicile to the tribunal of the divorcing jurisdiction or misrepresentation of the validity of the divorce to a third person.⁶⁶

(a) *Fraud on the Tribunal of the Divorcing Jurisdiction.*—Under the laws of some foreign countries, a divorce may be obtained even though neither of the parties is domiciled in the country.⁶⁷ A divorce in such a country, whether bilateral or ex parte, does not entail the ethical problem of participation in a fraud on a tribunal.

The laws of almost all states, however, require one of the parties to be domiciled in the state for the court to have jurisdiction to enter a decree.⁶⁸ Because neither spouse in a migratory

64. Cf. *In re Ryder*, 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967) (lawyer suspended for active involvement in concealing weapon and proceeds of robbery).

65. *But see* *Nappe v. Nappe*, 20 N.J. 337, 120 A.2d 31 (1956) (indicating that preparation of separation agreement incident to migratory divorce does not constitute participation in the divorce).

66. In ABA FORMAL OPINION, No. 84 (1932), the ABA's Committee on Ethics and Professional Responsibility decided that it was ethically improper for a lawyer to assist a client in obtaining a divorce in another state when the lawyer knew that residence was temporary. The basis of the decision was that the divorce would involve fraud or deceit on the court of the divorcing state. Subsequently, in ABA FORMAL OPINION, No. 248 (1942) the Committee ruled that it was improper for a lawyer to assist a client in obtaining a Mexican mail-order divorce. While the divorce did not involve fraud on the Mexican court, the committee decided that the lawyer acted unethically because such divorces were illegal under New York law. This basis for the opinion was unsatisfactory; although such divorces were invalid in New York, there was no specific statutory provision or common law rule that made them illegal. Drinker argues that the real basis for the decision was that the only reason for procuring the divorce was to misrepresent its validity to third persons. H. DRINKER, *LEGAL ETHICS* 150 (1953).

67. *See* *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978) (Dominican Republic).

68. The statutes often require residence, but the courts have interpreted residence to be the equivalent of domicile (actual residence coupled with the intent to remain permanently). *See* H. CLARK, *LAW OF DOMESTIC RELATIONS* 286 n.3-4 (1968). In some states, however, residence for the statutory period is sufficient to establish domicile. *See, e.g.,* ARK. STAT. ANN. § 34-1208.1 (1962 Replacement). It reads:

The word "residence" as used in Section 34-1208 is defined to mean actual presence and upon proof of such the party alleging and offering such proof shall be considered domiciled in the State and this is declared to be the legislative

divorce intends to remain in the divorcing state permanently, it seems that the divorce involves fraud on the tribunal. But this analysis is simplistic. While the courts of some states construe the domicile requirement strictly, others ignore it and merely require presence within the state for a certain period of time for divorce.⁶⁹ If an attorney knows that the courts of a particular state treat their domicile requirement strictly, it is unethical to counsel or assist a client to obtain a divorce in that state. In the absence of such knowledge, however, participation is proper.

May a lawyer ethically take the position that he cannot know whether a migratory divorce is fraudulent because the issue depends on a variety of legal and factual questions that he cannot determine with certainty?⁷⁰ Such a standard reads the Disciplinary Rule out of existence. Furthermore, the Ethical Considerations and case law indicate that an attorney should be held to the standard of reasonable knowledge under the circumstances.⁷¹

Two examples should clarify the standard. It is widely known that divorces can be obtained in Nevada after six weeks resi-

intent and public policy of the State of Arkansas.

Id. The constitutional validity of such a statute is unclear. See *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955) (where the Supreme Court held that a similar statute passed by the Virgin Islands was ultra vires). If the divorce was contemplated in a state that had a statute like the Arkansas statute, there would be no problem of fraud on the foreign tribunal as long as the client intended to reside in the state for the statutory period.

69. The author has no information on how many states are lax in applying their requirement of domicile. One frequently hears about Nevada divorces, but the situation in other states is not as well known. Presumably, divorce practitioners know which states are "divorce mills." See Note, *Migratory Divorce—The Alabama Experiment*, 75 HAR. L. REV. 568 (1962).

70. Whether a foreign court is actually defrauded will depend on how it treats its requirement of domicile. This depends on a variety of questions. What must the petition for divorce contain? Do trial judges inquire into the facts supporting an allegation of domicile? Is the divorce subject to collateral attack in the state if evidence of lack of domicile is later offered?

71. EC 7-26 states that a "lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from the facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." (emphasis added); *Florida Bar v. McCaghren*, 171 So.2d 371 (Fla. 1965) (lawyer suspended for proceeding with divorce when he had reason to believe that divorce was being obtained illegally, by connivance). Monroe Freedman discusses the question of what the criminal defense lawyer "knows." He concludes that the lawyer cannot justify arguing for the innocence of a criminal defendant because the lawyer never knows whether the person is guilty or innocent; often the lawyer knows that the client is guilty beyond any reasonable doubt. Instead, Freedman argues that policy reasons justify allowing attorneys to "lie" on behalf of clients. Because our system of justice gives a high value to liberty, lawyers are allowed to assert positions that are inconsistent with their actual knowledge. This consideration of policy does not apply to divorce litigation, however. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 51-58 (1975).

dence.⁷² While Nevada's divorce statute requires domicile, its courts do not treat the requirement strictly, only requiring residence for the statutory period. For many years Alabama was also a divorce mill because its statute did not require residence for a minimum period for its courts to have jurisdiction to grant a divorce.⁷³ In 1961, however, the Alabama Supreme Court amended its rules governing the conduct of attorneys to provide that filing a divorce petition for a person who is not a bona fide resident of the state is fraud.⁷⁴ Subsequently, the Alabama Supreme Court disciplined an attorney for participation in a migratory divorce.⁷⁵ Under these circumstances an attorney should know that Alabama treats its jurisdictional requirements seriously.

