
**E-89-4 Prior joint representation of spouses and
subsequent representation of one spouse
in divorce action**

Facts

Partner A in law firm A, B, & C has represented a husband and wife in various different legal matters over the course of the last 15 years or more pertaining to several different matters, to wit:

1. Incorporation of a plumbing and heating business in which husband and wife are the sole officers and stockholders in or about 1974.
2. Purchase of their homestead in or about 1977.
3. Purchase of trailer court in or about 1981.
4. Representation regarding problems with regulatory matters with the Department of Industry, Labor & Human Relations.
5. Purchase of additional corporate real estate in or about 1988.
6. Office conference pertaining to financial problems pertaining to purchase of homestead in or about 1988.

In addition, Partner B in law firm A, B, & C has represented husband and wife in various different collection and landlord-tenant problems. Furthermore, Partner C in law firm A, B & C has represented the husband and wife's corporation in collection of delinquent accounts.

Husband has asked Partner B and law firm A, B & C to represent husband in commencing a divorce action against wife.

Question

Would law firm A, B & C's representation of husband in a divorce action against wife be of the "same or substantially related matter in which the husband's interests are materially adverse to the wife's interests" within the meaning of SCR 20:1.9 and formal opinions E-85-8, E-85-9 and E-87-3?

Opinion

A substantial relationship will be found to exist “if the factual contexts of the two representations are similar or related.” *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985), quoting *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983). See also *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980), where the court stated:

The interest to be preserved by preventing attorneys from accepting representation adverse to a former client is the protection and enhancement of the professional relationship in all its dimensions. It is necessary to preserve the value attached to the relationship both by the attorney and by the client. These objectives require a rule that prevents attorneys from accepting representation adverse to a former client if the later case bears a substantial connection to the earlier one. Substantiality is present if the factual contexts of the two representations are similar or related. [Citation omitted.]

Further,

Only where we can clearly discern “that the issues involved in [the] current case do not relate to matters in which the attorney formerly represented the adverse party will the attorney’s present representation be treated as measuring up to the standard of legal ethics.” *Westinghouse Elec. Corp.*, 588 F.2d at 224, quoting *Fleischer v. A.A.P. Inc.*, 163 F. Supp. 548, 553 (S.D.N.Y. 1958). And in answering such questions, “[d]oubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification.” *Westinghouse Elec. Corp.* at 225.

Berg v. Marine Trust Co., 141 Wis. 2d 878, 889-90, 416 N.W.2d 643 (1987).

Although the matters in which the prior and proposed representations are not the “same,” they would appear “substantially related” since A, B & C law firm would be seeking to divest a former client, the wife, of property interests that the firm previously assisted the wife in acquiring. SCR 20:1.9(a); and *City of Whitewater v. Baker*, 99 Wis. 2d 449, 299 N.W.2d 584 (app. 1980).

Accordingly, “unless the former client [that is, the wife] consents after consultation,” the proposed representation may not be accepted. SCR 20:1.9(a). See also disqualification cases on similar facts cited at *Mallen & Smith*, Legal Malpractice 3d, section 22.6, p. 346, n.s. 30-32. “Consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” SCR chapter 20, “Terminology.”

Although not required by SCR 20:1.9, both the consultation and consent should be confirmed in writing to reduce the possibility of future misunderstandings arising. The committee emphasizes that its recommendation that such writings be used is not intended to suggest a standard of conduct but, rather, only as a means by which future misunderstandings and disputes can be avoided.