

# ADVISORY ETHICS OPINION 1998-06

## SYNOPSIS:

A lawyer who has represented both husband and wife in a number of matters may not thereafter represent the husband against the wife in a divorce where issues in the divorce representation will require the lawyer to do anything which would injuriously affect the former client in any matter.

## FACTS:

The requesting lawyer initially represented husband and wife when they acquired their home place. After the parties had negotiated/arranged for their own financing, the lawyer undertook examination of the title and prepared a title report which was issued in a local bank in connection with a mortgage.

The lawyer was later involved in connection with the parties' acquisition of a commercial property. Again, the parties arranged/negotiated their own financing and the lawyer's involvement was for purposes of examination of the title, issuance of a title certificate and preparation of necessary documents for the parties to mortgage this property. The parties later refinanced the same property and the lawyer updated the title for the bank.

The commercial real estate is used by the husband for his business. A portion of the property has been rented to various tenants; and over the period of the parties' ownership of the premises, the requesting lawyer has drafted several leases between the parties and the tenants. Sometimes the wife conveyed the information for preparation of the leases to the lawyer; and at other times, the husband conveyed such information. The lawyer has also represented both parties to collect monies owed after a tenant had quit the premises.

The parties continue to own both properties and the lawyer states that both parcels are "presumably by statute" a part of the marital property.

The lawyer has recently undertaken the husband's representation in a divorce action between the parties. The lawyer is mindful of Opinion 78-3 and is sensitive to a claim of conflict of interest, but believes that the issues in the divorce are not substantially related to any former representation. To that end, an advisory opinion has been requested.

## DISCUSSION:

This is not the first time a question involving these types of issues has been before this Committee. First and foremost, we feel it is of utmost importance to recall the provisions of DR 4-101. Specifically,

DR 4-101 (B)(3) provides:

"Except when permitted under DR 4-101(c), a lawyer shall not knowingly:

- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

As we stated in Opinion 78-3,

"The rules on providing representation against past clients are fairly well defined. Such representation is unethical if the matters in the current representation are 'substantially related' to the matters involved in former representation of the now adversary party, or [emphasis added] if the new representation will require the lawyer to do anything which will injuriously affect his former client in any matter in which he formerly represented him."

A divorce action necessarily involves the disposition of marital assets. We believe that since the lawyer represented both parties in connection with the acquisition of these marital assets, the lawyer's representation of the husband against the wife necessarily involves the lawyer in representation which will "injuriously affect his former client [the wife] in matters in which he formerly represented her.

Accordingly, we believe that it is improper for the lawyer to now represent the husband in a divorce action against the wife under the rules of professional conduct.

Similar circumstances were addressed in Opinion 80-21. In that opinion, we also determined that the attorney, who in recent months had represented a husband and wife in various business and personal matters, should decline to represent the husband in a divorce action against the wife.

This same type of issue has also been addressed in, and we would point the reader to, Opinions 85-5, 87-14, 88-2, 88-7, 88-12, 89-1, 93-3 and 95-13.

Finally we are mindful of the admonition of the Supreme Court In Re Themelis,<sup>1</sup> that “Conflict of interest is almost certain in divorce litigation [and] no type of litigation casts a greater burden . . . to insure that decision in such cases shall be without improper evidence . . .”

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<sup>1</sup> In Re Themelis, 117 Vt., 19, 23 (1951)