(b) *Fraud on Third Persons.*—Counseling or assisting a client to obtain a migratory divorce that the lawyer should know would be fraud on a third person is unethical.⁷⁶ When does a lawyer know that a migratory divorce constitutes fraud on a third person? If the migratory divorce is valid, that is, entitled to recognition in other jurisdictions, misrepresentation of its validity cannot occur and the ethical problem does not exist.⁷⁷ If the legal validity of the divorce is unclear, an attorney should be able to participate based on the principle that when a client's course of conduct depends on the application of a doubtful principle of law, the lawyer is ethically justified in adopting the construction most favorable to the client.⁷⁸ A patently invalid migratory divorce decree, on the other hand, carries a high probability of misrepresentation. Therefore, a lawyer acts unethically if he counsels or assists a client to obtain such a divorce.⁷⁹ Thus, the ethical prob-

72. For a recent case involving a Nevada divorce, see *Altman v. Altman*, 282 Md. 483, 386 A.2d 766 (1978).

73. See Note, *Migratory Divorce*, *supra* note 69.

74. See *In re Sullivan*, 283 Ala. 514, 525, 219 So. 2d 346, 355, *cert. denied*, 396 U.S. 826 (1969).

75. *Id.*

76. DR 7-102(A)(7), 1-102(A)(4); see note 66 *supra*.

77. One problem that the lawyer faces is that a migratory divorce may be valid in some states but not in others. Normally, spouses involved in migratory divorce return and remain in the original state. Thus, the attorney will normally apply its law in determining the validity of the divorce. If the attorney knows that either spouse will reside in another state, he should determine the validity of the divorce under the laws of that state as well. If the divorce is clearly invalid in any state in which the spouses will reside, the attorney should not participate.

78. See EC 7-3 to -6.

79. See H. DRINKER, *supra* note 66. The situation is analogous to presenting a frivolous claim or defense to a court. DR 7-102(A)(2); EC 7-4.

lem of participation in migratory divorces turns on the legal question of the validity of these divorces.

(i) *Bilateral Domestic Divorces*.—A series of Supreme Court cases has established the proposition that under the Full Faith and Credit Clause of the United States Constitution the validity of a divorce obtained in another state is not subject to collateral attack either by the spouses or by third parties if the court that entered the divorce decree had personal jurisdiction over the spouses.⁸⁰ Because the divorce may not be collaterally attacked, third parties are not subject to the risk that the validity of the divorce may be misrepresented.

(ii) *Ex Parte Domestic Divorces*.—An ex parte domestic divorce is subject to collateral attack by the nonparticipating spouse and third parties on the jurisdictional ground that the spouse who obtained the divorce was not domiciled in the state. While a court must give due weight to the jurisdictional determination of the divorcing court, it may conclude that the court did not have jurisdiction.⁸¹ The crucial question that an attorney must decide in evaluating participation in an ex parte divorce is whether the client will be domiciled in the divorcing state. This will often be unclear, depending on several factors such as the length of time that the client intends to stay in the state, the degree of permanence of the contact, and the association that the client retains with the original state of domicile.⁸² Generally, participation in such a divorce is ethically proper because its legal validity is unclear. On occasion, however, it will be clear that the divorce would be invalid if attacked. Under those circumstances the attorney may not ethically participate.⁸³

(iii) *International Divorces*.—No state recognizes the validity of ex parte international divorces.⁸⁴ Thus, it is ethically improper for an attorney to counsel or assist a client to obtain such a divorce. The problem is more complex with bilateral international divorces, however, because in *Rosenstiel v. Rosenstiel*⁸⁵ the

80. *Cook v. Cook*, 342 U.S. 126 (1951); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Johnson v. Muelberger*, 340 U.S. 581 (1951).

81. See *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945); *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942). For a discussion of the validity of ex parte divorces, see Annot., 28 A.L.R.2d 1303 (1953).

82. *Id.*

83. See note 79, *supra*.

84. See Annot., 13 A.L.R. 3d 1419 (1967).

85. 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966).

New York Court of Appeals held that as a matter of comity it would recognize the validity of bilateral divorces obtained in other countries. In states that decide to follow *Rosenstiel* it is ethically proper for an attorney to counsel or assist a client to obtain a bilateral international divorce.⁸⁶ Even if the highest court of the state has not passed on *Rosenstiel*, it should be proper for an attorney to participate because, as noted above, a lawyer may ethically adopt the construction of law most favorable to his client. If the highest court of a state has clearly rejected *Rosenstiel*, it is unethical for a lawyer to counsel or assist a client in a bilateral international divorce.⁸⁷

3. *The Effect of the Uniform Divorce Recognition Act on the Ethical Propriety of Participation by Attorneys in Migratory Divorce.*—Several states have adopted the Uniform Divorce Recognition Act,⁸⁸ which was promulgated by the National Conference of Commissioners on Uniform State Laws to deal with the problem of migratory divorce.⁸⁹ The Act states that a divorce in another jurisdiction will not be recognized in the enacting state if the spouses were domiciled in the enacting state at the time of the institution of proceedings in the divorcing jurisdiction;⁹⁰ it provides that certain contacts with the enacting state constitute

86. An Annotation concludes that no other state has accepted the *Rosenstiel* doctrine, but the issue is probably undecided in many states. See Annot., 13 A.L.R. 3d 1419, 1425 (1967).

87. Compare *Smoak v. Smoak*, 269 S.C. 313, 237 S.E.2d 372 (1977) with *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978); *In re Estate of Steffke*, 65 Wis. 2d 199, 222 N.W.2d 628 (1974). In *Smoak*, the South Carolina Supreme Court held that an ex parte divorce obtained in Haiti was void but that the husband was estopped to assert its invalidity to bar the wife's claim for alimony on the ground of her subsequent adultery. Because the *Smoak* case dealt with an ex parte rather than bilateral international divorce, it should not be considered as clearly establishing that such divorces are invalid in South Carolina. Thus, at the present time the validity of bilateral international divorces in South Carolina is uncertain; it should not be ethically improper for an attorney to counsel or assist a client to obtain one. See also *Zwerling v. Zwerling*, 244 S.E.2d 311 (S.C. 1978) (indicating that the *Rosenstiel* doctrine does not offend the public policy of South Carolina).

By contrast, in *Weber* and *Steffke* the highest courts of Nebraska and Wisconsin held that bilateral international divorces were invalid in those states. Thus, it would be improper for an attorney in those states to participate in such a divorce.

88. Reprinted in 9 UNIFORM LAWS ANN. 362 (1973).

89. See *id.* at 298 (Supp. 1977) (table of jurisdictions that have adopted the Act).

90. Section One of the Act provides:

A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.

Id. at 362.

prima facie evidence of continued domicile.⁹¹

It is not improper for an attorney to counsel or assist a client to obtain either a domestic or international migratory divorce *merely* because his state has passed this Act. The Act does not affect the validity of bilateral domestic divorces, for under the Full Faith and Credit Clause the courts of the enacting state may not reexamine the jurisdiction of the divorcing court.⁹² The Act *may* apply to international divorces. Its purpose, however, was to deal with the problem of domestic migratory divorce.⁹³ In light of this history and the *Rosenstiel* case, it is uncertain whether the Act invalidates international divorces. As to ex parte domestic divorces, while the Act makes a spouse's contact with the enacting state prima facie evidence of continued domicile, this may be rebutted. The attorney should consider the factors indicated in the Act along with all of the facts of the situation he confronts to determine whether the ex parte divorce would be patently invalid. If so, his participation would be unethical.

4. *The Effect of the Doctrine of Estoppel on the Ethical Propriety of Participation by Lawyers in Migratory Divorce.*—Numerous cases establish the doctrine that even if a divorce is invalid, a person is estopped to assert the invalidity of the divorce against a person who reasonably relies on its validity.⁹⁴ The doctrine thereby shields the third person from the harm that would result from declaring the divorce invalid. The question arises whether the possibility that a court will apply the doctrine of estoppel in a particular case gives a divorce sufficient validity to allow an attorney to participate in it.

For two reasons the doctrine of estoppel does not give a divorce sufficient validity to justify an attorney's participation. First, the scope of the doctrine is unclear. It is unclear when a person has relied sufficiently to invoke the doctrine,⁹⁵ and it is

91. Section Two provides:

Proof that a person obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

Id. at 378.

92. See note 80 *supra*.

93. See UNIFORM DIVORCE RECOGNITION ACT, *Prefatory Note*, reprinted in 9 UNIFORM LAWS ANN. 359 (1973).

94. See *generally* Annot., 175 A.L.R. 538 (1948).

95. See *In re Atherley's Estate*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

unclear, for example, whether the doctrine is applicable to certain parties such as the United States Government.⁹⁶ Second, while the doctrine protects innocent persons from some harm, it does not provide complete protection. For example, a person who learns that his spouse has not been validly divorced may suffer psychological or social harm that the doctrine of estoppel can do nothing to prevent. The doctrine can only address the adverse legal consequences of an invalid divorce.

V. ETHICAL PROBLEMS CAUSED BY THE POSSESSION OF
CONFIDENTIAL INFORMATION THAT INVOLVES
FRAUD OR ILLEGALITY

A. *General Principles*

The Code of Professional Responsibility imposes on lawyers a duty to preserve the "confidences" and "secrets" of their clients.⁹⁷ The term "confidence" refers to any information that is protected from disclosure by the evidentiary attorney-client privilege. "Secret" means any other information gained in the attorney-client relationship that the client has requested to be kept secret or that might be embarrassing or detrimental to the client.⁹⁸

Although the Code does not impose a general duty on attorneys to reveal illegal or fraudulent conduct, it does impose that duty under limited circumstances. A lawyer has a duty to reveal unprivileged violations of the Code⁹⁹ by other attorneys, and subject to the qualifications discussed below, he must reveal information that clearly establishes that a client or other person has committed a fraud on a tribunal or that a client has committed a fraud on another person.¹⁰⁰ Furthermore, the Code prohibits an attorney from engaging personally in illegal conduct.¹⁰¹ The following sections discuss the application of these principles to situations that lawyers are likely to encounter in divorce practice.

B. *Past Fraud by a Client*

Lawyer represented *H* in a divorce case. After extensive

96. *Magner v. Hobby*, 215 F.2d 190 (2d Cir. 1954), *cert. denied*, 348 U.S. 919 (1955).

97. DR 4-101(B)(1).

98. DR 4-101(A).

99. DR 1-103.

100. DR 7-102(B).

101. DR 1-102(A)(3), 7-102(A)(7).

negotiation a property settlement agreement was made and an uncontested divorce obtained. During the course of representation of *H* in a subsequent business transaction, lawyer learns that *H* failed to disclose certain assets in the divorce. Because *H* was asked about these assets in a deposition taken under oath, his failure to answer honestly constitutes both fraud and perjury. Does the lawyer have either the duty or right to disclose this information?

The obligation of a lawyer to disclose past fraud committed by a client has an inconsistent history. Despite some indications to the contrary, prior to the adoption of the Code the ABA Committee on Professional Ethics took the position that a lawyer had neither the duty nor the right to disclose past fraud committed by a client, even if the fraud consisted of perjury.¹⁰² The rationale for that view was that the proper functioning of the adversarial system required that clients be able to consult lawyers without fear that information revealed to the lawyer would be disclosed without the client's consent.

The Code of Professional Responsibility as originally adopted by the ABA in 1969 seemed to reverse that position. DR 7-102-(B)(1) provided:

(B) a lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

Furthermore, the section contained a *but see* reference to the ABA's Formal Opinion 287,¹⁰³ in which it had stated the obligation not to disclose such information.¹⁰⁴ In 1974, however, the ABA amended the rule to read as follows:

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetuated a fraud upon a person or tribunal shall promptly call

102. ABA FORMAL OPINION, No. 23 (1930). The Committee ruled that the whereabouts of a fugitive constituted privileged information, but took a different position on this question only six years later. *Id.*, Nos. 155-156 (1936). In ABA FORMAL OPINION, No. 287 (1953), the Committee resolved the conflict in favor of the position announced in ABA FORMAL OPINION, No. 23. In that opinion the Committee held that an attorney could not reveal perjury committed by a client in obtaining a divorce.

103. *Id.* No. 287 (1953).

104. See DR 7-102(B)(1) n.71.

upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a privileged communication.*¹⁰⁵

In Formal Opinion 341¹⁰⁶ the ABA Committee discussed the meaning of the 1974 amendment. The Committee interpreted the phrase "privileged communication" in DR 7-102(B)(1) to be synonymous with the terms "confidences" and "secrets" in Canon 4. As a result of this interpretation, a lawyer who learns about fraud committed by a client is almost always under an obligation not to reveal the information.¹⁰⁷ Thus, in the hypothetical situation above, if the 1974 version of the Code applies the lawyer does not have the duty to disclose the fraud; nor could the lawyer disclose the fraud even if he wanted to, because the information is confidential under Canon 4 and none of the exceptions in DR 4-101(C) applies.

Although disclosure is improper, if an attorney discovers that his client has committed a fraud like that in the example, he may withdraw from representation.¹⁰⁸ Withdrawal is not required, however, unless the lawyer will participate in the furtherance of the fraud.¹⁰⁹

In those states that have not adopted the 1974 amendment of the Code,¹¹⁰ lawyers face a difficult choice. On the one hand, the wording of the section clearly requires disclosure. Moreover, Opinion 341 indicates that the ABA Committee believes this was the proper interpretation of the section prior to the amendment. On the other hand, disclosure of the client's secrets is a major breach of the attorney-client relationship, which should be avoided unless the obligation to disclose is clear. One authority has concluded that the 1969 version should be read as simply

105. Emphasis added to show amendment.

106. ABA FORMAL OPINION, No. 341 (1975).

107. If one of the exceptions contained in DR 4-101(C) applied, the lawyer could reveal the information. Thus, if an attorney was charged with participation in the client's fraud, he could reveal the fraud in order to defend himself against the charge. See DR 4-101(C)(4). See also *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir. 1974), cert. denied, 419 U.S. 998 (1974).

108. DR 2-110(C)(1)(e). The withdrawal would be based on the client's refusal to follow the lawyer's advice to rectify the fraud.

109. If the lawyer became involved in the fraud, he would violate DR 7-102(A)(7). Withdrawal would become mandatory under DR 2-110(B)(2). For example, if subsequent contempt proceedings were commenced in the divorce case, the lawyer could not make arguments in court that supported the original fraud. Withdrawal would be required.

110. See, e.g., S.C. SUP. CT. R. 32.

restating the conflict between the duty to disclose and the duty to maintain confidences,¹¹¹ which ABA Formal Opinion 287¹¹² resolved in favor of preservation of confidences. An attorney faced with this dilemma should seek advice from his local ethics committee. If an attorney does not make the disclosure, he should not be subject to discipline because the standard is unclear.¹¹³

C. Past Fraud by a Person Other Than a Client

Lawyer represents *W* in a divorce case. In the course of representation the lawyer learns that *H* filed fraudulent tax returns. Although *W* signed the returns, she was unaware of the fraud.¹¹⁴

Of course, if the client consented, the fraud could be revealed to the Internal Revenue Service. It is, however, probably not in the wife's interest to reveal the information because a claim for taxes by the government is likely to lessen her ability to collect alimony and child support. The wife might want the attorney to threaten to reveal the information to prompt a better settlement of the case, but that would clearly be improper because the attorney would be threatening criminal prosecution solely to obtain an advantage in a civil matter.¹¹⁵ Thus, the practical question is whether the attorney has a duty to reveal the information despite his client's wishes.

DR 7-102(B)(2) deals with the lawyer's obligation to reveal a fraud committed by a person other than a client. Unlike section (B)(1), section (B)(2) requires that the disclosure be made only if the fraud was committed on a tribunal rather than a person.¹¹⁶ The ABA has ruled that the IRS generally is an adversary, not a tribunal;¹¹⁷ thus it seems that the attorney does not have a duty to reveal the fraud, nor does the attorney have the discretion to

111. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 147 (1976).

112. ABA FORMAL OPINION, No. 287 (1953).

113. The Supreme Court has held that due process in attorney disciplinary proceedings requires that the attorney have sufficient notice that the conduct with which he is charged is improper. *In re Ruffalo*, 390 U.S. 544 (1968).

114. The wife would be protected against liability under the innocent spouse provision of the Internal Revenue Code. I.R.C. § 6013(e).

115. DR 7-105.

116. The distinction between DR 7-102(B)(1) and (B)(2) might be explained as follows. As an officer of a court an attorney always has a duty of candor to the court. Thus, the lawyer had a duty to disclose fraud on a tribunal whether committed by a client or a third person. Like other citizens, however, an attorney generally does not have an affirmative duty of candor to a stranger.

117. ABA FORMAL OPINION, No. 314 (1965).

do so under Canon 4 because none of the exceptions in DR 4-101(C) applies.

A more difficult question arises if the fraud was committed on a tribunal. For example, suppose the husband obtained worker's compensation benefits through perjured testimony and the attorney for the wife discovers this during divorce proceedings. Does the attorney have the duty to reveal the fraud to the compensation board? The wording of section 7-102(B)(2) seems to require disclosure; unlike (B)(1), the section does not contain an exception for privileged communications under Canon 4. Yet the information was received in a privileged communication, and its revelation would be very detrimental to the wife. The 1974 amendment to DR 7-102(B)(1) and Opinion 341 reflect a policy that preservation of confidences and secrets is more important than the duty to disclose fraud. Thus, it is reasonable to imply a similar limitation in DR 7-102(B)(2).

D. Past Conduct by a Client Not Constituting Fraud

Lawyer represents *W* in a contested divorce case. *W* informs lawyer that she is pregnant by another man. Lawyer thinks that revelation of this information will be very detrimental to *W*'s chances of obtaining custody of her minor children. Does the lawyer have a duty to reveal this information?

The wife's pregnancy is a confidential communication under Canon 4. None of the exceptions in 4-101(C) applies nor does the pregnancy constitute a fraud on a person or tribunal. Thus, there is no duty to reveal the information.

Of course, the situation is a precarious one. If the wife is asked about her condition either at a deposition or at trial, she will face the dilemma either of making a damaging admission or committing perjury.¹¹⁸ If she commits perjury, the attorney will have a duty to ask her to rectify the fraud, and if this fails he will have a duty to withdraw from the case.¹¹⁹ In the absence of court order, however, he should not reveal that perjury has been committed.

E. Past Versus Future Conduct

In the course of representing *W* in a divorce case, lawyer

118. If adultery were a crime, another option would be to claim the privilege against self incrimination.

119. See ABA INFORMAL OPINIONS, Nos. 1314, 1318 (1975).

learns that both *H* and *W* have severely beaten their minor child on numerous occasions. Does the lawyer have the right or duty to reveal this information to the court?

When representing a spouse in a divorce case, the attorney's relationship with the children is troublesome. Under traditional notions of the attorney's role, he does not have an attorney-client relationship with the children.¹²⁰ Yet, cases may exist in which the interests of the children diverge from those of the parents. Child abuse is obviously such an instance. Because of these situations a number of states have passed statutes that provide for independent representation for children.¹²¹ The presence of an independent attorney may not be sufficient, however, if the attorney for the child treats his role ministerially or simply does not have adequate information to represent the child properly.

In the example above, the attorney should first discuss the problem with his client and attempt to persuade her to seek professional help.¹²² If this fails, the attorney is authorized to disclose the information. DR 4-101(C)(3) provides that an attorney may disclose the client's intention to commit a crime and the information necessary to prevent it. Child abuse is a criminal offense.¹²³ Because child beatings frequently reoccur, the attorney may properly treat it as a "continuing crime."¹²⁴ While the disciplinary rule states only that the lawyer "may" reveal the information, the lawyer should do so for three reasons. First, public policy affords children a special status. Second, life and health are fundamental values in our society. Last, the attorney might be subject to tort liability if he fails to make the disclosure and the child subsequently suffers harm.¹²⁵

120. Berdon, *A Child's Right to Counsel in a Contested Custody Proceeding Resulting from a Termination of the Marriage*, 50 CONN. B.J. 150, 159 (1976); Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L. Q. 108, 115 (1971).

121. See Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126 (1978).

122. The Ethical Considerations recognize that an attorney should discuss nonlegal as well as legal aspects of a case with his client. See EC 7-8.

123. In some states specific statutes covering child abuse have been enacted. See, e.g., S.C. CODE ANN. § 16-3-1030 (1976) (criminal offense for legal custodian to neglect the care of a child). In others, the general criminal assault and battery statutes should apply.

124. DR 4-101(C)(3); see ABA FORMAL OPINIONS, NOS. 155, 156 (1936).

125. See *Tarasoff v. Regents of Univ. of Calif.*, 13 Cal. 3d 177, 529 P.2d 553 (1974).

VI. RELATIONS WITH OPPOSING PARTIES AND OTHER LAWYERS

A. *General Considerations*

The Code of Professional Responsibility regulates communication between lawyers and opposing parties.¹²⁶ The rationale for this regulation is that the adversarial system works best if each party is represented by counsel; inequality of knowledge between lawyer and lay person might cause the unrepresented person to be misled.¹²⁷ While the goal of avoiding unfair results is certainly a laudable one, the rules should not be used to promote the self interest of attorneys either by unnecessarily increasing legal fees or by blocking settlements. This section discusses the application of these considerations to dealings with opposing parties and lawyers in divorce cases.

B. *Unrepresented Parties and the Uncontested Divorce*

Disciplinary Rule 7-104(A)(2), which regulates communication with unrepresented parties, provides:

During the course of his representation of a client a lawyer shall not:

. . . .
(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

The interpretation of this section will have a significant impact on the ability of lawyers to handle efficiently uncontested divorces. A broad interpretation of what constitutes the giving of advice would make it very difficult for one lawyer to handle uncontested divorces.

The interpretation that ethics committees have given this section is confusing. In Formal Opinion 58¹²⁸ the ABA's Committee considered whether it was proper for an attorney to meet with an unrepresented opposing party in an attempt to obtain the party's consent to divorce. The Committee rules that the conference might easily lead to the giving of legal advice and that

126. DR 7-104.

127. EC 7-18. Canon 9, the predecessor to DR 7-104, stated this policy clearly: "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." ABA CANONS OF PROFESSIONAL ETHICS No. 9.

128. ABA FORMAL OPINION, No. 58 (1931).

this was improper under Canon 9 of the Canons of Ethics. The Committee advised that an attorney should limit communications with an unrepresented opposing party to a statement of the proposed action and a recommendation that the adverse party consult independent counsel. In Informal Opinion 1140¹²⁹ the Committee ruled that an attorney violated the section if he submitted to the defendant a document that waived the issuance and service of summons, waived any right to contest the venue or jurisdiction of the court, agreed that the case be submitted to the court without notice to the defendant, and agreed that depositions could be taken without notice. Subsequently, the Committee dealt with the application of the Disciplinary Rule in the context of no-fault divorce. In Informal Opinion 1255¹³⁰ the Committee faced the question of whether it was improper for an attorney to submit to an unrepresented party a form "Appearance and Responsive Pleading of Respondent" that had been prescribed by the state supreme court under a recently enacted no-fault divorce law. The Committee, following the approach set forth in Opinion 1140, ruled that such a procedure had the potential for abuse and therefore constituted a violation of the Disciplinary Rule. But the Committee, without giving reasons, indicated that a distinction might be drawn between a responsive pleading and a waiver of service and entry of appearance. Subsequently, in Informal Opinion 1269,¹³¹ the Committee decided that forwarding these documents constituted merely communication with an unrepresented party, not the giving of advice, and was therefore proper under the Disciplinary Rule.

Several ethics committees of state bar associations have recently considered the question of communication with an unrepresented party. The New York committee ruled that in an uncontested divorce it was proper for an attorney to prepare a separation agreement.¹³² The Committee ruled, however, that the attorney should not engage in negotiations, but should merely act as a scrivener on behalf of the parties. Apparently the Committee believed that the danger of overreaching is too great if an attorney negotiates with an opposing party. The Committee also decided, however, that if the case was contested it would be proper for the

129. ABA INFORMAL OPINION, No. 1140 (1970).

130. *Id.*, No. 1255 (1972).

131. *Id.*, No. 1269 (1973).

132. N.Y. St. Bar Ass'n, Opinion 478, *reprinted in* [1978] 4 FAM. L. REP. (BNA) 2233.

attorney to negotiate with an unrepresented party. The Committee concluded that the lawyer's duty to assure the proper functioning of the court system meant that this type of negotiation might be necessary. In contrast to the New York approach, the Ohio Bar ruled that it was proper for an attorney in an uncontested divorce to prepare a separation agreement on behalf of both parties.¹³³ While the Committee did discuss whether lawyers should participate in negotiations, it imposed three requirements on lawyers. First, the opposing party must be informed that the lawyer does not represent her. Second, the opposing party must be given an opportunity to evaluate her need for representation. Third, both parties must consent to the procedure in writing.

In most jurisdictions the interpretation of DR 7-104(A)(2) is an open one. The overwhelming public demand for low-cost, uncontested divorces is a sufficient reason not to interpret the section restrictively. Attorneys should be allowed to prepare those documents that are necessary for an uncontested divorce to be handled by one lawyer. These documents will vary depending on local law, but will probably include a consent to jurisdiction and a separation agreement. A difficult question is whether attorneys should be allowed to negotiate with unrepresented parties. Direct dealing creates a greater risk that the unrepresented party will be misled, but the New York approach, which requires the attorney to refuse to deal with the opposing party and to act merely as a scrivener, seems both impractical and inconsistent with traditional notions of professionalism. The unrepresented party should be adequately protected from harm by a full and frank disclosure by the attorney of his role and the risks that an unrepresented party faces. The disclosure rules established by the Ohio Bar seem to be a reasonable way of meeting this duty.

C. Represented Parties

Several ethical problems may arise in dealing with parties who are represented by counsel. In the usual case the ethical requirements are straightforward. It is ethically improper for a lawyer to communicate with a person who is represented by counsel without her lawyer's consent.¹³⁴ If an opposing party contacts

133. Ohio Bar Ass'n, Formal Opinion 30, *reprinted in* [1975] 1 FAM. L. REP. (BNA) 3109.

134. DR 7-104(A)(1). Lawyers have been disciplined for communicating with clients who are represented by counsel. *See* *Carpenter v. State Bar of Cal.*, 210 Cal. 520, 292 P. 450 (1930); *In re Mussman*, 111 N.H. 402, 286 A.2d 614 (1971).

a lawyer, the lawyer should inform her of this ethical restriction and state that he will be willing to discuss the matter if the party's counsel contacts him and informs him that he has permission to speak with his client.

A client may ask his lawyer whether it is permissible to negotiate with his spouse rather than through lawyers. If spouses want to discuss the case, lawyers have, of course, no right to prevent them from doing so. Sometimes, however, one spouse wishes to discuss the case and the other does not. To protect a spouse from harassment, the lawyer should first contact the opposing counsel to determine if the other spouse is actually willing to negotiate directly.¹³⁵

On occasion, the rule against contact with opposing parties who are represented by counsel may create problems. Suppose a lawyer believes that opposing counsel is not negotiating in good faith, refusing to submit settlement offers to his client. Does a lawyer have any recourse in this situation? A lawyer has an ethical obligation to submit all settlement offers to his client.¹³⁶ An opposing lawyer who thinks that this is not being done has two options. First, he can demand that the other attorney submit the offers to his client and request proof that the client has received the offer. In the absence of this proof the attorney would be justified in reporting his adversary to the disciplinary authorities for violation of a Disciplinary Rule. Second, the attorney can make sure that the offer is transmitted to the opposing party by following the procedure outlined by the ABA in Informal Opinion 1348.¹³⁷ In that opinion the Committee on Professional Ethics ruled that even if a lawyer believes that opposing counsel is not transmitting settlement offers to her client, direct communication with the opposing party is improper.¹³⁸ Instead, the Committee advised that the offer could be submitted through the court. This procedure allows the lawyer to achieve the goal of communicating the offer to the opposing party without the danger of direct contact.

135. See [1976] 2 FAM. L. REP. (BNA) 2424 (summarizing opinions by the Virginia State Bar Ethics Committee).

136. ABA FORMAL OPINION, No. 326 (1970).

137. ABA INFORMAL OPINION, No. 1348 (1975).

138. In ABA INFORMAL OPINION, No. 985 (1967), the ABA Committee advised that it was proper for an attorney to mail a settlement offer directly to an opposing party if local law authorized such a procedure, provided that a copy of the offer was sent to the opposing counsel and so long as the attorney did not have an improper motive in making the offer.

D. Disgruntled Clients

A difficult ethical problem arises when a lawyer is contacted by another attorney's client who is dissatisfied with the services of her attorney.¹³⁹ The attorney should not, of course, undertake representation unless he receives evidence that the other attorney has released the case or has been discharged.¹⁴⁰ The more difficult question is whether the attorney ought to discuss the case with the client at all prior to obtaining a release. Some attorneys believe that it is an act of discourtesy to the other attorney to do so, but a more realistic approach is that the lawyer must listen to the client's complaints. Some disputes with attorneys are relatively minor, perhaps resulting from confusion. The second attorney may be able to avoid perpetuation of this confusion simply by listening. If the problem is more serious, a change of counsel may be necessary. The second counsel cannot decide whether to take the case without some knowledge of it; yet forcing the client to obtain a release from her attorney before any discussion may leave the client without a lawyer if the second attorney later refuses the case. Moreover, the Code imposes a duty on lawyers to disclose unprivileged information which establishes a violation of a Disciplinary Rule by another attorney.¹⁴¹ If lawyers take this obligation seriously, they should not shield themselves from discussions that might reveal such information.

VII. FINANCIAL ASPECTS OF MARITAL PRACTICE

A. Fee Setting

Fee disputes are a common basis for complaints to disciplinary authorities. For lawyers seeking standards of what constitutes a fair fee, the abundance of divorce case law should provide ample guidance. Divorce attorneys should be aware that the standard of discipline for charging an excessive fee seems to be tightening. In several disciplinary cases the California Supreme Court ruled that an attorney could be subject to discipline if the fee was "so exorbitant and wholly disproportionate to the services performed as to shock the conscience."¹⁴² In *Bushman v. State Bar of California*,¹⁴³ for example, an attorney was suspended for one

139. See [1976] 2 FAM. L. REP. (BNA) 2682, 2686-87.

140. EC 2-30.

141. DR 1-103.

142. *Goldstone v. State Bar of Cal.*, 214 Cal. 490, 499, 6 P.2d 513, 516 (1931).

143. 11 Cal. 3d 558, 522 P.2d 312, 113 Cal. Rptr. 904 (1974).

year when he took a \$5000 note for legal fees in a divorce case in which opposing counsel, for approximately the same work, charged \$300. The Wisconsin Supreme Court, however, applied a stricter standard in judging the propriety of a \$5000 fee in a divorce case in *In re Marine*.¹⁴⁴ The complainant testified that she had spent 16.5 hours with the attorney, while the attorney claimed that he had worked between 55 and 70 hours on the case. Because of the absence of time records,¹⁴⁵ the referee had difficulty in determining the time spent, but finally concluded that 54 hours was a reasonable estimate. Testimony established that the maximum reasonable hourly rate for the attorney's services was \$60. Therefore, the maximum reasonable fee was \$3240, which was \$1760 less than the amount charged. The court concluded that a lawyer of ordinary prudence would be left with the definite and firm conviction that the fee was excessive and suspended the attorney for six months.¹⁴⁶

While the Disciplinary Rules do not prohibit contingent fee agreements in divorce cases, Ethical Consideration 2-20 states: "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified." The Ethical Consideration expresses a sound policy. Social policy favors the sanctity of marriage. This policy means that an attorney should attempt to promote reconciliation if possible. If a lawyer has a contingent fee agreement, a conflict between his financial interest and his duty to promote reconciliation exists.¹⁴⁷ If a divorce decree has been entered, however, this policy does not apply. Therefore, contingent fee agreements in proceedings to enforce prior property, alimony, and support awards are proper if justified by the client's financial inability to pay a reasonable fee.¹⁴⁸

B. Fee Collection

When a client disputes a fee, a lawyer has three options. In

144. 82 Wis. 2d 602, 264 N.W.2d 285 (1978).

145. A lesson to be drawn from these cases is that an attorney who does not keep time records will have difficulty justifying the fee.

146. This is the standard for judging the propriety of a fee under DR 2-106, but is a stricter standard than that applied in *Bushman*.

147. F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 45-49 (1964).

148. See Ill. Bar Ass'n, Opinion 337 (1971) (MARU No. 8284); Mo. Bar Admin. Advisory Comm., Formal Opinion 114, summarized in [1977] 3 FAM. L. REP. (BNA) 2733; Los Angeles County Bar Ass'n, Opinion 291 (1965) (MARU No. 6195).

some states fee dispute boards have been established.¹⁴⁹ While a lawyer may not force a client to use such a board, the procedure might be useful in a good faith dispute over the reasonableness of the fee. The board is not likely to be of aid if the client simply refused to pay the fee, however. Second, the lawyer could bring suit against the client. Although litigation with a client over fees should be avoided, it is not improper to sue a client.¹⁵⁰ Third, the lawyer could withdraw from the case, although court permission is usually required, and if the case is complicated, withdrawal may not be allowed.¹⁵¹

It is improper for a lawyer to refuse to obtain a final decree on behalf of a client to obtain payment of the fee. As long as the relationship of lawyer and client continues, the lawyer owes the client a duty of loyalty.¹⁵² Refusing to obtain the final decree is inconsistent with this duty. Numerous bar associations that have considered this practice have advised that it is improper to refuse to take a final decree to induce payment of the fee.¹⁵³

The typical state divorce statute authorizes a court to require the husband to pay the wife's counsel's fees.¹⁵⁴ On occasion, dispute over the amount of the fee to be paid the wife's counsel is the only stumbling block to a final divorce agreement. If agreement cannot be reached, lawyers should suggest that the fee question be submitted to the court for determination. The lawyer's interest in obtaining what he considers a fair fee should not delay the completion of divorce proceedings.

149. See George, *Arbitration of Attorney Fee Disputes: New Direction for Professional Responsibility*, 5 U.C.L.A.-ALAS. L. REV. 309 (1976). South Carolina also recently adopted such a procedure. See *The Transcript*, November 1978, at 1, col. 1.

150. EC 2-23 states that a lawyer "should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." See *Kizer v. Davis*, 369 N.E.2d 439 (Ind. App. 1977).

151. In *Kriegsman v. Kriegsman*, 150 N.J. Super. 474, 375 A.2d 1253 (1977), plaintiff's attorney received a retainer of \$2,000, but by the time of trial had submitted bills for over \$7,000 that remained unpaid because plaintiff was in financial difficulty. The court denied the motion of plaintiff's attorneys to withdraw because it would result in substantial prejudice to plaintiff. The court remarked that attorneys have obligations to clients and should not be allowed to withdraw merely for nonpayment of a fee when substantial harm would result.

152. DR 7-101(A)(1).

153. See *Idaho St. Bar Opinion* of June 26, 1973, 16 ADVOCATE 10 (MARU No. 8263); *N.Y. St. Bar Ass'n, Opinion* 212, 44 N.Y. ST. B.J. 126 (1972) (MARU No. 8972); *Va. St. Bar, Informal Opinion* 62 (MARU No. 9997); *Greater Cleveland Bar Ass'n, Opinion* 94 (1973) (MARU No. 9702). But see *Los Angeles County Bar Ass'n, Informal Opinion* 1967-9 (MARU No. 7849).

154. See, e.g., S.C. CODE ANN. § 20-3-120 (1976). Such statutes may now be unconstitutional in light of *Orr v. Orr*, 47 U.S.L.W. 4224 (1979).

VIII. CONCLUSION: CHANGE IN THE PROFESSIONAL RESPONSIBILITIES OF THE DIVORCE PRACTITIONER

While many of the ethical obligations of the divorce lawyer discussed above will remain unchanged, three trends in the profession are likely to produce a drastic restructuring of other rules. First, the profession seems to be moving toward a competitive rather than a regulatory model for the delivery of legal services. This factor has caused and will cause changes in the rules on advertising¹⁵⁵ and solicitation,¹⁵⁶ dealings with lay organizations,¹⁵⁷ and restrictions on the unauthorized practice of law.¹⁵⁸

155. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court held that truthful advertising through the print media of the availability and fees for routine legal services, such as uncontested divorces, was constitutionally protected speech. The American Bar Association responded to *Bates* by considering alternative proposed amendments to the Disciplinary Rules that regulate lawyer advertising. Proposal A, which the ABA called regulatory, authorized the inclusion of specific information in advertisements. By contrast, Proposal B, which the ABA called directive, allowed any form of advertisement so long as it was not "false, fraudulent, misleading, or deceptive." Further, Proposal B contained standards concerning what constituted fraudulent advertising, including standards for advertising of fees. At its August 1977 meeting the ABA passed a resolution that recommended the adoption of Proposal A and directed transmission of both proposals to the highest courts of all states as well as state regulatory agencies. For the text of the amendments see 63 A.B.A.J. 1234 (1977). While a few states have adopted Proposal B, most follow the regulatory approach. 64 A.B.A.J. 472 (1978).

Numerous questions remain unanswered. Will states move gradually toward the "directive" approach or will lawyer advertising remain regulated? What forms of advertising will be deemed false, deceptive, or misleading? What will be the effect of advertising on malpractice liability? What types of activities constitute advertising? For example, does a general mailing constitute advertising or solicitation? See *Kentucky Bar Association v. Stuart*, 568 S.W.2d 933 (Ky. 1978) (general mailing to real estate brokers of statement of fees for title examination and closing held protected advertisement under *Bates*).

156. In two cases decided last term, the Supreme Court considered the constitutionality of restrictions on solicitation of clients. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Court held that solicitation of clients through in-person contacts for pecuniary rather than political reasons could be constitutionally regulated by the state and that a prophylactic rule was a reasonable way to effect such regulation. In a companion decision, however, the Court held that solicitation of prospective clients by nonprofit organizations as a form of political expression was constitutionally protected and could not be prohibited by a blanket rule against solicitation. *In re Primus*, 436 U.S. 412 (1978). The Court noted that a carefully tailored rule aimed at solicitation that is false or misleading would be constitutionally permissible. *Id.* These decisions establish solicitation standards for attorneys belonging to divorce clinics that have been established for pecuniary or public interest reasons.

157. A major topic of debate within the profession during the last few years has been the propriety of participation by attorneys in group legal services plans. At first the Code restricted participation except to the extent required by "controlling constitutional interpretation." In 1974, DR 2-103(D) was amended to allow attorneys to participate in "open panel" plans, but the 1974 amendments placed significant restrictions on "closed panel"

Second, increasing concern over the competence of lawyers has been expressed.¹⁵⁹ More malpractice litigation¹⁶⁰ and the growth of specialization programs¹⁶¹ are likely developments. Third, the question of whether it is proper for an attorney to represent both spouses in an uncontested divorce reflects a deeper concern with the issue of whether the adversarial model is appropriate for divorce cases.¹⁶² Because of these trends, the divorce lawyer would be well-advised to begin planning for a future that appears likely to be radically altered.

plans. After hostile reaction, the Code was amended in 1975 to allow participation in closed panel plans. For a history of these developments see V. COUNTRYMAN, T. FINMAN, & T. SCHNEVER, *THE LAWYER IN MODERN SOCIETY* 620-25 (1976).

Substantial restrictions still remain, however. The organization may not derive any profit from legal services. DR 2-103(D)(5)(a). Thus, it is improper for an attorney to participate with a group organized by a business that seeks to earn a profit from legal services. The organization may not be started by lawyers with a profit-making purpose. DR 2-103(D)(5)(b). These restrictions will undoubtedly come under attack.

158. Private businesses have tried to compete with lawyers by marketing divorce kits. Generally, the courts have held that if the organization does no more than prepare, advertise, and sell the kit, even if the kit contains instructions for preparing forms, it does not engage in the unauthorized practice of law. If the organization counsels or assists specific individuals in using these kits, however, it engages in the unauthorized practice of law. Compare *Delaware St. Bar Ass'n v. Alexander*, 386 A.2d 652 (Del. 1978) and *Florida Bar v. Brumbaugh*, [1978] 4 FAM. L. REP. (BNA) 2292 and *People v. Divorce Assoc. and Publishing, Ltd.*, 407 N.Y.S.2d 142 (Sup. Ct. 1978) with *New York v. Winder*, 42 App. Div. 2d 1039, 348 N.Y.S.2d 270 (1973) and *Oregon St. Bar v. Gilchrist*, 272 Ore. 552, 538 P.2d 913 (1975). But see *Florida Bar v. Stupica*, 300 So. 2d 683 (Fla. 1974) (advertisement, publication, and sale without personal advice constitutes unauthorized practice of law); *Florida Bar v. American Legal and Business Forms*, 274 So. 2d 225 (Fla. 1973).

159. Compare Burger, *The Special Skills of Advocacy*, 3 J. CONTEMP. L. 163 (1976) with Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613 (1977).

160. See generally Annot., 78 A.L.R. 3d 255 (1977).

161. For the current status of specialization programs, see ABA STANDING COMM. ON SPECIALIZATION, INFORMATION BULL. No. 5 (September 1978). For a specialization program in family law, see TEXAS BD. OF LEGAL SPECIALIZATION STANDARDS FOR CERTIFICATION OF A FAMILY LAW SPECIALIST. Attorneys who live in states that have or are considering specialization programs should begin planning now. The typical program requires the attorney to demonstrate that a certain percentage of his work has been devoted to the specialty. Completion of an examination is also a common requirement.

162. Compare Callner, *Boundaries of the Divorce Lawyer's Role*, 10 FAM. L.Q. 389 (1977) with Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME LAW 229 (1977). For recent literature that discusses the role of the attorney, see G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* (1978). For especially good treatments on the role of the attorney in divorce practice, see C. FOOTE, R. LEVY, & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 822-48 (1966); H. FREEMAN & H. WEIHOFEN, *CLINICAL LAW TRAINING* ch. 8 (1972).